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CALIFORNIA DIGEST.

A DIGEST OF THE REPORTS

OF

THE SUPREME COURT OF CALIFORNIA,

VOLUMES ONE TO FIFTY-FIVE INCLUSIVE,

WITH

A DOUBLE INDEX OF ALL REPORTED CASES; WITH A REFERENCE,
UNDER EACH, TO THE CASES IN WHICH IT IS CITED.

BY A. L. RHODES,

LATE ONE OF THE JUSTICES OF THE COURT.

IN TWO VOLUMES.

VOL. II.

SAN FRANCISCO:

A. L. BANCROFT & CO.,

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1882.

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apply, so far as actions upon written contracts not of record are concerned, only to actions upon **simple contracts**, that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes where specialties are mentioned, the limitation is generally fixed either at fifteen or twenty years. The case is entirely different in this state. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject-matter and not the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Id.

15. In an action to recover possession of land and damages for its detention, if the statute of limitations of three years is pleaded as to damages, the plaintiff can recover damages for only three years before the commencement of the action.

Love v. Shartzler, 31 Cal. 487.

16. This case comes within the nineteenth section of the statute of limitations, and not within the provision relative to the commencement of actions, based on a **contract obligation** or liability not founded upon an instrument in writing. See facts.

Dodge v. Clark, 17 Cal. 586.

17. The defendant's testator was a stockholder of a mining corporation, and as such became individually responsible to plaintiff for a portion of its liabilities, and for which a right of action accrued against the testator in his life-time. The claim thus arising was not presented to defendant (his **executors**) for allowance, as a demand against their testator's estate, until after the expiration of the ten months prescribed by the one hundred and thirtieth section of the probate act for the presentation of claims against estates. Thereafter it was so presented by plaintiff, and was rejected by defendants; whereupon plaintiff brought action for its recovery, to which defendants pleaded said section of the probate act in bar: *Held*, that under the statute the action was barred.

Davidson v. Rankin, 34 Cal. 503.

18. A **foreign judgment** is not a "contract, obligation, or liability for the payment of money, founded on an instrument of writing executed out of this state," within the meaning of the statute of limitations.

Patten v. Ray, 4 Cal. 237.

19. The **levy and sale** must both be made within the period of two years limited by statute. See facts.

Isaac v. Swift, 10 Cal. 71.

20. Where a **civil engineer's lien** for work done for the defendants in the con-

struction of a canal or ditch was filed in the recorder's office of the county where the ditch is located, on the sixth day of May, 1856, and suit was not commenced to enforce the lien until the twenty-sixth day of January, 1857: *Held*, that the time fixed by statute for the enforcement of the lien had **expired** before the commencement of the suit, and that the plaintiff was not entitled to a judgment giving a lien upon the property.

Green v. Jackson W. Co., 10 Cal. 374.

21. A count in a complaint in the old form of **assumpsit for money had and received**, in which the promise is laid of a day more than two years prior to the commencement of the action, is demurrable on the ground that it shows the demand to be barred by the statute of limitations.

Keller v. Hicks, 22 Cal. 457.

22. Claims against the city of **San Francisco** by the bidders at the attempted sale in December, 1853, for the purchase money paid on such sale, are within the fourth subdivision of the seventeenth section of the limitation act, and are barred by a failure to sue within two years from the date of the receipt of the money by the city.

Pimental v. San Francisco, 21 Cal. 351.

23. The complaint, in an action to recover back from the city of San Francisco purchase money paid upon the invalid sales of her city slip property in 1853, was filed April 21, 1856, and alleged that one installment of the purchase money was paid December 27, 1853, and another February 27, 1854, and a third April 27, 1854, and that these several payments were received by the city on the respective days of their payment. The referee to whom the case was referred found as a fact that the several payments were made to the city and accepted by her as alleged in the complaint: *Held*, that the defense of the statute of limitations pleaded by the city must be sustained as to the first two installments, and disallowed as to the third. Id.

24. The **destruction of notes** in no respect impairs the liability of the maker, or the right of the plaintiff to recover upon them. The right of action upon a contract in writing is not barred by the statute of limitations until the lapse of four years after it has accrued. The fact that the contract was in writing, and not the present existence of the writing, determines the period within which the action must be brought.

Bagley v. Eaton, 10 Cal. 126.

25. The **highest evidence** of that fact is, of course, the **writing itself**; but, in case of its loss or destruction, the fact may be established by parol. The destruction of notes, then, only impairs the evidence of the liability of the maker. Id.

26. An action to recover money paid to a **tax collector**, under **protest**, must be

commenced within six months from the time the cause of action accrued.

Cameron v. Smith, 50 Cal. 303.

27. The general statute of limitations applies to a cause of action concerning the **wife's separate estate**, where she may sue alone. *Id.*

28. Where the action was trespass, and an **amended complaint** was filed for the purpose of including a parcel of land inadvertently omitted from the original complaint: *Held*, that the filing of the original complaint did not stop the statute of limitations from running against the trespass upon the omitted parcel.

Atkinson v. A. & S. Canal Co., 53 Cal. 102.

29. If a **tenant in common**, who is in the possession of the entire tract, sells the whole tract, and the purchaser, with notice of the co-tenancy, enters into possession, he must, in order to acquire the title of the co-tenant by the statute of limitations, prove an **actual ouster**, the same as his grantor would have been required to do had he remained in possession.

Packard v. Johnson, 51 Cal. 545.

30. An **answer in ejectment** stating that the defendant was, when the suit was commenced, is now, and has been for more than five years immediately prior thereto, the owner of and seised in fee, and entitled to the possession of the demanded premises, is not a **plea** of the statute of limitations.

McCreery v. Sawyer, 52 Cal. 257.

31. When the statute of limitations has run, the **debt** can not be **revived**, except by a **promise in writing** signed by the debtor.

Estate of Galvin, 51 Cal. 215.

32. If a **foreign corporation** has a managing agent in this state who exercises his authority openly as such, without fraudulent concealment, it may be sued in the courts of this state, and service of process made personally upon such managing agent; and if the agent, as such, has held and possessed land for the company for five years, the corporation may claim the benefit of the statute of limitations.

Lawrence v. Ballou, 50 Cal. 258.

WHEN THE STATUTE BEGINS TO RUN.

33. Where payment was made by plaintiff, by a **settlement of accounts** with the payee of the note, the statute only begins to run from the date of the appropriation of money due by the payee to the plaintiff, to the payment of the note.

Sherwood v. Dunbar, 6 Cal. 53.

34. The statute of limitations of **Ver-mont** deducts from the time fixed to sue on a judgment all the time the defendant may be absent from that state, unless he has left **attachable property** to satisfy the judg-

ment; and by the construction of the statute, given to it by the courts of that state, it means that such attachable property must be sufficient to satisfy the judgment.

Nelson v. Nelson, 6 Cal. 430.

35. Statutes of limitation **do not act retrospectively**; they do not begin to run until they are passed, and consequently can not be pleaded until the period fixed by them has fully run since their passage. *Id.*

36. The act of April 2, 1857, can not be pleaded in an action brought in 1856, on a foreign judgment obtained in 1847. *Id.*

37. If a party enters into a valid agreement, in writing, with the defendant, not to sue upon a particular demand, which he holds, until the happening of a particular event, the **running of the statute is suspended** until the event occurs.

Smith v. Lawrence, 38 Cal. 24.

38. To make such agreement valid, it is not necessary that the debtor should **sign it**. *Id.*

39. So long as a **mortgagor** holds the equity of redemption, and no other rights intervene by reason of subsequent liens or incumbrances, he has the power by **written stipulation** under the statute, or by absenting himself from the state, to suspend the running of the statute of limitations.

Wood v. Goodfellow, 43 Cal. 185.

40. When **third persons** have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the statute of limitations as against the **mortgage**, even though the mortgagor, as between himself and the mortgagee, may have waived its protection. *Id.*

41. There is no difference in principle between the suspension of the running of the statute of limitations resulting from an **express waiver**, and one caused by voluntary act in absenting one's self from the state. *Id.*

42. If, when the cause of action here accrues, the person against whom the same exists resides in the state, and he afterwards departs from the state, his **successive absences** from the state must be aggregated together, and deducted from the whole time which has elapsed since the cause of action accrued, and the balance is the time the statute of limitations has run.

Rogers v. Hatch, 44 Cal. 280.

43. If the statute of limitations has been set in motion by a departure from the state, and is then interrupted by a return, it commences running again by a **second absence** from the state. *Id.*

44. The time to which the statute of limitations runs is the **filing of the original complaint**. The filing of an amended complaint does not extend this time up to the period when it is filed.

Lorenzana v. Camarillo, 45 Cal. 125.

45. In an action for **contribution**, between joint obligors, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff.

Sherwood v. Dunbar, 6 Cal. 53.

46. The statute of limitations would not begin to run until after the election of a new and innocent board. See facts.

Oakland v. Carpenter, 13 Cal. 540.

47. An action for causing death by a wrongful act or neglect must be commenced within two years after the death of the person injured.

Benjamin v. Eldridge, 50 Cal. 612.

48. If the statute of limitations has commenced running as to a cause of action before the codes took effect, it continued to run, notwithstanding the passage of the codes, and was not lengthened by them. Id.

49. Statute of limitations, as a rule, does not begin to run when no administration exists on the estate of the deceased at the time the cause of action accrued.

Smith v. Hall, 19 Cal. 85.

50. The twenty-fourth section of the limitation act of 1850, providing that "if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his **executors or administrators** after the expiration of that time, and within one year after the issuing of letters testamentary or of administration," applies only to cases where the statute has commenced to run. The object of this section is not to curtail, but to prolong the period for suing in the given category. Id.

51. The time fixed by the first section of the limitation act of 1855, within which an action may be commenced for the recovery of land under a title derived from the Mexican or Spanish governments, does not begin to run until the issuance of the **patent** of the United States government.

Johnson v. Van Dyke, 20 Cal. 225.

Beach v. Gabriel, 29 Id. 580.

52. The terms "**final confirmation** by the government of the United States," as used in said act, mean the definitive confirmation of the title to certain specifically described premises, and include not only the recognition of the validity of the title by the judicial department, but also by the executive department, which formerly exercised supervision and control over the location of confirmed Mexican grants. Id.

53. The statute of limitations does not begin to run against the title to land derived from the government of Mexico until a confirmation by a patent from the government of the United States.

Downer v. Smith, 24 Cal. 114.

54. The statute of limitations in relation

to Spanish and Mexican grants, commences running from the time of the final approval of the survey, and not from the time of the issuance of the patent.

Mahoney v. Van Winkle, 33 Cal. 448.

55. The statute of limitations does not commence to run, with regard to lands held under a **Mexican or Spanish grant**, until a patent for the same has been issued by the government of the United States.

Reed v. Spicer, 27 Cal. 57.

56. The period of limitations in this state, to bar a right of entry upon real estate, commences to run from the twenty-second of April, 1855. Clark v. Huber, 25 Cal. 593.

57. The right to foreclose and the right to redeem are reciprocal, and the statute of limitations as to the right of redemption begins to run at the time the right of action accrues on the mortgage.

Grattan v. Wiggins, 23 Cal. 16.

58. Where an officer of a corporation is elected for a term of one year, with a compensation at a certain sum per month, the statute of limitations does not begin to run against any portion of his claim for salary until the end of the year.

Rosborough v. Shasta R. C. Co., 22 Cal. 556.

59. If a person, while insane, is fraudulently induced to execute a conveyance of his property to another, the statute of limitations will not commence running against the grantor's right to commence an action to set aside the deed, until he recovers his reason and discovers what he has done.

Crowther v. Rowlandson, 27 Cal. 376.

60. A creditor of a corporation, who seeks to make the stockholders liable for his demand, must bring his action against them within the time prescribed by the statute of limitations. The statute begins to run when the debt falls due, and the time prescribed by the statute of limitations is not extended, as to the right to sue the stockholders, by a judgment against the corporation.

Stilphen v. Ware, 45 Cal. 110.

61. If one of two coterminous proprietors erects what is intended to be a division fence, claiming it to be on the true line, and holds and occupies the land included by the fence adversely for five years, this is sufficient to support the statute of limitations, even though the other coterminous proprietor did not at any time acquiesce in the location of the fence, but constantly protested against it. Whitman v. Steiger, 46 Cal. 256.

62. The statute does not run against a vendee in possession under an executory contract, so long as he remains in possession with the acquiescence of the vendor.

Love v. Watkins, 40 Cal. 547.

63. In computing the time at which the statute of limitations begins to run on promissory notes, the day on which the note be-

comes due is excluded in all cases when days of grace are allowed.

Bell v. Sackett, 38 Cal. 407.

64. A promissory note made payable one day after the happening of a particular event, is not due until one day after such event happens, and a suit on it is not barred by the statute of limitations, if commenced on the day after such event happens.

Hathaway v. Patterson, 45 Cal. 295.

65. The expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, does not operate as an **extinguishment or payment**; therefore, where the legal title of land has been conveyed to a trustee to secure a debt, the title and power of the trustee is not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under the deed. The statute of limitations is to be employed as a shield, not as a sword; as a means of defense, not a weapon of attack.

Grant v. Burr, 54 Cal. 298.

66. If money is loaned to be repaid on demand, and no note or obligation is given in writing to repay it, the statute of limitations commences running from the time of the loan.

Estate of Galvin, 51 Cal. 215.

67. The time prescribed for the limitation of an action upon a judgment begins to run with the entry of the judgment, and not upon its rendition.

Trenouth v. Farrington, 54 Cal. 273.

68. Where the right to maintain an action on a note or other demand has been suspended by the pendency of bankruptcy proceedings in the case of the debtor, the period of such suspension is not to be counted as part of the time prescribed by the statute of limitations to bar the action.

Hoff v. Funkenstein, 54 Cal. 233.

69. Held, that the statute of limitations commenced to run only from the time of the conveyance. See facts.

Wolf v. Marsh, 54 Cal. 228.

70. If an attorney is employed to act as such for a party to an action, and there is but one employment, the statute of limitation does not commence to run against his claim for legal services until his services under the single employment are ended.

Hancock v. Pico, 47 Cal. 161.

71. The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser.

Jefferson v. Wendt, 51 Cal. 573.

72. An action brought by the state to cancel a patent for land alleged to have been procured by fraud must be brought within three years from the time the cause of action accrued; and the cause of action

accrues at the time of the discovery of the fraud. People v. Blankenship, 52 Cal. 619.

73. The liability of a railroad company for damages for an injury done to a passenger by collision of its cars accrues when the collision occurs and the action must be brought within two years from such time.

Piller v. S. P. R. R. Co., 52 Cal. 42.

74. The fact that the injured person does not recover for a long time does not extend the time for bringing the action. Id.

75. The two years' limitation for commencing an action, found in the first clause of the first subdivision of section 339 of the code of civil procedure, applies to all actions at law not specially mentioned in other portions of the statute. Id.

76. The four years' limitation for commencing actions in section 343 of the code of civil procedure applies to all suits in equity not strictly of concurrent cognizance in law and equity. Id.

77. Where the possession of property is obtained (in good faith or otherwise) from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary. Accordingly, in an action against defendants, who had, in good faith, and without notice of the plaintiff's rights, received in pledge the plaintiff's goods from her bailee, and afterward sold them: Held, that the statute of limitations commenced to run from the time of the defendant acquiring possession, and not from the time of the subsequent sale by them.

Harpending v. Meyer, 53 Cal. 555.

78. In a suit for the recovery of land, after the issuance of the patent, the statute of limitations can not be held to have commenced running prior to the date of the patent.

Manly v. Howlett, 55 Cal. 94.

NEW PROMISE.

79. To take a contract out of the statute there must be an acknowledgment or new promise "contained in some writing signed by the party to be charged thereby."

Heinlin v. Castro, 22 Cal. 100.

80. Where the new promise is made to the payee of a promissory note, the indorsee, to whom the note is afterwards transferred, may maintain an action upon it. He succeeds, in such cases, to the rights of the payee. Smith v. Richmond, 19 Cal. 476.

81. A memorandum indorsed upon an overdue bond, stating a receipt of a portion of the debt, and also extending the time and changing in some respects the terms of payment, signed by the obligee alone, but assented to by the obligor, is not a writing "signed by the party to be charged thereby,"

and does not affect the operation of the limitation statute. *Peña v. Vance*, 21 Cal. 142.

82. If the signing of such a memorandum by the creditor and the assent to it by the debtor be viewed as a new and distinct contract for the payment of money, it would be a mere verbal contract, an action upon which would be barred by the lapse of two years from the time of payment fixed by its terms. *Id.*

83. Under the provisions of the thirty-first section of the statute of limitations, there are two ultimate facts that may be proved in the mode therein prescribed, a continuing contract and a new contract. The statutory acknowledgment or promise, if made while the original contract is a subsisting liability, establishes a continuing contract, while if made after the bar of the statute, a new contract is created.

McCormick v. Brown, 36 Cal. 180.

84. An express promise, to be available to the creditor, must be either direct, certain, and unconditional as to the time or manner to pay the debt, or a direct offer to pay, unconditionally, a specified part of the debt, or a like offer, upon specified conditions, as to either time or manner, or both, to pay the whole or some part of the debt, or a direct conditional promise to pay the whole or a specified part of the debt; but in case of such offer or conditional promise, the creditor can only recover by showing an acceptance by him of the offer as made, or a performance on his part of the prescribed conditions of the promise. *Id.*

85. The new promise may be either express or implied. An express promise can only be established by producing the promise itself, in the form prescribed by the thirty-first section of the statute, while an implied promise can only be established by the production in like form of the acknowledgment prescribed in said section. *Id.*

86. An acknowledgment, within the statute, to support an implied promise, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Such acknowledgment can not be deduced from an offer or promise to pay a part of the debt, or the whole debt in a particular manner, or at a specified time, or upon specified conditions. *Id.*

87. The rule held in *McCormick v. Brown*, 36 Cal. 180, as to what constitutes a sufficient acknowledgment of a debt to take it out of the statute, affirmed.

Farrell v. Palmer, 36 Cal. 187.

88. When a creditor sues after the statute has run upon the original contract, his cause of action is not founded on the original contract, but upon the new promise; the original contract, or the moral obligation arising

thereupon, being a sufficient consideration for the new promise.

McCormick v. Brown, 36 Cal. 180.

89. A creditor can not recover after the statute has run upon the original contract of obligation, without proving a new promise. *Id.*

90. It is sufficient, where the complaint alleged an express promise to pay a debt which was barred by the statute, to prove an acknowledgment of debt from which a promise to pay is implied.

Farrell v. Palmer, 36 Cal. 187.

91. An acknowledgment of a debt, as provided in the thirty-first section of the statute of limitations, if made to the administrator of the estate of the creditor, deceased, is sufficient. *Id.*

92. Where on the trial of an action founded on a statutory acknowledgment, or new promise, to recover a debt which was barred by the statute, the plaintiff having proved the debt and an acknowledgment which might apply to it: *Held*, this was a *prima facie* case of identification for the plaintiff, and that the *onus* was then on the defendant to prove another debt to which such acknowledgment referred. *Id.*

93. If one of the makers of the note and mortgage, and of the subsequent promise, was a married woman, such subsequent promise could not be enforced against her, under any circumstances, personally; nor against her estate, unless the instrument in writing containing the subsequent promise had been acknowledged and certified as required by law. *Belloc v. Davis*, 38 Cal. 243.

94. Nor would subsequent incumbancers or purchasers, whose rights had attached to the mortgaged property prior to the date of the subsequent promise, be affected thereby. *Id.*

95. Such promise is not void for want of certainty. The promise to "pay all indebtedness" must be deemed sufficiently specific to embrace the only debt which is shown to be owing. *Id.*

96. An action on a new promise to pay a judgment, so as to avoid the bar of the statute, must be brought within four years from the making of the new promise.

McCormick v. Brown, 36 Cal. 180.

PART PAYMENT.

97. A part payment made before a contract has expired by limitation, is insufficient to take the case out of the statute.

Fairbanks v. Dawson, 9 Cal. 89.

98. The object of the statute was to substitute a written contract for that which might be implied from admissions, and to avoid the mischief arising from *parol testimony* to prove either an express promise,

or facts from which a promise would follow as a legal and logical result. Id.

99. Part payment has always been held sufficient to take the debt out of the statute. Unless accompanied at the time with qualifying declarations or acts on the part of the party making the payment, it is deemed an unequivocal admission of a subsisting contract or liability, from which a jury is justified and bound to infer a new promise. And it matters not whether the payment be either upon the **principal or interest** of the debt. *Barron v. Kennedy*, 17 Cal. 574.

100. The thirty-first section of our statute of limitations does not alter this rule as to the effect of such payment; it only alters the **mode of proof**, and is directed principally at least, against the admission of oral acknowledgments and promises. Id.

101. *Fairbanks v. Dawson*, 9 Cal. 89, holds that this section of the statute covers an acknowledgment by payment, and requires it to be evidenced by a writing; and this case does not require any departure from the rule there laid down, the payment of interest being by checks, inclosed in letters, stating that the checks were for interest on the debt for certain months. Id.

102. A part payment does not take a debt from the operation of our statute of limitations, unless such payment is evidenced by a **writing signed by the party** to be charged thereby.

Peña v. Vance, 21 Cal. 142.

103. Section thirty-nine of the limitation act excludes all acknowledgments and promises not in writing; and a promise implied from the fact of part payment constitutes no exception. Id.

104. A part payment, indorsed upon a **promissory note**, whether made before or after the expiration of the period fixed by the statute of limitations, does not avoid the bar of the statute.

Heinlin v. Castro, 22 Cal. 100.

DEFENDANT OUT OF THE STATE.

105. Suit commenced January 8, 1859, on a note executed in New York, and due January 1, 1856. Defendant was not in this state when the cause of action accrued, but arrived here March 23, 1856, and remained until June 20, 1856, from which time he was absent until February 14, 1857. Plaintiff resided in New York, and was fully informed of the movements of defendant. Some evidence tending to show that defendant came to this state in 1856, for a temporary business purpose, intending to return to New York and form a partnership, according to previous arrangement. Defense, statute of limitations of two years: *Held*, that the case is within the statute, and that the statute commenced running on the arrival of the defendant here

in March, 1856, there being no fraud or concealment on the part of defendant, and his presence here between March and June being open and public, and sufficient for the commencement of a suit.

Palmer v. Shaw, 16 Cal. 93.

106. The word "return," used in the twenty-second section of the limitation act of 1850, is held by the authorities to apply as well to persons coming from abroad as to the citizens of the country going abroad for a temporary purpose and then returning. But the coming from abroad must not be clandestine, and with an intent to defraud the creditor, by setting the statute in operation and then departing. Id.

SUIT, HOW COMMENCED.

107. The provision in the general limitation act of 1850, that the **filing of the complaint** shall be deemed a commencement of suit, applies to that act only, and not to the mechanic's lien act. Under this latter act, to commence a suit within six months from the expiration of a credit given, a complaint must be filed and a summons issued.

Flandreau v. White, 18 Cal. 639.

108. The filing of a complaint in the proper court, without the issuance of a summons thereon, is the commencement of an action within the terms and meaning of the limitation act, and stops the running of the statute.

Pimental v. San Francisco, 21 Cal. 351.

109. A suit is commenced within the limitation act of 1850 by simply filing the complaint. To prevent the bar of the statute, no other proceeding is necessary.

Sharp v. Maguire, 19 Cal. 577.

110. For all other purposes, except to prevent the bar of the statute, an action can be commenced only by filing the complaint and issuing a summons, unless a defendant voluntarily appear and plead without summons, when he can compel plaintiff to proceed with the case. Id.

111. Where an action on a promissory note was commenced by filing a complaint within four years after the note became due, and a summons was issued within one year thereafter, but not until after the expiration of said four years: *Held*, that this was sufficient, and the cause of action was not barred by the statute.

Allen v. Marshall, 34 Cal. 165.

REAL ACTIONS.

112. The act of 1855 is the only statute of limitations to actions for the recovery of **real property**, and the time fixed therein runs only from the date of that act.

Billings v. Harvey, 6 Cal. 381.

113. The amendatory act of 1855 repeals section 6 of the statute of limitations of 1850,

and the **five years** allowed for the commencement of real actions only begins to run from the date of the passage of the amendatory act. *Billings v. Hall*, 7 Cal. 1.

114. The amendatory act does not divest rights vested under the old law; for statutes of limitations affect the **remedy**, and not the right. *Id.*

115. An **adverse possession** of land for the period of time prescribed by the statute of limitations not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the adverse holder.

Arrington v. Liscom, 34 Cal. 365.

116. A party who has been in the exclusive adverse possession of lands for a period of time which, under the statute of limitations, vests him with a title thereto, may maintain an **action against a party claiming under a record title**, to have said adverse claim determined and adjudged null and void as against him. *Id.*

117. Title to land is the means whereby the owner of lands has the just possession of his property. A party, under the statute of limitations, may acquire an **absolute right of possession** in lands as against all the world; such a right as, when ousted, will restore him to and effectually protect him in his just possession thereof, even against one having the written title. An adverse possession, therefore, confers a **substantial title**, and it is such a title as entitles the holder to all the remedies to quiet his possession that are incident to possession under written titles. *Id.*

118. The statute of limitations runs only in favor of parties in possession claiming title adversely to the whole world, and not in favor of those who assert the title to be in others. It therefore never runs in favor of the plaintiff, and the grantees of the plaintiff are in no better position. Their possession can not be tacked on to that of the grantors, so as to render adverse the possession for the entire period subsequent to the sale.

McCracken v. San Francisco, 16 Cal. 591.

119. The object of section 10 of the statute of limitations is to define accurately under what conditions a possession shall be decreed adverse, when the party enters under a **claim of title** founded upon a written instrument, judgment or decree.

Figg v. Mayo, 39 Cal. 262.

120. The party who invokes the benefit of that section in aid of his possession must show that he entered not only under a claim of title, but it must also be **exclusive** of any other right. *Id.*

121. A block of land in a town or city, which is represented on the plan or map of the city as surrounded by public streets, and divided in the center by an alley, and laid

out in lots appropriately numbered, is within the spirit and letter of the exception of section 10 of the statute of limitations. *Id.*

122. The **tide lands** held by the state in virtue of its sovereignty are not within the purview of the third section of the statute of limitations. *Farish v. Coon*, 40 Cal. 33.

123. A party in possession of **tide lands** belonging to the state, who afterwards locates school land warrants on such lands, and thenceforth claims and occupies under such locations, holds not adversely, but in subordination to the title of the state, and the statute of limitations will not run against the state. *Id.*

124. The locator of the warrants is in the position of a purchaser in possession, whose possession is not hostile but in consonance with the title of the vendor; and in order to put the statute of limitations in motion, it must appear that the locator repudiated the title of the state, and claimed to hold, not under that title, but in hostility to it. *Id.*

125. An **actual possession of a part** of a tract of land, with constructive possession of the rest, whether held by the owner of the true title, or by one who entered under color of title by deed, will not prevent the statute of limitations from running in favor of one who enters adversely upon the **constructive possession**.

Davis v. Perley, 30 Cal. 630.

127. In this state, prior to 1863, if a **married woman** was entitled to maintain an action on a promissory note, the statute of limitations did not run as against her right of action during her coverture. Since 1863, the statute of limitations runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her. *Wilson v. Wilson*, 36 Cal. 437.

128. As a married woman, under section 7 of the practice act, may maintain **ejectment** for her **separate property** without joining her husband, her coverture does not create a disability so as to save the bar of the statute of limitations as to such property, the amendment of April 18, 1863 (stats. 1863, p. 325), having changed the rule of the statute of 1850 on this subject.

Kapp v. Griffith, 42 Cal. 408.

129. Adverse possession for five years of the separate property of a married woman creates a bar under the limitation act of April 18, 1863 (stats. 1863, p. 325), and is a good defense to an action of ejectment by her or her grantee. *Id.*

130. When the owners of adjoining lands have acquiesced for a length of time, equal at least to the length of time prescribed by the statute of limitations to bar a right of entry in the location of a **division line** between their lands, although it may not be the true

line according to the calls of their deeds, they are therefore precluded from saying it is not the true line.

Sneed v. Osborn, 25 Cal. 619.

131. A party holding land dependent on a division line established between contiguous owners by their acquiescence for the time prescribed by the statute of limitations as a bar to action for the recovery of real property, holds it by a legal and not an equitable title. *Id.*

132. The fact that an easement has been created upon land, or that an offer of an easement has been made, but not accepted, does not prevent the statute of limitations from being set in motion and running in favor of one who enters upon and claims the soil upon which the easement has been imposed adversely to the grantor of the easement.

San Francisco v. Calderwood, 31 Cal. 585.

133. In an action of ejectment, where the defendant pleads the statute of limitations, a judgment roll, in a forcible entry case, is admissible as evidence of the defendant's adverse possession.

Unger v. Roper, 53 Cal. 39.

134. In an action to recover lands, the plaintiff can recover the rents and profits for three years only prior to the commencement of the action, if the defendant pleads the statute of limitations.

Carpentier v. Mitchell, 29 Cal. 330.

135. The grantor who conveys by a quitclaim deed may remain in possession of the property conveyed, and assert and maintain an adverse possession for the term of five years, and thus acquire a title, as against the grantee, by the statute of limitations.

Dorland v. Magelton, 47 Cal. 485.

136. If the defendant pleads the statute of limitations, and the court finds an adverse possession of five years, the supreme court will not presume that the defense of the statute was waived, unless the record shows such waiver. *Vassault v. Seitz*, 31 Cal. 225.

137. If the statute of limitations is pleaded, and the court finds all the facts necessary to sustain this issue, and gives judgment for the party pleading it, the fact that the prevailing party did not urge the statute in his argument in the court below does not preclude him from raising it in the supreme court. *Id.*

138. Where, to ejectment on a patent to plaintiffs for land from the United States, defendants plead possession in themselves and the parties through whom they claim for five years before the commencement of the action, on the fourth of March, 1860, but admitted the issuance of the patent on the nineteenth of February, 1856: *Holt*, that the plea is of no avail, because the admission shows plaintiffs were seized of the premises within the five years. *Fremont v. Seals*, 18 Cal. 433.

139. The act of April 11, 1855, amending the sixth section of the statute of limitations of 1850, by a proviso extending the time for commencing actions of ejectment under Spanish or Mexican titles, repeals that section *in toto*. *Billings v. Harvey*, 6 Cal. 381.

140. The cause of action accrues at the time of an eviction, actual or constructive. *McGary v. Hastings*, 39 Cal. 360.

141. A covenant in a deed that the tract conveyed contains a specific quantity of land, is a mere chose in action, and is broken, if broken at all, as soon as made, and the mere fact that there was no proof till long after it was made, by which the breach of it could be established, might possibly prevent the statute of limitations from running, but this point not decided.

Salmon v. Vallejo, 41 Cal. 481.

142. The statute of limitations, upon an implied warranty of title to chattels sold by one in possession, does not commence running until the vendee is disturbed in his possession by the true owner.

Gross v. Kierski, 41 Cal. 111.

143. When two parties enter into a contract for an exchange of lands, the facts that one of the parties has performed on his part, by conveying the land which he agreed to convey in exchange for the tract to be conveyed by the other, and that the grantee has entered into possession and sold portions of the land thus conveyed, do not prevent the statute of limitations from running as to the right of the party who has performed to a conveyance from the other.

Brennan v. Ford, 46 Cal. 7.

144. When mutual agreements to convey lands are to be performed concurrently, the statute of limitations does not commence running until one party has performed by delivering a deed, or has offered to perform by making a tender. *Id.*

145. One who is in the adverse possession of land does not impair his right to rely upon the statute of limitations by purchasing the land at a tax sale, unless he makes the purchase for the owner under an agreement to have a lease of the land or a portion thereof, which would amount to a recognition of the owner's title and stop the running of the statute. *Hayes v. Martin*, 45 Cal. 539.

146. An equitable action, to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions. *Oakland v. Carpentier*, 13 Cal. 540.

147. If one who claims title under a deed to a large tract of land enters upon it and erects a house, and acquires actual possession of a small part around his house, and constructive possession of the whole, and

the owner of the true title afterwards enters on the same tract in another place, claiming the whole, the constructive possession thus acquired by the one who first entered is overcome by the constructive possession of the true owner, so that the statute of limitations does not run in favor of the one who has not the true title.

Semple v. Cook, 50 Cal. 26.

148. If the holders of two hostile titles to the same tract of land are each in the occupation of a small portion within the exterior boundaries of the tract, the constructive possession follows the true title, and the statute of limitations does not run in favor of the holder of the invalid title, except as to his actual possession. *Id.*

149. The act of March, 1864 (stats. 1863-4, p. 149), in relation to limitations of actions for the recovery of real estate in the city and county of San Francisco, is not unconstitutional. *Brooks v. Hyde*, 37 Cal. 366.

150. The provision in the fourteenth section of the statute of limitations, that the possession of the tenant shall be deemed the possession of the landlord, does not apply when the tenant acquired another title five years before the commencement of the suit, or has held adversely to the landlord for five years before the commencement of the suit. *Lawrence v. Webster*, 44 Cal. 385.

151. If the tenant acquired another title five years before the commencement of suit by the landlord, or has held adversely to him more than five years, the landlord in ejectment must rely on title, exclusive of the lease. *Id.*

152. If the tenant is in possession of the land, under an agreement with his landlord to deliver him possession upon ten days' notice, and the owner of the legal title, without knowledge or notice of the tenancy, after due inquiry, executes a lease to the tenant, the possession of the tenant, after the execution of such lease, and while the landlord has no knowledge of the tenancy, is not of such an adverse character as to keep the statute of limitations running in favor of the landlord, and against the owner. *Thompson v. Pioche*, 44 Cal. 508.

153. Where a deed was executed and delivered as security for a subsisting debt, and it does not appear when the debt thus secured became due, the presumption is that it was due immediately, or upon demand, and if sufficient time has elapsed since the date of the conveyance for the statute of limitations to run, the debt is barred. *Espinosa v. Gregory*, 40 Cal. 58.

153a. Where an absolute conveyance is thus given as security, the mortgagor retains the right of redemption only, the legal title being in the mortgagee, and the rights of mortgagor and mortgagee are so far

mutual, that when the debt is barred the right to redeem is also barred. *Id.*

154. The final confirmation of a Mexican grant, so as to set the statute of limitations in motion, under the act of 1855, passed by the legislature of California, was the issuance of a patent to the grantee. *Sabichi v. Aguilar*, 43 Cal. 285.

155. Under the act of 1863, amending the statute of limitations of 1855 (stats. 1863, p. 327), the final confirmation which set the statute of limitations in motion was the final confirmation of a survey by the courts of the United States provided for in act of congress of June 14, 1860, or the issuance of a patent. *Id.*

156. The approval of a survey of a Mexican grant, by the surveyor-general alone, was not final, so as to set the statute of limitations in motion. *Id.*

See Mahoney v. Van Winkle, 33 Cal. 448.

157. The pendency of proceedings for the approval of a survey of a Mexican grant of land does not stop the running of the statute of limitations in favor of one in the adverse possession. *Hayes v. Martin*, 45 Cal. 559.

158. An actual adverse possession of five years subsequent to the passage of the act of 1863, relative to Spanish and Mexican grants, will, in certain cases, bar a recovery under a title derived from Spain or Mexico, even though the title was not confirmed until after the expiration of the five years.

San Jose v. Trimble, 41 Cal. 536.

159. One who relies on title by adverse possession to land included in a Mexican grant need not show that he claimed adversely to the United States, but it is sufficient if he shows that he claimed adversely to the title on which the plaintiff relies. *Id.*

160. An adverse possession for five years subsequent to the passage of the act of April 18, 1863, amending the statute of limitations, will bar a cause of action under an alcalde grant in San Francisco.

Grimm v. Curley, 43 Cal. 251.

161. The statute of limitations in respect to a Mexican grant is not set in motion by a survey made under the act of congress of June 14, 1860, becoming final. The statute in such case does not commence running until the patent issues.

De Miranda v. Toomey, 51 Cal. 165.

See Reed v. Spicer, 27 Cal. 57; *Donner v. Smith*, 24 Id. 114; *Gardiner v. Schmaelzle*, 47 Id. 588.

162. The statute of limitations affords no defense to one who, without right, enters into possession of a Spanish grant belonging to an infant, if a suit for its recovery is commenced within five years after the infant attains his majority.

Burton v. Robinson, 51 Cal. 186.

163. The owner of a Mexican grant of land which has not been finally surveyed or patented can not recover possession of the same from one who has been five years in the adverse possession thereof after the owner has attained his majority. *Id.*

164. A party deraining title under a patent, issued in pursuance of the confirmation of a grant derived from the Mexican or Spanish government, has five years, after the patent issues, in which to commence an action against one holding adversely, to recover possession of land, and the statute of limitations does not commence running in favor of one holding adversely until the patent issues.

Galindo v. Wittenmeyer, 49 Cal. 12.

165. The owners of grants of land by Mexico or Spain, which grants had not been finally confirmed by the United States more than five years before the passage of the act of April 18, 1863, amending the statute of limitations, had five years after the passage of said act of 1863 in which to commence actions for the recovery of the same.

Morris v. De Celis, 51 Cal. 55.

166. The party claiming title under a Mexican grant, if the other relies on five years' adverse possession, must show that the patent has not issued for the same, or that the official survey has not been approved by the district court under the act of congress of June 14, 1860. *Id.*

167. If, in ejectment to recover land granted by Mexico, it appears that the final confirmation was made by the board of land commissioners, it devolves on the defendant, if he claims under five years' adverse possession, to show that at the time of the passage of the act of congress of June 14, 1860, the survey was pending in the district court for confirmation, in order to rebut the presumption that the survey had not been finally confirmed by the district court. *Id.*

168. A defendant in ejectment, who relies on the statute of limitations, need not prove adverse possession for the five years next preceding the commencement of the action. His defense is complete if he shows a five years' continued adverse possession, although not the five years next preceding the commencement of the suit.

Cannon v. Stockmon, 36 Cal. 535.

169. An adverse possession of the defendant in ejectment, if continued for five years, creates a title in him to the land so possessed.

Morris v. De Celis, 51 Cal. 55.

170. If the plaintiff, in his complaint in ejectment, relies on a title derived from the Mexican government and confirmed by the United States, without stating the time of confirmation, an answer which sets up as a defense the statute of limitations is good, without stating that the Mexican grant

was finally confirmed within less than five years next before the commencement of the action.

Anderson v. Fisk, 36 Cal. 625.

171. If the grantor in a deed takes adverse possession of the land granted subsequent to his deed, and holds continuous adverse possession for five years, he may set up the statute of limitations as a defense in an action of ejectment brought against him by his grantee.

Franklin v. Dorland, 28 Cal. 175.

172. In ejectment, a plea of the statute of limitations of two years, under the settlers act, is no defense. *Id.*

173. In an action brought by a riparian proprietor deriving title under a Mexican grant, patented within five years of the commencement of the suit, to quiet his title against parties claiming the right to an exclusive use of the water under an adverse and exclusive user, by themselves and predecessors for over twenty years: *Held*, first, that the patent having issued within five years, the statute of limitations could have no application; and, second, that for the same reason the defendants had not acquired a prescriptive right.

Pope v. Kinman, 54 Cal. 3.

174. If the grantee of a Mexican grant conveys an undivided interest in the same, and, after the conveyance is made, holds possession of the whole of the grant, adversely to all the world, for the period required by the statute of limitations, the title which he has conveyed is extinguished.

Hartman v. Reed, 50 Cal. 485.

175. The court does not apply the above principle to a case where a patent from the United States has issued within the period of the statute, if the grantee was entitled to the benefit of the patent. *Id.*

176. Section 6 of the act defining the time for commencing civil actions is the only section in the act applicable to actions for the recovery of lands, and covers every case for the recovery of the possession of land; and the proviso to section 6 covers every case of title derived from the Spanish or Mexican government.

Richardson v. Williamson, 24 Cal. 289.

177. Section 7 of said act, and the proviso thereto attached, refer to personal actions founded upon the title to real property, and not to actions for the recovery of such property. *Id.*

178. The provisos to sections 6 and 7 of said act are not limited in their application to cases where the plaintiff claims under a Mexican or Spanish grant, and the defendant contests the validity of such grant, but apply to all cases where the original source of title is from such grant, even if both parties claim to derive title from the same grant. *Id.*

179. A person in the mere naked posses-

sion of **pueblo land in San Francisco**, and whose claim is not connected with the title of the city, and who was ousted in 1861 by a party who thence held adversely to him, can not insist that such party shall be deprived of the benefit of the statute of limitations, because holding in subordination to the title of the city.

McManus v. O'Sullivan, 48 Cal. 7.

180. The statute of limitations did not commence running against the city of San Francisco, with reference to the pueblo lands confirmed to it by the decree of the circuit court of the United States, May 18, 1865, until the passage of the act of congress of March 8, 1866, quieting the title of the city to said lands. Id.

181. The statute of limitations in relation to land claimed under a Mexican grant which requires **confirmation** does not commence running until a **patent** is issued by the United States. Hagar v. Spect, 48 Cal. 406.

182. A **possession**, in order to confer a title to land under the statute of limitations, must be **continuous** for the full period of five years. Id.

183. An action to recover land embraced within a Mexican grant may be commenced **within five years next after a patent is issued** by the United States, although more than five years have elapsed after the final approval of the survey by the district court of the United States.

Reed v. Ybarra, 50 Cal. 465.

184. The statute of limitations of this state, in respect to an **imperfect Mexican grant** of land, does not commence running until the patent is issued by the United States to the confirmee.

Gardiner v. Schmaelzle, 47 Cal. 588.

185. In **ejectment**, a party who is brought in on motion of the plaintiff, as an additional defendant, after the suit has been pending a long time, may claim the benefit of the statute of limitations up to the day he is made a party. Lawrence v. Ballou, 50 Cal. 258.

186. If the plaintiff, in his **complaint in ejectment**, alleges that the defendant is present and in the actual occupation of the demanded premises, he can not afterwards be heard to say that the defendant was not present and in occupation, but was out of the state, when the defendant relies upon his presence and occupation as constituting an adverse possession, and as entitling him to the benefit of the statute of limitations. Id.

187. The statute of limitations as to the **pueblo lands in the city of San Francisco** did not commence to run until the passage of the act of congress of July 1, 1864, granting and relinquishing the title to the city.

Hoadley v. San Francisco, 50 Cal. 265.

188. If lands have been possessed for such

a length of time as will, under the operation of the statute of limitations, extinguish the title held by a private person, or a municipality, such adverse possession will not also extinguish a public use of the land to which it has been dedicated, such as the right of the public to use it for a road, or a public square. Id.

189. If the title to land is granted to a city in **trust for the use of the public**, private persons can not acquire the right to it by an adverse possession for the period prescribed in the statute of limitations. Id.

190. In an action to recover lands where the plaintiff claims title to the demanded premises derived from a Spanish or Mexican grant, and the defendant has been in five years' adverse possession under a claim of title, he may rest with proof of his adverse possession, and the burden is cast upon the plaintiff of proving that less than five years have expired since the final confirmation of the grant, in order to defeat the defense of the statute of limitations.

Richardson v. Williamson, 24 Cal. 280.

191. Where the plaintiff proves title derived from a Spanish or Mexican grant, and rests, and the defendant proves five years' adverse possession under a claim of title, as a defense, and rests, the defendant is entitled to judgment unless the plaintiff shows in rebuttal that less than five years have expired since a final confirmation. Id.

192. Garcia and Nye, in 1840, while the Mexican law was in force in California, executed before the alcalde of San Francisco an instrument in writing manifesting upon its face an intent to "alienate" by the former in favor of the latter the land therein described, but without expressing or indicating whether for a consideration or as a donation. Nye immediately entered into possession under said instrument in writing, and he and his grantors, down to and including defendants, have ever since continued in possession, claiming title in fee: *Held*, that the possession under said instrument by Nye and his grantees was adverse from the beginning, even conceding the said instrument to be insufficient under the Mexican law to pass title by reason of a failure to express therein a consideration, or to indicate that the conveyance was intended as a donation, as the case might be; *held, further*, that said possession having been continued by Nye and his grantees, including defendants, for a period of more than five years since the passage of the statute of limitations, and before the commencement of this suit, all right of action in favor of plaintiffs derived from said Garcia is barred.

Mulford v. Le Franc, 26 Cal. 88.

193. Where the plaintiff in ejectment claims under a title derived from the Spanish

or Mexican government, and the defendant relies on and shows five years' adverse possession, it is incumbent on the plaintiff to prove that **proceedings for a final confirmation are pending**, or that the title has been finally confirmed within five years before the commencement of the action, in order to defeat the bar of the statute of limitations. *Vassault v. Seitz*, 31 Cal. 225.

194. An action may be brought and maintained to recover possession of land within the **pueblo of San Francisco**, by one holding title derived from the pueblo at any time within five years after the issuance of a patent for the pueblo lands by the United States. *Davis v. Davis*, 26 Cal. 23.

195. If one who has taken **adverse possession of water**, as against a prior appropriator, suffers a portion of the same to flow down to accommodate miners working in the stream, this does not prejudice his adverse possession so as to prevent the statute of limitations from running.

Davis v. Gale, 32 Cal. 26.

196. If one who has the **prior right** to the use of water permits another to acquire and hold for five years continuous adverse possession of the same, or any part thereof, he loses his right to the same or that part thereof which the adverse possessor enjoyed.

Id.

197. One who buys land in the adverse possession of another is barred by the statute of limitations from commencing an action for its recovery when five years have expired from the time a cause of action first accrued, to any of those through whom by **mesne conveyances** he has acquired title.

Le Roy v. Rogers, 30 Cal. 229.

198. The **purchaser of land at a mortgage sale** then in the adverse possession of another, when he obtains the sheriff's deed, becomes the assignee of the mortgagor, and can not maintain an action for its recovery unless it is commenced within five years from the time a cause of action first accrued to the mortgagor or those under whom he claims title.

Id.

199. The **sale of December 26, 1853, under Ordinance No. 431**, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1853 or 1860. The property remaining can at any time be taken possession of or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money.

McCracken v. San Francisco, 16 Cal. 591.

WRITTEN CONTRACT.

200. The language, "**an action upon any contract, obligation, or liability founded upon an instrument of writing**," in the seventeenth section of the statute of limitations, refers to contracts, obligations, and liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities.

Chipman v. Morrill, 20 Cal. 130.

201. Where two persons executed a **note**, one as principal and the other as surety, and a judgment obtained upon the note is paid by the surety: *Held*, that the obligation of the principal to repay the surety is not "**founded upon a written instrument**," within the meaning of the statute, and that more than two years having elapsed after the payment before suit brought, the demand was barred.

Id.

202. Bonds of the city of Sonora, dated March 25, 1853, and falling due in two years, are sued on April 5, 1860. March 9, 1855, an act of the legislature was passed, re-incorporating the city, and providing that "**in case the public debt is not liquidated at the expiration of three years, the trustees shall have power to levy a sufficient tax in addition to the one per cent. authorized**" in another section for general purposes of revenue, "**to pay the outstanding debt.**" March 29, 1858, another similar act was passed, the time mentioned being six instead of three years. These acts were passed at the instance of the corporators: *Held*, that these acts recognize the **city debt**, and provide for its payment, and hence withdraw the **bonds** from the statute of limitations.

Underhill v. Trustees Sonora, 17 Cal. 172.

203. *Held, further*, that even if the acts had not been passed at the instance of the corporators, probably the result would be the same by virtue of the control the legislature has over municipal bodies.

Id.

204. The plaintiff acted for two yearly terms, as president of the defendant, a corporation, with an understanding that he should be paid, but without any agreement to that effect, or as to the amount of compensation. Having been re-elected, the trustees on the same day made an order as follows: "**Ordered, that the compensation of the president of the board of trustees be established at fifty dollars per month;**" and plaintiff continued, to serve for two years longer: *Held*, that the **order** was an agreement by the corporation to pay for plaintiff's past, as well as future services, at the rate of fifty dollars per month; *held, further*, that the order above mentioned was a **con-**

tract in writing, within the meaning of the statute of limitations, to pay for plaintiff's past services, and that his demand therefor would not be bound by the statute until the expiration of four years from the date of the order.

Rosborough v. Shasta R. C. Co., 22 Cal. 556.

205. A mere naked receipt in writing, acknowledging the delivery of money, is not a contract, and does not import a promise, obligation, or liability, and an action upon it is therefore barred by the statute of limitations in two years.

Ashley v. Vischer, 24 Cal. 322.

206. A receipt or acknowledgment in writing for money, which also contains a clause stating that the money received is to be applied to the account of the person from whom received, partakes of the double nature of a receipt and contract, and shows upon its face a liability to account, and an action upon it is not barred by the statute of limitations until four years have expired. *Id.*

JUDGMENT AND EXECUTION.

207. The statute of limitations of this state only commences running against a judgment from the time of the final entry thereof.

Parke v. Williams, 7 Cal. 247.

208. Where a judgment by confession was entered in Pennsylvania, which was afterwards opened and a trial had, which resulted in judgment for plaintiff: *Hohl*, that our statute of limitations did not commence running until the final entry, although, by the laws of Pennsylvania, the lien of the first judgment was not destroyed. *Id.*

209. The statute of limitations can only be construed to apply to judgments **not in case** at the time of the passage of the act of 1855, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the act of 1850. *Scarborough v. Dugan*, 10 Cal. 305.

210. Judgments recovered in the courts of this state are within the first subdivision of the seventeenth section of the limitation act, and actions thereon are barred by the lapse of five years from the time they are rendered.

Mason v. Cronise, 20 Cal. 211.

211. The statute of limitations requires an action on a judgment to be brought within five years; but when a judgment is rendered **payable in installments**, the time begins to run from the period fixed for the payment of each installment as it becomes due. *De Uprey v. De Uprey*, 23 Cal. 352.

212. Where S. covenanted with H. that the original Mexican title to certain lands which S. conveyed to H. was valid, and in the event said title should not be confirmed by the courts of the United States, before which it was then pending, upon the final adjudica-

tion of the same, that S. and his legal representatives should and would be liable to H. for the purchase price of said lands, with interest; and where the district court of the United States for the northern district of the state of California, on the ninth day of November, 1859, adjudged such title invalid, from which judgment no appeal was taken or waiver made of the right thereto, or acquiescence in the finality of said judgment declared, within five years thereafter: *Hohl*, that the right of action for a **breach of said covenant** only accrued after the lapse of five years from November 9, 1859, during which time said judgment was subject to appeal, and, as regards its subject-matter, was not a final adjudication.

Hills v. Sherwood, 33 Cal. 474.

213. The bar of a judgment and verdict in an action to recover the possession of real estate is limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, that their rights have been varied or extinguished at a period after the rendition of the verdict and judgment.

Caperton v. Schmidt, 26 Cal. 479.

214. The five years of limitation within which an execution for an unsatisfied balance on a foreclosure sale may be taken out commences to run from the date of the judgment of foreclosure, and not from the date when the balance was docketed.

Bowers v. Crary, 30 Cal. 621.

215. Every process which may be required to completely enforce a judgment must be taken out within five years after its entry. *Id.*

216. The docketing of a balance remaining due after sale of mortgaged property is not an entry of a new judgment for such balance. *Id.*

217. The mere contingent provision for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien until the amount of the deficiency has been ascertained and fixed. In this latter case, the limitation upon the lien does not commence to run until the deficiency be ascertained, and an execution can be issued therefor. *Chapin v. Broder*, 16 Cal. 403.

218. The statute limiting the time for issuing execution upon a judgment to five years after its entry applies to judgments rendered in suits to **foreclose a mortgage**, equally as to mere personal judgments.

Stout v. Macy, 22 Cal. 647.

MORTGAGE.

219. Where an action upon a promissory note is barred by the statute of limitations,

the **remedy** upon a mortgage given to secure it is also barred.

Heinlin v. Castro, 22 Cal. 100.
McCarthy v. White, 21 Id. 495.
Lord v. Morris, 18 Id. 482.

220. In this state a mortgage does not, as at common law, give a **right of possession** to the mortgagee, and hence, from this fact, and the difference between the statute of limitations of this and other states, the decisions of courts in other states to the effect that the mortgagee has a remedy on his mortgage after the note is barred, have no application. Lord v. Morris, 18 Cal. 482.

221. Where a **note is secured** by mortgage upon real property, and subsequently, after the remedy on the note is barred by the statute, the mortgagor executes a second mortgage to a third party, such third party can interpose the plea of the statute of limitations in a suit to foreclose the first mortgage, and thus secure priority for his subsequent mortgage; and this, even though the mortgagor had, after the execution of the second mortgage, and after the note was barred, indorsed on the first note that he renewed, revived, and agreed to pay the same. Id.

222. A **renewal of a note**, secured by a mortgage upon lands, so as to extend the time within which it would be barred by the statute of limitations, carries with it an extension of the lien on the mortgage to the time when the note will expire by the terms of the renewal, if at the time the note is renewed the maker of the note and mortgagor is still the owner of the lands mortgaged. Lent v. Morrill, 25 Cal. 492.

223. If the maker of the note and mortgagor sells the lands mortgaged to secure the same, and, while divested of the title, extends the time of payment of the note, and afterwards becomes reinvested with the title, this reinvestment extends the lien of the mortgage, so that it will remain valid until the note, as extended, is barred by the statute of limitations. Id.

224. If the maker of a **note** secures the same by a mortgage on lands, and, while still the owner of the mortgaged property, **extends the time of payment** of the note, or if he divests himself of the title to the lands, and then extends the time of payment of the note, and afterwards acquires title, the purchaser from the mortgagor of the lands mortgaged takes the same subject to the lien of the mortgage, until the note is barred by the statute of limitations, although at the time of his purchase he did not know that the time of payment of the note had been extended. Id.

225. Where three persons execute their joint mortgage on land to secure their joint and several promissory note to the mortgagee, and one of them leaves the state, and the

note afterwards becomes barred by the statute of limitations as to the two who remain in the state, the lien of the mortgage is also barred as to the interest of the two in the land, and it can only be enforced against the interest of the one as to whom the note is not barred. Low v. Allen, 26 Cal. 141.

226. If the mortgagee, after obtaining a judgment foreclosing his mortgage, by an agreement with the mortgagor, enters into the possession of the mortgaged property, and receives the **rents and profits**, and applies them towards the satisfaction of the amount due, and the mortgagee further agrees not to issue an order of sale, the statute of limitations does not run against the rights of the mortgagee, so long as the debt remains unpaid, and the parties acquiesce in the arrangement. Frink v. Le Roy, 49 Cal. 314.

227. Where a **promissory note** is executed by **one person**, and a mortgage to secure the debt is given by **another**, and the payor of the note dies, and the holder thereof fails to present either the note or mortgage to his administrator for allowance within ten months after publication of notice to creditors, although the claim is barred as against the estate, yet the mortgage remains in full force as against the mortgagor and the mortgaged property, and may be foreclosed at any time before it is barred, as against the mortgagor, by the statute of limitations.

Sichel v. Carrillo, 42 Cal. 493.

228. The above rule remains the same when the note is made by the husband for his own debt, and the **wife** mortgages her **separate property** to secure it, and the husband signs the mortgage to show his assent to it. In such case the wife's liability on the mortgage is not affected by the death of the husband, and the failure of the holder to present the claim for allowance to the administrator of his estate. Id.

229. Where a mortgagor transfers his interest in the mortgaged premises to a third person, the mortgage, as contradistinguished from the mortgage debt, is to be deemed a **contract in writing** in the sense of the statute, on which an action must be brought within four years from the time when the action would lie, in order to avoid the bar of the statute of limitations.

Woods v. Goodfellow, 43 Cal. 185.

230. An action can not be maintained to enforce a mortgage given to secure a note, if at the time the action is commenced more than **four years** have transpired since the note fell due, and this fact appears on the face of the complaint, or the statute of limitations is pleaded.

Wormouth v. Hatch, 33 Cal. 121.

231. A complaint containing such a statement of facts shows upon its face that the note was outlawed, and in case of the **submission** of such a case upon the pleadings,

judgment was properly rendered for defendant. *Id.*

232. The right of the mortgagee to maintain an action on the debt, and to enforce the lien of the mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal; and when one is barred by the statute of limitations, the other is also barred.

Arrington v. Liscom, 34 Cal. 365.

233. A mortgage to secure a debt for the payment of which there is no written agreement, is a contract "**founded upon an instrument of writing**" within the meaning of the limitation act, and an action for its foreclosure may be maintained at any time within four years from its breach, notwithstanding that the statute has in the mean time run against the debt.

U. W. Co. v. Murphy Flat F. Co., 22 Cal. 620.

234. The right to enforce the lien of a mortgage given to secure a debt is barred by the statute of limitations at the end of four years from the time the right of action accrues on the debt.

Cunningham v. Hawkins, 24 Cal. 403.

235. The right of the mortgagor to maintain an action to redeem the property from the lien of the mortgage is barred by the statute of limitations at the end of four years from the time the right of action accrues on the debt. *Id.*

236. The right of the mortgagee to maintain an action on the debt, and enforce the lien of a mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal, and when one is barred by the statute of limitations, the other is also. *Id.*

237. When the right to maintain an action for the redemption of the mortgaged property from the lien of the mortgage is barred by the statute of limitations, it can not be revived by an offer of the mortgagor to pay the debt. *Id.*

238. If one who has a mortgage upon a tract of land leaves the same with another who has a subsequent mortgage upon the same land, and makes him his attorney in fact, with knowledge of such subsequent mortgage, with power to demand, collect, and receive the monthly interest, but without any power or any instructions to enforce the collection of the mortgage, and without the attorney in fact undertaking the trust of enforcing the collection of the mortgage, and while in the hands of the attorney in fact the mortgage becomes barred by the statute of limitations, the attorney in fact has not been guilty of such fraud as will preclude him, when made a party to a suit afterwards

brought to foreclose the mortgage, from taking advantage of the statute of limitations to prevent the same from having priority over his subsequent mortgage. Had the attorney in fact undertaken the trust and assumed the duty of enforcing the mortgage by legal proceedings, and failed to do so until it was barred by the statute of limitations, he would have been precluded from availing himself of the statute as a defense in a suit afterwards brought to foreclose it, and the same would still be entitled to priority over his own mortgage.

Lent v. Shear, 26 Cal. 361.

239. W. and K. owning a tract of land in common, W., in 1853, mortgaged his interest in a portion of the tract, containing four hundred and eighty acres, to M., to secure a note executed at the same time, and falling due March 4, 1854. April 3, 1856, W. and K. entered into a written agreement for the partition of the whole tract, by which the four hundred and eighty acres mortgaged was to belong exclusively to K., W. stipulating to make him a deed of the same as soon as it could legally be done. May 10, 1858, M. and W. had an accounting, and signed a writing stating that there was a balance of one thousand seven hundred and six dollars and sixty cents then due on the note, and that the time of payment was extended to January 1, 1859. April 8, 1859, W., in pursuance of the agreement of 1856, executed a deed of the premises to K., who had notice of the previous transactions between W. and M. The agreement between W. and K. in 1856 was not recorded, nor did M. have actual notice of its existence until after May 10, 1858. In an action by M. to foreclose the mortgage, in which K. set up as a defense the statute of limitations: *Held*, that this defense was available to him by reason of his interest in the property acquired under the agreement of 1856; that he was not affected by the acknowledgment made by W. in 1858; that the want of knowledge of K.'s purchase by plaintiff when he received W.'s acknowledgment, and extended the time of payment was not material, for the reason that the period of limitation had already expired, and that plaintiff gave no consideration for the acknowledgment; *held, further*, that if the debt had not been barred at the time of W.'s acknowledgment, the position of the plaintiff would have been different; that having no notice of the agreement of purchase, if he had suffered the statute to run, relying upon the acknowledgment, he would have been entitled to protection.

McCarthy v. White, 21 Cal. 495.

PROMISSORY NOTE.

240. An action on a promissory note is barred by statute of limitations, if not com-

menced within **four years** from the time the cause of action accrues.

Banks v. Marshall, 23 Cal. 223.

241. A note payable six months after date, with interest payable monthly in advance, contained the following clause: "In case the said interest, or any portion thereof, should become due and remain unpaid after demand, then the mortgage given by me, of even date herewith, which is given to secure the payment of this note, may be foreclosed," etc., and the mortgage contained a provision, by which the mortgagee was "empowered to foreclose said mortgage, according to the provisions in said note contained:" *Held*, that the prompt **payment of the interest** on demand when it fell due did not, under these clauses in the note and mortgage, prolong the time of payment beyond the time specified in the note, and that a cause of action accrued upon the note and to foreclose the mortgage immediately upon the expiration of the six months, although there had been no default in the payment of interest; *held, further*, that an action not commenced within four years after the expiration of six months from the date of the note is barred by the statute of limitations.

Pendleton v. Rowe, 34 Cal. 140.

242. The statute of limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and no **special demand** is necessary to put it in motion.

Brummagin v. Tallant, 29 Cal. 503.

243. Upon a note payable six months after date, with interest payable monthly, and further providing that "in case default be made in any payment of interest, when the same shall become due, then the whole amount of principal and interest to become due and payable immediately upon such default," the cause of action, within the true meaning of the statute of limitations arises at the expiration of the **credit fixed by the note**, and not at the time when default is made in payment of the interest.

Belloc v. Davis, 38 Cal. 242.

244. Such a provision in a note is in the nature of a **penalty**, inserted for the sole benefit of the creditor, and one which he may enforce or waive at his election. *Id.*

245. By accepting the payment of the interest after default has been made, the creditor waives all benefit from the default, and thereafter the rights and obligations of both parties continue without regard to the forfeiture. *Id.*

246. If one who holds the note of another receives from him the note of a third person as **collateral security**, and afterwards, when tendered to him, refuses to receive payment of the note for which the collateral was given, and refuses to render an account and deliver up the collateral, this

refusal does not make him the owner of the collateral, nor does it set the statute of limitations in motion so that he may plead it in bar to an action brought to make him account for money or property received by him on the collateral, more than four years after the refusal. *Ponce v. McElvly*, 47 Cal. 155.

247. If a complaint on a judgment is amended so as to state a cause of action on a promissory note, the action on the note is not commenced until the **amended complaint** is filed, and the statute of limitations on the note commences running at the time last mentioned. *Anderson v. Mayers*, 50 Cal. 525.

248. When a complaint is amended so as to state a **new cause of action**, the action is not commenced as to said new cause until the amended complaint is filed. *Id.*

249. If a mortgage be made to secure the payment of several promissory notes of the mortgagor, some of which matured more than four years before the death of the grantee of the mortgagor, and before the commencement of the action, such notes are not within the saving clause of section 353 of the code of civil procedure, and are barred by the statute of limitations; but as to such of the notes as matured less than four years before the death of the grantee, the action will be in time if commenced within one year after the issuance of **letters of administration** on the estate of the grantee.

Hibernia Bank v. Herbert, 53 Cal. 375.

250. If suit is brought on a promissory note executed out of this state and due more than two years before the action is commenced, the **presumption** is that it is barred by the statute of limitations; and if the defendant has been absent from the state during any portion of the two years, that fact should be averred in the complaint.

Bass v. Berry, 51 Cal. 264.

251. The liability of **sureties** on a promissory note is not discharged by the statute of limitations until four years after their liability becomes fixed.

Dussol v. Bruguere, 50 Cal. 456.

252. In this state, prior to 1863, if a **married woman** was entitled to maintain an action on a promissory note, the statute of limitations did not run as against her right of action during her coverture. Since 1863, the statute of limitations runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her. *Wilson v. Wilson*, 36 Cal. 447.

253. A note given on the twenty-ninth day of February, 1868, due twelve months after date, falls due on the twenty-seventh day of February, 1869, and it is too late to commence an action on it on the first day of March, 1873, even if the last day of February, 1869, is **Sunday**.

Hibernia Bank v. O'Grady, 47 Cal. 579.

ACCOUNTS.

254. Accounts audited and approved, and certified to be correct, are not barred by that portion of the statute of limitations applying to accounts.

Sannickson v. Brown, 5 Cal. 57.

255. Where D. had a running account with L. from 1833 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857; and D., within one year after the granting of letters of administration, commenced his suit on said account against the estate: *Held*, that the suit was commenced in time.

Danglada v. De la Guerra, 10 Cal. 386.

256. The fact that a long period intervened between the death and the administration taken on the estate can make no difference. *Id.*

257. Payments made on an open account for goods sold and delivered due for more than a year do not make the account a mutual account within the eighteenth section of the limitation act of 1850, and the account is barred.

Weatherwax v. Cosumnes V. M. Co., 17 Cal. 344.

258. The fact that the memorandum-book of plaintiff in which the account was kept and the pass-book of defendant were compared by them and the result ascertained and the account orally acknowledged by defendant to be correct, amounts to no more than a parol admission of its correctness, which would not take the case out of the statute. And had these books been produced on the trial, the mere entries therein of the items of the account, with this oral acknowledgment of its correctness, would not place the account on any different footing, so far as the statute of limitations is concerned, than if no such acknowledgment had been made. *Id.*

259. The fact that defendants once gave plaintiff a lump of gold amalgam to be sent to the mint for coinage, the proceeds to be applied to plaintiff's account, does not make the account mutual, nor affect the case in respect to the statute of limitations. *Id.*

260. Where the items of an account are all on one side, the account is not mutual, and the statute of limitations is a bar to so much of the account as did not accrue within the period limited for the commencement of suit. *Fraylor v. Sonora M. Co.*, 17 Cal. 594.

261. Where the statute of limitations of two years was pleaded to a suit upon an implied contract for services rendered as secretary to a corporation, and the court below ruled that the statute did not apply, because the account was a "mutual, open, and current" account, and hence within the eighteenth section of the act of 1850 (*Wood's Dig.* 48): *Held*, that the court erred; that to con-

stitute such an account there must have been reciprocal demands between the parties, which was not the case here, the items of the account all being on one side. *Id.*

262. Where there have been reciprocal demands between the parties upon a mutual open and current account, the statute of limitations commences running at the time of the last item of the account proved on either side. *Norton v. Larco*, 30 Cal. 126.

263. When one party is selling the other goods from time to time, and charging the same, and the other gives him money, which he credits on the account as a payment, this credit does not make the account a mutual one within the meaning of the eighteenth section of the statute of limitations.

Adams v. Patterson, 35 Cal. 122.

264. When the account is not a mutual one, the statute of limitations bars each item of the same two years after its delivery. *Id.*

265. In an action by Hill, to recover one half his advances made under a contract between him and Haskin, whereby they agreed to buy and sell on joint account certain mining stock, Hill to advance all the money, and Haskin to repay one half with interest, and Hill to hold all the stock purchased as security for his advances, but without specifying any time within which the repayment was to be made: *Held*, that an offer to account and a demand for repayment by Hill were conditions precedent to his right to maintain the action, and that the statute of limitations would not commence running against him until such offer and demand.

Hill v. Haskin, 42 Cal. 159.

266. An action upon an official bond is not an action "upon a liability created by statute," mentioned in the third subdivision of the seventeenth section of the statute of limitations, and is not therefore barred by such statute after the expiration of three years. *Placer Co. v. Dickerson*, 45 Cal. 12.

TRUSTS.

267. If one holds the legal title to land in trust for another, and there is a stipulation that the trustee shall deed the land to the beneficiary upon the payment of the purchase money and interest to the trustee, a cause of action does not accrue to compel the execution of the trust until the money is paid, nor does the statute of limitations commence running until this time.

Millard v. Hathaway, 27 Cal. 119.

268. If one holds the legal title to land as security for a sum of money due him by the one having the equitable estate, although the trustee, after the lapse of four years from the time the money falls due, can not be compelled to accept the money and execute a conveyance; yet, if he voluntarily

receives the money when tendered, he is not discharged by the statute of limitations from executing the trust and giving a deed to the beneficiary. Id.

269. A deposit of money by one with another, to be held by him in trust for the depositor until he shall demand it, constitutes an express continuing trust, and no right of action will accrue to the *cestui que trust* until the trustee assumes a position in hostility to the trust relation, either by refusing to pay the money on demand, or by some other act, nor will the statute of limitations commence running until a demand is made for the money, or the trustee has violated his contract.

Schroeder v. Jahns, 27 Cal. 274.

270. In such case, if no demand be made on the trustee, and he does not violate his contract in his life-time, but demand is made on his administrator after his death, the statute of limitations does not commence running against the intestate, but the cause of action accrues against the administrator.

Id.

271. If a trust attaches to the legal title acquired through a sheriff's certificate of purchase and deed, the statute of limitations does not commence running until the execution of the sheriff's deed, and expires at the end of four years from that time.

Currey v. Allen, 34 Cal. 254.

272. The statute of limitations does not begin to run in the case of an express trust, until the trustee, with the knowledge of the *cestui que trust*, has disavowed and repudiated the trust. Miles v. Thorne, 38 Cal. 335.

273. The statute of limitations does not run in favor of a trustee, as against the *cestui que trust*, while the latter is in the possession of his estate, and there has been no adverse holding on the part of the trustee. Love v. Watkins, 40 Cal. 577.

274. If A. conveys land to B. with a provision in the deed that B. shall reconvey to him, B. holds the land in trust for A. and the statute of limitations does not commence running on A.'s right to a reconveyance until B. repudiates the trust, and such repudiation is brought to the knowledge of A. Hearst v. Pujol, 44 Cal. 230.

275. If one who receives from another a note and mortgage of a third person in pledge as security for a debt due him by the pledgor, afterwards refuses to return the pledge to the pledgor upon the tender of payment of the debt for which the pledge was made, this refusal does not set the statute of limitations in motion as to a trust which may afterwards arise by reason of the pledge receiving money or land in payment of the note and mortgage.

Ponce v. McElvy, 47 Cal. 155.

276. In an action to establish an involun-

tary trust as to real estate against Mary P., and to compel a conveyance of the legal title, it appeared that the cause of action accrued more than eight years before the commencement of the action, but that the plaintiff was at that time in the possession of the land by his tenant, and remained so until about December, 1867, at which time the defendant entered upon the land by collusion with the tenant, and thenceforth claimed to hold adversely: *Held*, upon a plea of the statute of limitations, that the plaintiff was not barred.

Altschul v. Doyle, 55 Cal. 633.

FRAUD.

277. Where relief is sought on the ground of fraud, the statute of limitations does not commence running until the discovery of the fraud. Currey v. Allen, 34 Cal. 554.

278. The clause in the seventeenth section of the statute of limitations, providing that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud, is applicable to constructive fraud as well as fraud in fact.

Boyd v. Blankman, 29 Cal. 19.

279. An action for relief on the ground of fraud may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry. Id.

280. The judgment creditor who has received a sheriff's deed of the debtor's land may bring an action to cancel a fraudulent deed of the same made by the debtor before judgment, at any time within three years after the execution and delivery of the sheriff's deed. Hager v. Shindler, 29 Cal. 47.

281. The limitation of actions for relief on the ground of fraud to three years after the discovery of the fraud alleged does not apply to an action to set aside and cancel a conveyance upon the ground that it is a cloud upon the title of the plaintiff, even if the court is asked to set aside the conveyance because it was made to defraud a creditor. Stewart v. Thompson, 32 Cal. 260.

282. Where three persons entered into a partnership agreement, by the terms of which the partnership was to be kept secret, and plaintiff, ignorant of the existence of the partnership, sold goods to one of the firm individually in 1854, and afterwards, in 1860, discovering that the partnership existed in 1854, and that the goods went to the use of the concern, brought suit against the three: *Held*, that this agreement to keep the partnership secret and its mere concealment from plaintiff do not amount to such a fraud as to avoid the statute of limitations.

Soule v. Atkinson, 18 Cal. 225.

283. In an action for relief on the ground

of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. *Sublette v. Tinney*, 9 Cal. 423.

284. If the plaintiff wishes in such a case to bring himself within the exception of the statute, he must allege the fact of a **discovery** of the fraud at a period bringing him within the exception. *Id.*

285. An action by an administrator to recover back real estate conveyed by the decedent in his life-time for the purpose of defrauding his creditors may be commenced within three years after the creditors recover judgment against the estate.

Forde v. Exempt F. Co., 50 Cal. 299.

ESTATE OF DECEASED PERSONS.

286. Judgment was obtained against C. in December, 1850; he died in February, 1852; letters of administration on his estate in December, 1856; this judgment presented to the administrators as a claim against the estate in February, 1859; claim rejected, and this suit brought in March following to compel its allowance. *Held*, that the claim is not barred by the statute of limitations of five years applicable to judgments; that the right of action on the judgment ceased under our statute upon the death of the debtor; that presentation of the claim to the administrator is substituted in place of suit; and that the right to sue comes, not from the existence of the debt and non-payment, but from the refusal to allow it as a claim against the estate, and hence does not accrue until presentation of the claim, which need not be made until after publication of notice to creditors. *Quivey v. Hall*, 19 Cal. 97.

287. By common law, when the statute of limitations begins to run, a **subsequent disability**, as death of the party bound, etc., does not stop it. But this doctrine has no application where judgment is obtained against an intestate in his life-time and no execution levied. In such case the judgment creditor being prevented by the statute from suing after the death of the debtor, the statute ceases to run until presentation of the claim to the administrator. *Id.*

288. A note not due at the death of the maker was presented to the administrator of his estate, March 5, 1859, and rejected, and suit brought thereon March 12, 1859—letters of administration having issued December 4, 1856, and no notice to creditors to present their claims having been published: *Held*, that the note is not barred by the statute of limitations. *Smith v. Hall*, 19 Cal. 85.

289. The allowance of a claim against the estate by the administrator and probate judge prevents the claim from becoming

barred by the statute, even if it is not filed in the probate court.

Willis v. Farley, 24 Cal. 490.

290. The sales mentioned in the one hundred and nineteenth section of the probate act, which reads as follows: "No action for the recovery of any real estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale," include and comprise all sales, whether valid, voidable, or void, made under orders made by probate courts, of real estate belonging to persons who have died since the passage of the probate act.

Harlan v. Peck, 33 Cal. 515.

291. The clause in the statute of limitations which provides that civil actions shall be commenced within certain periods therein prescribed "after the cause of action shall have accrued," does not imply, in addition, the existence of a **person legally competent** to enforce it by suit. The statute must run in all cases not therein expressly excepted from its operation.

Tyman v. Walker, 35 Cal. 634.

292. There is no provision made in the statute excepting from its operation a case where the party who would have been entitled to sue dies before the cause of action has accrued. *Id.*

293. In such case, the persons interested in his estate—his **creditors, heirs, and devisees**—have the full time allowed by the statute (six months) to obtain a grant of administration and commence an action. *Id.*

294. B. being seised of certain lands, shortly before his death, which occurred April 5, 1854, placed W. in possession under him. In October, 1854, W. made entry and claim of said lands, as his own, and thereafter, under said claim, held the undisturbed possession of the same for more than twelve years. On the fifth day of October, 1866, T. was appointed administrator of the estate of B., and on the eighth day of November following brought **ejectment** against W. to recover the possession of said lands, to which W. pleaded the statute of limitations in bar: *Held*, that the plea was well taken and the action was barred. *Id.*

295. The statute of limitations does not run, while the administration is pending and unsettled, as to a claim against an estate which has been allowed, nor as to a judgment which has been recovered against an administrator or an executor for a debt of the estate. *Estate of Schroeder*, 46 Cal. 305.

296. The limitation on the right to enforce a claim or debt, which is not presented to the administrator within ten months after the first publication of notice to creditors, applies solely to the claim as against the es-

tate, and in no way affects the validity of the debt as against other persons who are liable for the debt, or whose property is liable.

Sichel v. Carrillo, 42 Cal. 493.

297. In an action brought by a distributee against an executor to recover the value of land allotted to the plaintiff under a decree of distribution, the complaint alleged that by the decree it was adjudged that the defendant came into possession of the land in question as executor, and was chargeable with the same, and that he be charged with it; but further alleged, in effect, that prior to the rendition of the decree the land had been lost to the estate through the negligence of the defendant, by an adverse possession of intruders for more than five years: *Held*, first, that the complaint stated a good cause of action; and, second, that it did not rest upon the last-mentioned averment, but was based on the decree of distribution, and (being in due time after the decree) that the action was not barred.

Wheeler v. Bolton, 54 Cal. 302.

WHO MAY PLEAD THE STATUTE OF LIMITATIONS.

298. As a general rule, the plea of the statute of limitations is a personal privilege of the party, and can not be set up by a stranger. This is true with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He can not at his pleasure affect the interests of other parties.

Lord v. Morris, 18 Cal. 482.

299. A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the statute of limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured.

McCarthy v. White, 21 Cal. 495.

Lord v. Morris, 18 Id. 484.

Lent v. Shear, 26 Id. 361.

Grattan v. Wiggins, 23 Id. 16.

Coster v. Brown, 23 Id. 142.

300. If an action of ejectment is continued in the name of the plaintiff, who has sold pending the action, the defendant can not plead the statute of limitations as against the vendee of the plaintiff.

Moss v. Shear, 30 Cal. 467.

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10. EFFECTS OF FILING.

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25. ACTUAL NOTICE.

IN WHAT CASES NOTICE OF, MUST BE FILED.

1. It is confined to actions affecting the title to real property, and which operate directly upon the title, and by the result of which some change as to the title is wrought; examples of which are found in actions for the condemnation of real estate, and the specific performance of contracts relating thereto, for the foreclosure of mortgages and other liens, and the like.

Long v. Neville, 29 Cal. 135.

Watson v. Dowling, 26 Cal. 124.

2. A bona fide purchaser of land, without notice of proceedings pending for its condemnation at the time of purchase, no notice of *lis pendens* being filed, is not affected by the proceedings.

Bensley v. Mt. Lake W. Co., 13 Cal. 306.

3. The common law doctrine of *lis pendens* does not apply to proceedings before a board of supervisors for condemnation of land for road purposes.

Curran v. Shattuck, 24 Cal. 427.

4. Under our statute, the mere pendency of a suit does not charge the purchaser of the subject-matter of the suit as a purchaser *pendente lite* at common law. A notice of *lis pendens* must be filed or appear of record.

Head v. Fordyce, 17 Cal. 149.

Otherwise as to actions of ejectment.

Watson v. Dowling, 26 Cal. 124.

IN WHAT CASES NOTICE NEED NOT BE FILED.

5. This action does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones or to enforce liens upon legal estates.

Wattson v. Dowling, 26 Cal. 124.

Long v. Neville, 29 Id. 131.

6. In an action to enforce the lien of a tax by a sale of the property, it is not necessary to file a *lis pendens*.

Reeve v. Kennedy, 43 Cal. 643.

7. The clause in the practice act of this state relating to the filing of a *lis pendens* does not apply to suitors, except in our state courts.

Majors v. Cowell, 51 Cal. 478.

8. Neither the statute of this state in respect to the filing of a *lis pendens*, nor any equivalent proceeding, has been incorporated into the rules of the supreme court of the United States as applicable to suits in equity, nor into the rules of the circuit court of the United States for the ninth circuit.

Id.

9. Under the practice of the high court of chancery in England, a suit in equity does not give constructive notice to parties purchasing land from a defendant, until process has been served or waived by a voluntary appearance. The mere filing of a complaint does not constitute a *lis pendens*.

Id.

EFFECTS OF FILING.

10. The effect of *lis pendens* is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment rendered, or which may be rendered in the suit in which notice is given.

Gregory v. Haynes, 13 Cal. 594.

Curtis v. Sutter, 15 Id. 263.

Haynes v. Calderwood, 23 Id. 409.

11. The effect of our statute providing for the filing of a *lis pendens* is to abrogate the rule making the mere pendency of an action constructive notice. It does not change the rule of law relating to actual notice of a pending action, and the effect of such actual notice upon parties dealing with or taking possession of property in litigation.

Sampson v. Ohleyer, 22 Cal. 200.

12. It simply adds to the common law rule a single term, to wit, to require for constructive notice, not only a suit, but filing notice of it and there is no distinction under the statute between different kinds of interest in or titles to real estate.

Richardson v. White, 18 Cal. 102.

OMISSION TO FILE, EFFECT OF.

13. Where notice of *lis pendens* was not filed, plaintiff can not successfully set up that

notice would have done no good to the purchaser, because he could make no defense, or no better defense than the vendor. The object of the notice is to give the opportunity of defense, and also to notify third persons of the litigation.

Richardson v. White, 18 Cal. 102.

Sampson v. Ohleyer, 22 Id. 200.

Horn v. Jones, 28 Id. 194.

14. Our statute changes the common law rule upon this subject in ejectment cases only.

Richardson v. White, 18 Cal. 102.

15. A purchaser of real property, pending the suit, a suit in equity, affecting the title to it, is not bound by the judgment, unless notice of *lis pendens* be filed with the county recorder before the purchase.

Id.

16. The point not decided, whether a *lis pendens* filed by a plaintiff, in an action to try the title to land, in which the defendants set up title in themselves and ask for affirmative relief, imparts notice to purchasers from such plaintiff, pending the action, of the pendency of the same, and the possible result that his title might be adjudged invalid.

Corwin v. Bensley, 43 Cal. 233.

17. If such a *lis pendens* is filed in an action to try the title to land as imparts notice to purchasers from a party to the action, during its pendency, such purchasers must apply for leave to protect their interest in the suit.

Id.

18. A person buying land, without notice of the pendency of an action to try its title, is not affected by a judgment in the action, and, therefore, can not support a motion to set aside such judgment, under the sixteenth section of the practice act.

Id.

19. If, during the pendency of an action to try the title to land, the plaintiff sells, and afterwards stipulates to a judgment in favor of the defendants, his grantees can not support a motion to set aside the judgment, under the thirty-eighth section of the practice act.

Id.

PURCHASERS AFTER LIS PENDENS FILED.

20. If a *lis pendens* is filed at the commencement of an action brought to set aside a deed on the ground of fraud, parties who buy of the defendant pending the litigation are bound by the decree.

Hurlburt v. Butenop, 27 Cal. 50.

21. A person who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree.

Montgomery v. Byers, 21 Cal. 107.

22. If A. brings an action against B. to recover possession of land, and files a *lis pendens*, and during the pendency of the action, and after the *lis pendens* is filed, C. purchases the land of B., and judgment is afterwards rendered against B., C. is bound and **estopped** by the judgment.

Calderwood v. Tevis, 23 Cal. 335.

23. If an action is brought against a corporation to foreclose a mortgage purporting to have been executed by it, and a *lis pendens* is filed, and a decree is rendered enforcing the mortgage, a party who buys the mortgaged property, *pendente lite*, at sheriff's sale, made on a judgment which does not enforce a lien older than the *lis pendens*, is **estopped** from saying that the mortgage was not the act of the corporation.

Horn v. Jones, 28 Cal. 194.

24. A purchaser of land, subsequent to a suit brought against his vendor to quiet title, and to a notice of *lis pendens* filed in the county recorder's office, is a **mere volunteer**, who takes subject to any decree in the suit. Gregory v. Haynes, 13 Cal. 592.

ACTUAL NOTICE.

25. A party taking an interest in land pending a foreclosure, with actual notice of the action, is bound to the same extent, as if a *lis pendens* is filed.

Sharp v. Lumley, 34 Cal. 611.

26. Where after the commencement of an action of ejectment against a tenant he gave notice to the landlord, and requested him to defend, and the latter employed an attorney to conduct the suit: *Held*, that the actual notice given to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him.

Sampson v. Ohleyer, 22 Cal. 200.

27. The object of filing a notice of *lis pendens* is to impart constructive notice of the pendency of such foreclosure action; and the effect of actual notice thereof, to a party receiving it, is the same as if notice of *lis pendens* had been filed.

Sharp v. Lumley, 34 Cal. 612.

28. Where, in the schedule attached to a petition of the mortgagor in insolvency, which was filed after the action of foreclosure was commenced, there was contained a description of the mortgaged premises and of the mortgage; also the further statement, "suit for foreclosure commenced;" and the order of the judge before whom the insolvency proceedings were pending provided "that all actions now pending may be prosecuted to judgment:" *Held*, that notice of the action to foreclose was thereby imparted to the assignee of such insolvent and to all parties purchasing from him, and they are

bound by the judgment in the action for foreclosure, if it be valid. Id.

FORECLOSURE, 50, 108, 156.	VENDOR AND PUR- CHASER, 27-28.
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LOST PAPERS.

1. The fact that instructions given by the court are lost or mislaid before a motion for new trial is heard, is no ground to suspend the hearing of the motion, or for new trial.

Visher v. Webster, 13 Cal. 58

APPEAL, 410, 411.	EVIDENCE, 88.
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MALICIOUS PROSECUTION.

1. An action for malicious prosecution lies against several defendants, and the gist of the action is the malicious prosecution, and probably the cause of action is complete before acquittal. *Dreux v. Domec*, 18 Cal. 83.

2. Plaintiffs and one C., partners in the mercantile business, purchased of defendant goods on credit, which were shortly afterwards sold by plaintiff and his partner at a sacrifice, and the proceeds immediately invested in a homestead in the name of C., who was a brother-in-law of plaintiff. Defendant subsequently caused plaintiffs to be arrested upon the charge of cheating, from which arrest they were discharged. Afterwards, defendant caused plaintiff and C. to be arrested on a charge of concealing property with intent to defraud and delay their creditors; the charge was dismissed as to plaintiff, and C. was sent up to the criminal court to answer. Plaintiff thereupon brought his action against defendant for malicious prosecution: *Held*, that if plaintiff was entitled to any damage, he could recover only the actual damage which he sustained by the arrest. *Sears v. Hathaway*, 12 Cal. 277.

3. Malice can not be presumed in a prosecution where the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law.

Id.

4. In this case defendants filed a general denial, and also averred that they had nothing to do with the prosecution except as witnesses. Plaintiff filed a replication taking issue on this averment: *Held*, that if plaintiff chose to consider this a good defense and join issue on it, defendants can not complain, though, probably, this matter was put in issue by the general denial, and the replication was unnecessary.

Dreux v. Domec, 18 Cal. 83.

5. In an action for malicious prosecution, plaintiff, to show malice, may introduce the docket and proceedings before the justice of the peace, and show what the defendants, who had plaintiff arrested for assault with intent to kill, there did and swore to. *Id.*

6. If one person arrests another for the commission of a crime, under the belief that the person arrested has committed the crime, the person making the arrest can not

be said to act maliciously, although he may act unlawfully.

Lyon v. Hancock, 35 Cal. 372.

7. In an action to recover damages for a malicious prosecution, it is not error for the court to instruct the jury that when the plaintiff first rested his case the court had decided as a matter of law that there was a want of probable cause, provided the testimony of the plaintiff and the admissions in the pleadings warrant it, and the testimony introduced by the defendant has not in any degree tended to obviate or avoid the want of probable cause made by the pleadings and the plaintiff's testimony.

Kinsey v. Wallace, 36 Cal. 463.

8. If a person gives another a *carte blanche* to use his name as plaintiff in prosecuting suits of the character of the one in question, without requiring to be informed as to the facts and circumstances of the suit, the two to share the compensation between them, such person can not, if a suit is commenced in his name maliciously and without probable cause, shield himself from damages on the ground of ignorance, or on the pretense that he might have supposed there was a good cause of action. *Id.*

9. A dismissal of an action under the circumstances shown by the record in this case, by a stipulation signed by both parties, which provides that each party shall pay his own costs, is such a determination of the action in favor of the defendant as will enable him to maintain an action for malicious prosecution. *Id.*

10. The gravamen of the action of malicious prosecution is that the defendant instituted the criminal prosecution without having such a knowledge or information of the circumstances as would superinduce in the mind of a reasonable person a belief that the defendant was guilty.

Harkrader v. Moore, 44 Cal. 144.

11. Malice must be shown, in order to support the action for malicious prosecution; but it is not necessarily to be inferred from want of probable cause. There may be want of probable cause and no malice; but the jury may find the fact of malice from the circumstances of the want of probable cause. *Id.*

12. In an action for a malicious prosecution, it is competent for the defendant to prove that he had received information from a reliable source which induced him to cause the arrest of the plaintiff, and what that information was; and in proving what the information was the defendant may show declarations made to him by others, and reports in circulation.

Lamb v. Galland, 44 Cal. 609.

13. In such actions the defendant may rebut the evidence of the plaintiff touching the

want of probable cause, by showing that he acted in **good faith**, under the advice of **counsel**, after a fair and full statement of the facts in the case.

Levy v. Brannan, 39 Cal. 485.

14. Such evidence is directly responsive to the evidence on the part of the plaintiff tending to show the want of probable cause, and does not constitute **new matter** within the sense of the code. Id.

15. Where the defendant has fully and fairly laid his case before counsel, and acts by advice thereof, it is a good defense to the action, though the question whether the defendant acted *bona fide* under such advice is a **question of intention** to be decided by the jury. Potter v. Seale, 8 Cal. 217.

16. **Public policy** and security require that prosecutors should be protected by the law from the civil liabilities, except in those cases where the two elements of malice in the prosecutor, and want of probable cause for the prosecution, both occur. Id.

17. Though malice be proved, yet if there was **probable cause**, the action must fail. Id.

18. The **question of malice** is one for the jury to decide. Probable cause is a mixed question of law and fact. The latter may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. Id.

19. To maintain an action for malicious prosecution, the **primary question** to be considered is the want of probable cause for the prosecution complained of, and this must be established before plaintiff can recover. Grant v. Moore, 29 Cal. 644.

20. From the want of probable cause, **malice** may be **inferred**; but from the most express malice want of probable cause can not be implied. Id.

22. In an action for malicious prosecution, it is erroneous for the court to leave to the **jury** the decision of the question whether the facts they may find will amount to a want of probable cause. Id.

23. In an action for malicious prosecution, if the facts are doubtful, the court should **instruct** the jury that if they find the facts in a certain way, there was no probable cause, and their verdict should be for plaintiff; but if they find in another way, there was probable cause, and their verdict should be for the defendant. Id.

24. If, in an action for malicious prosecution, it appears that the defendant had a cause of action in the case alleged to have been maliciously brought, although for a much less amount than claimed, there was probable cause, and the court should grant a **nonsuit**. Id.

25. In an action for malicious prosecution,

the **burden is on the plaintiff** to show affirmatively a want of probable cause. Id.

26. The **jury**, in an action for malicious prosecution, are not to determine whether the facts amounts to a probable cause; but it is the province of the court to determine that question. When the facts are not controverted, the **court must instruct** the jury whether they amount to probable cause; and when they are controverted, the court must instruct that if they find the facts in a designated way, then such facts do, or do not, amount to probable cause.

Harkrader v. Moore, 44 Cal. 144.

27. The **defense** must be that the prosecutor did believe, and had reasonable grounds to believe at the time, that the accusation he made was well founded. Id.

28. It is not sufficient for the defense to prove that facts and circumstances existed which furnished **reasonable grounds** for the belief that the defendant in the criminal action was guilty; but it must also be proved that the prosecutor had been informed of those facts and circumstances, and that he believed the facts amounted to the offense charged. Id.

29. It is not sufficient that the defendant in an action for malicious prosecution knew, or was informed, of the existence of facts sufficient to make a reasonable person believe that the party prosecuted was guilty; but he must show that he **believed** he was guilty. Id.

30. In actions for malicious prosecution, actual **malice** must be **proved as a fact** to the jury. Levy v. Brannan, 39 Cal. 485.

31. **Sufficiency of evidence**, to justify a verdict of damages for malicious prosecutions, considered.

Russell v. Dennison, 45 Cal. 337.

32. In the case stated in the opinion, seven thousand dollars damages for malicious prosecution held **not excessive**. Id.

33. Parties who, in good faith, and upon grounds believed at the time to be sufficient, cause the arrest of supposed offenders, should not be mulcted in damages merely because the accused party had succeeded in obtaining an **acquittal**.

Ganea v. S. P. R. Co., 51 Cal. 140.

34. In an action to recover damages for a malicious prosecution, it is error for the court to leave it to the jury to determine whether the facts and circumstances proved do or do not establish the want of probable cause. Emerson v. Skaggs, 52 Cal. 246.

35. If, in such action, it clearly appears to the judge that the facts fail to establish a want of probable cause, he may grant a **non-suit**, or direct the jury to render a verdict for the defendant. Id.

36. If there are facts proved by the de-

pendant which tend to show probable cause, it is error for the court to **charge the jury** that the evidence offered by the defendant does not establish probable cause. *Id.*

37. The point mentioned, but not decided, whether an action to recover damages for the malicious prosecution of a civil action, when no arrest of the person of the defendant or seizure of his property has occurred, can be maintained.

Smith v. George, 52 Cal. 341.

38. In order to sustain an action for malicious prosecution, **malice and want of probable cause must concur**. If either of these be wanting the action must fail.

Anderson v. Coleman, 53 Cal. 188.

39. In an action for malicious prosecution of a criminal charge, the plaintiff must prove that the prosecution alleged to have been malicious has terminated by his **aquittal**.

Hibbing v. Hyde, 50 Cal. 206.

40. In an action to recover damages for a malicious prosecution, the want of probable cause must be **affirmatively established** by the plaintiff.

Ganea v. S. P. R. R. Co., 51 Cal. 140.

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MANDAMUS.

1. JURISDICTION.

17. NATURE AND EFFECT OF WRIT.

25. TO WHOM WILL ISSUE.

37. WHEN WRIT WILL LIE.

80. WHEN WRIT WILL NOT LIE.

132. APPLICATION FOR AND PROCEEDINGS THEREON.

134. *Application and Petition.*

154. *Answer.*

165. *Replication.*

166. *Issues and Trial.*

177. JUDGMENT.

184. APPEAL.

JURISDICTION.

1. Under the constitution, as amended, the supreme court has **original jurisdiction** to issue writs of mandamus.

Tyler v. Houghton, 25 Cal. 26.

2. The **supreme court** may exercise its appellate jurisdiction by means of the process of mandamus. *People v. Turner*, 1 Cal. 143.

3. The supreme court has the right to compel **inferior tribunals** to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue

of its appellate powers and its authority to issue process necessary to give them effect.

Purcell v. McKune, 14 Cal. 230.

4. The supreme court can issue a mandate in a proper case, **in aid of its appellate jurisdiction**, but to do so it must have such jurisdiction in the given case. When the act to be done is judicial in its character, the writ will not direct in what manner the inferior officer shall act, but only direct him to act. In dismissing an appeal the county court acts judicially.

People v. Weston, 28 Cal. 639.

5. This court has no jurisdiction to grant a writ of mandate to compel the judge of a district court to proceed with the trial of an action commenced therein, in which an order has been made by said district court directing the cause to be transferred to the **circuit court of the United States** for trial, for the alleged reason that the parties thereto are citizens of different states.

Francisco v. Manhattan Ins. Co., 36 Cal. 283.

6. In such case the subject-matter of said order of the district court is within the **jurisdiction**, and is not void, even if erroneous. It can not be reviewed by this court on application for mandamus. Moreover, the party aggrieved thereby has a plain, speedy, and adequate remedy by the due course of law. *Id.*

7. This court has no jurisdiction by its writ of mandate, when directed to a person who acts in a **judicial or deliberative capacity**, except to compel a performance of his official duty by acting and deciding in the premises to the best of his judgment. *Id.*

9. The fourth section of the sixth article of the constitution of the state, as amended in 1863, confers upon the district courts **original jurisdiction** to issue writs of mandamus, certiorari, prohibition and *habeas corpus*.

Perry v. Ames, 26 Cal. 381.

Courtwright v. B. R. & A. Co., 30 Id. 573.

10. District courts have jurisdiction to issue writs of mandate regardless of the **amount involved** in the action.

Cariaga v. Dryden, 30 Cal. 244.

11. The Spring Valley water works petitioned the county judge of San Mateo county, under the act of 1858 (stats. 1858, p. 218), to appoint commissioners to appraise the value of certain lands "required for the purposes of the company," and the judge, upon an inspection of the articles of incorporation, held that the company was not a corporation, because the articles did not show "where the principal place of business of the company is to be located," the articles stating simply that San Francisco was the place of business, and dismissed the application and all proceedings based thereon. The company apply to the supreme court for a certiorari: *Held*, that the writ does not lie; that

the **dismissal of the petition** for the cause assigned is not an excess of jurisdiction under the act of 1858, and that mandamus from the district court is the proper remedy.

Ex parte S. V. W. W., 17 Cal. 132.

12. County courts, under the statute, have jurisdiction in proceedings by mandamus, and the statute is constitutional.

Jacks v. Day, 15 Cal. 91.

13. Writs of mandate are not "**special cases**" within the meaning of section 8, article VI of the constitution.

People v. Kern Co., 45 Cal. 679.

14. The act which attempts to confer power on the county courts to issue writs of mandate is unconstitutional. Id.

15. If notice of appeal is given from an order of a justice of the peace directing stolen property to be delivered to the alleged owner, the county court has no jurisdiction to compel, by writ of mandate, the justice of the peace to send up the appeal papers.

People v. Holloway, 26 Cal. 651.

16. In such cases the county court can only inquire by the intervention of a grand jury whether a public offense has been committed in the county. Id.

NATURE AND EFFECT OF WRIT.

17. The distinction between writs of mandate and *quo warranto*, as held in England, is not abolished by the statute of this state, but is fully recognized.

People v. Olds, 3 Cal. 167.

18. A mandamus can give no right, but may be resorted to to put a party in a position to assert his right. Id.

19. A mandamus could only compel the board to act, but could not direct their action; and the rejection of the account is an action upon it, which is all a mandamus could require, where the compensation claimed in the account is not fixed by law.

Price v. Sacramento Co., 6 Cal. 254.

20. A mandamus directing a board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts; such board have a discretion in respect to their action in this regard, though compelled to act on the subject-matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action.

S. F. Gas Co. v. Supervisors S. F., 11 Cal. 42.

21. When the act to be done is judicial and discretionary, a writ of mandate can not direct what judgment shall be rendered, nor can it be granted, after an inferior tribunal has acted, for the purpose of reviewing its decision. People v. Pratt, 28 Cal. 166.

22. The legislature has declared that an officer, for willful disobedience to the man-

date of the court, shall be deemed guilty of a misdemeanor in office.

McCauley v. Brooks, 16 Cal. 56.

23. A statute declaring that a board of supervisors shall not be sued in any action whatever, but that it may be proceeded against by mandamus, does not change the essential nature or office of the writ itself.

Tilden v. Supervisors, 41 Cal. 68.

24. The legislature in establishing the remedy by mandamus, had in view the nature and extent of the remedy as known at the common law, and as used in other states of the union. The writ may issue in the cases mentioned in section 467 of the practice act, but only when it is evident that the law has provided no other sufficient remedy.

Kimball v. Union W. Co., 44 Cal. 173.

TO WHOM WILL ISSUE.

25. Mandamus will issue to the governor in certain cases.

McCauley v. Brooks, 16 Cal. 11.

26. Distinction, from political considerations, between the governor and the inferior officers of the executive department, as to the issuance of this writ, stated. Id.

27. If land sold by state officers was the property of the state, and all the acts required by law prior to the issuing of the patent have been duly performed, and the purchaser is competent to purchase, a writ of mandate will be issued to compel the governor to sign the patent, unless the law has vested him with discretionary powers in that respect.

Middleton v. Low, 30 Cal. 596.

28. When a ministerial duty, affecting a private right, is specially devolved on the governor by law, which the legislature might have devolved on any other state officer, he may be compelled to perform the same by a writ of mandate. Id.

29. A mandamus will issue from a superior to an inferior court, to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form a case of contempt. Merced M. Co. v. Fremont, 7 Cal. 130.

30. Mandamus lies to compel an inferior tribunal to perform a duty enjoined by law; but if the duty is judicial, the writ can not prescribe what the decision of the inferior tribunal shall be.

Lewis v. Barelay, 35 Cal. 213.

31. A writ of mandate will be issued to compel a judge to proceed and try a cause, when he refuses to do so.

People v. De la Guerra, 43 Cal. 225.

32. Courts have no jurisdiction to issue writs of mandamus to the governor.

Harpending v. Haight, 39 Cal. 189.

33. Courts having jurisdiction of the writ

of mandamus, may issue the same to compel the governor to perform a **ministerial act** required by law, and not included within the powers confided to his discretion by the constitution. *Id.*

34. A **tax collector** who fails to pay money into the treasury at the time required by law, will be compelled to do so by writ of mandate. *People v. Austin*, 46 Cal. 520.

35. The **auditor** may be compelled by writ of mandate, to enter on the assessment book the delinquent taxes of the preceding year, even after the duplicate copy of the same has been delivered to the collector. *People v. Ashbury*, 46 Cal. 523.

36. Where, pending a motion for a new trial in the district court, the defendants violate an injunction previously issued by said district court, this court will issue a mandamus against the judge of such district court to compel him to issue his **attachment for contempt**.

Ortman v. Dixon, 9 Cal. 23.

WHEN THE WRIT WILL LIE.

37. The statute of this state is a reaffirmance of the principles of the **common law**, as regards the writ of mandamus, and section 468 provides that it shall be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law; *e converso*, it shall issue in no other. *People v. Olds*, 3 Cal. 167.

38. To supersede the remedy by mandamus, a party must not only have a specific adequate **legal remedy**, but one competent to afford relief upon the very subject-matter of his application.

Fremont v. Crippen, 10 Cal. 211.

39. Neither a remedy by **criminal prosecution**, nor by action on the case for neglect of duty, will supersede that by mandamus, since it can not compel a **specific act** to be done, and is therefore not equally convenient, beneficial, and effectual. *Id.*

40. Mandamus may be resorted to to compel an officer to do an act which is sought to be enforced, in all cases where the officer has no **discretion**, and where he is under an obligation to do the specific act, and there is no adequate remedy in the ordinary course of law. *McDougal v. Bell*, 4 Cal. 177.

41. The writ of mandamus can only be issued to compel the performance of an act or duty **clearly enjoined by law**, and in a case where the party has no other plain, speedy and adequate remedy.

Draper v. Noteware, 7 Cal. 276.

42. The rule that mandamus will not lie where the relator has **another remedy** is not universally true where the writ is sought against ministerial officers.

People v. Loucks, 23 Cal. 63.

43. The court will not undertake, in the

first instance, to supervise, direct or control the acts or omissions of a mere **ministerial officer**, but where the effect of the application is to bring under review the decision of a district court, the **appellate jurisdiction** given by the constitution attaches, and may be exercised by means of the writ of mandamus. *People v. Turner*, 1 Cal. 143.

44. Where an order has been made by the district court of the eighth judicial district, expelling certain **attorneys** from the bar, on the ground that they had set at defiance the authority of the court, and had vilified and denounced its proceedings, but no notice had been given of the charges against them, and no opportunity afforded to make their defense: *Held*, that a writ should issue commanding the district court to vacate the order and restore the parties. *Id.*

45. The writ of mandamus is a proper remedy to compel the district court to **restore an attorney** whose name has been stricken from the rolls by the order of such court. *Id.*

46. Mandamus is the proper remedy to compel a **county treasurer** to satisfy **warrants** surrendered for redemption, as provided by law. *Day v. Callow*, 39 Cal. 593.

47. When the legislature makes it the duty of the **supervisors** of a county to levy a **tax** sufficient to pay the interest on, and ultimately satisfy the principal of, outstanding bonds of the county, the board must fairly exercise its judgment with a view to effect the end contemplated, and if it refuses to do so, may be compelled by the writ of mandate. *Robinson v. Butte Co.*, 43 Cal. 353.

48. If in such case the board levies a tax which its members know will not produce a sufficient sum, it will be compelled by writ of mandate to levy the **additional percentage** required. *Id.*

49. The record on application for mandamus to require a judge of an inferior court to settle a **bill of exceptions**, must enable the supreme court to determine whether, if settled and signed, the bill of exceptions would tend to manifest error committed at the trial. *People v. Dickson*, 46 Cal. 53.

50. If a statute allows the **trustees of a township**, when they deem it expedient, to expend more money than may be done under the **road laws**, in the improvement of any highway, or the purchase of any toll road, to submit to the voters of the township the question of the issuance of **bonds** by the supervisors, by a proclamation which shall state the specific object for which the money is to be expended, and if the trustees submit the question by a proclamation which does not specify the particular road to be improved, or the particular toll road to be purchased, a writ of mandate will not be issued to compel the supervisors to issue the bonds. *McMahon v. Supervisors*, 46 Cal. 214.

51. A writ of mandate will be granted to compel a subordinate tribunal to perform a duty enjoined by law, and which it refuses to perform; but when the act to be done is **judicial or discretionary**, the writ will not direct what decision shall be made, nor will it be granted after the inferior tribunal has acted for the purpose of reviewing the legality of its decision.

People v. Sexton, 24 Cal. 78.

52. Proceeding by mandamus is the proper remedy to compel judges to hold their courts, and **county officers** to keep their offices, at a county seat.

Calaveras Co. v. Brockway, 30 Cal. 323.

53. If a county judge refuses to appoint **commissioners to appraise land** in a proceeding to condemn the same, a writ of mandate will be issued compelling him to do so.

Lake Merced W. Co. v. Cowles, 31 Cal. 215.

54. Where a **public body or officer** has been empowered to do an act which concerns the public interest, the execution of the power may be enforced by writ of mandate.

N. V. R. R. Co. v. Napa Co., 30 Cal. 435.

55. A mandamus lies to compel the judge of a district court to enter **judgment on the report of the referee**.

Russell v. Elliott, 2 Cal. 245.

56. Where the district court granted an injunction from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction: *Held*, that a mandamus may issue to compel the district judge to **issue the attachment**, the plaintiff's remedy, by appeal, being inadequate.

Merced M. Co. v. Fremont, 7 Cal. 130.

57. In this case, mandamus issued to compel a judge to **settle the bill** first, and then to sign it.

People v. Lee, 14 Cal. 510.

58. Relator conveyed to Y. one third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator, for the recovery of the property. Y. employed an **attorney** to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in place of the one employed by Y. Court refused to grant the motion, the only reason urged for the **substitution** being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: *Held*, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit, and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene, if a proper case be

made, or prosecute his rights independently, or wait until a recovery, and then claim his rights under the contract with relator.

Downer v. Norton, 16 Cal. 436.

59. An order made in an action pending in the district court, **staying all proceedings** therein until the further direction of court, is **not an appealable order**. The **remedy** of a party prejudiced thereby is by application for a mandamus to compel the court to proceed.

Rhodes v. Craig, 21 Cal. 419.

60. A mandamus may issue to compel the **controller of state** to account to a member of the legislature for the daily compensation fixed by law.

Fowler v. Peirce, 2 Cal. 165.

61. The contract between the state and Estill remaining obligatory, not qualified by any legislation, it was the duty of the controller, upon demand of relators, assignees of Estill, to have issued **warrants upon the treasurer** for the sums claimed under the contract; and the performance of this can be enforced by mandamus.

McCauley v. Brooks, 16 Cal. 11.

62. The clerk of a court may be compelled by writ of mandate to issue process for the enforcement of a judgment, notwithstanding his liability on his **official bond for damages** for a refusal to do so.

People v. Loucks, 28 Cal. 68.

63. Mandamus will lie to compel the clerk of the common council of San Francisco to make **publication** of certain notices which it is his duty to publish.

Washington v. Page, 4 Cal. 388.

64. A writ of mandate will be granted to compel an **assessor** to assess for taxation property liable to be taxed, and which he neglects or refuses to assess.

People v. Shearer, 30 Cal. 645.

65. A writ of mandate will issue to compel a **justice of the peace** to enter a judgment of discontinuance.

Anderson v. Pennie, 32 Cal. 265.

66. Where a **writ of restitution** has been awarded in such a case, and the **sheriff** refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ.

Fremont v. Crippen, 10 Cal. 211.

67. The writ of mandate may be applied for to ascertain whether a **board, officer, or tribunal** has the power to perform the duty required by the relator, and mandamus is the only speedy and adequate remedy that the relator possesses to test the question of power.

People v. Sups. S. F., 28 Cal. 429.

68. Boards of **supervisors**, and bodies like them, without any legislative provision, by general law, are subject, with certain

exceptions, to mandamus, to enforce the duties devolved upon them.

Hastings v. San Francisco, 18 Cal. 49.

69. Where supervisors, in the exercise of their discretion, determined after hearing the testimony that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law, and award the license to another, supposing that he has succeeded to the rights of the owner of the franchise, the error may be corrected by mandamus or any other proper proceeding.

Thomas v. Armstrong, 7 Cal. 287.

Fall v. Paine, 23 Id. 302.

Frank v. Sups. San Francisco, 21 Id. 668.

70. The board of supervisors act ministerially in the issuance of bonds under this act, and mandamus lies if they improperly refuse.

C. M. R. R. Co. v. Butte Co., 18 Cal. 671.

71. If a board of supervisors of a county refuse to act on a claim against the county presented to them, for the reason that they have not the power to approve of it, mandamus is the proper action to determine whether they possess such power.

People v. Sups. S. F., 28 Cal. 429.

72. Railroads concern the public interest as matter of legal judgment, and where the board of supervisors of a county are empowered to subscribe for the county to the capital stock, they may be compelled to subscribe by writ of mandate.

Mulford v. Estudillo, 32 Cal. 131.

73. Under the revenue act of 1861, it is the duty of a tax collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same, and the performance of this duty may be enforced by mandamus.

Perry v. Washburn, 20 Cal. 318.

74. Courts having jurisdiction of the writ of mandamus may issue the same to compel the governor to perform a ministerial act required by law, and not included within the powers confided to his discretion by the constitution. Harpending v. Haight, 39 Cal. 189.

75. An act requiring and empowering a board of supervisors, as soon as practicable after its passage, to issue county bonds to raise money to be used in improving roads, and providing that the bonds shall be sold to the highest bidder after notice given by publication, and further providing that immediately the county treasurer shall transfer one half the road fund of the county over to the fund created by the act, to be repaid by money derived from the bonds, so that no delay may occur in the work, is mandatory, notwithstanding a provision in the act giving the board power to reject all bids for the bonds. People v. Supervisors, 50 Cal. 561.

76. The power given the board to reject all bids is a power to be used to effectuate, not to defeat, the legislative will. Id.

77. The writ of mandate is the proper remedy against an auditor who refuses to issue a county warrant when directed to do so by the board of supervisors. An action on the auditor's official bond is not a "plain, speedy, and adequate remedy."

Babcock v. Goodrich, 47 Cal. 488.

77a. To supersede the writ of mandate, the party must have not only a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application. Id.

78. An auditor can not refuse to draw a county warrant because there is no money in the treasury. Id.

79. If the officer fails to make a deed which complies with the law, it would seem that he can be compelled by mandamus to make a proper deed.

Grimm v. O'Connell, 54 Cal. 522.

WHEN WRIT WILL NOT LIE.

80. A mandamus will not lie where there is any other specific, speedy, and adequate remedy. People v. Olds, 3 Cal. 167.

81. The writ of mandamus should not issue when there is another sufficient and adequate remedy.

Harpending v. Haight, 39 Cal. 189.

82. A writ of mandate will not be issued to compel a court to render a judgment of acquittal in a criminal case.

Ex parte Cage, 45 Cal. 248.

83. Mandamus will not issue to compel any person, inferior officer, court, or corporation, to act in any particular manner, where such person, officer, court, or corporation is invested with discretionary power.

McDougal v. Bell, 4 Cal. 177.

Flagley v. Hubbard, 22 Id. 34.

84. A mandamus is not the proper remedy where an inferior court refuses to enter a judgment for costs. The party complaining may appeal, or bring his action for the costs.

Peralta v. Adams, 2 Cal. 594.

85. A mandamus will not issue to compel the court below to enter a decree upon the report of a referee; the remedy is by appeal.

Ludlum v. Fourth Dist. Court, 9 Cal. 7.

86. The county court has jurisdiction to dismiss an appeal, and mandamus will not lie to compel such court to reinstate a cause when an appeal has been dismissed, even if the court acted erroneously in dismissing it.

Lewis v. Barclay, 35 Cal. 213.

87. In a matter in which the county court has final jurisdiction, and acts, there is no remedy, even if it acts erroneously. Id.

88. If an action be tried by a district

court without a jury, and counsel for the plaintiff be instructed by the court to draw a judgment in his favor, but before the judgment was finally passed, strangers claiming to have succeeded to the title of the defendant move for a stay of proceedings, and to be allowed to intervene, and the motion is allowed, this court will not by mandamus compel the district court to **set aside the order**, and enter a final judgment in the case.

People v. Sexton, 37 Cal. 532.

89. A mandamus will not be granted to **compel loan commissioners** of the county of Santa Clara to **satisfy**, in gold coin, the **bonds** issued under the act of April 9, 1861, to authorize the board of supervisors of said county to subscribe to the capital stock of the San Francisco and San Jose railroad, when the only fund under their charge applicable to the discharge of said bonds consists of legal tender notes.

People v. Cook, 39 Cal. 658.

90. Where the clerk of a court refuses to **issue an execution** upon a simple money judgment, the remedy is by motion in the proper court, or by action against him, and not by application for a writ of mandamus.

Fulton v. Hanna, 49 Cal. 278.

91. When a board of **supervisors** have acted on a claim, either by allowing or disallowing it, a writ of mandate will not be issued to reverse or review their judgment.

Tilden v. Sacramento Co., 41 Cal. 68.

92. Before such writ can be properly awarded the board **must refuse to act** upon the claim after it has obtained jurisdiction of it. *Id.*

93. A party entitled to **stock** in a private corporation has a right of action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company books, and mandamus will not lie to compel the transfer.

Kimball v. Union W. Co., 44 Cal. 173.

94. Where the judge below requires such statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence thereof the court, on motion of plaintiffs for **judgment on the pleadings** and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. Purcell v. McKune, 14 Cal. 230.

95. Mandamus is not the proper remedy where a district court refuses to **transfer an indictment** for murder pending therein to another district court for trial, the legislature having passed a special act directing said court to transfer said indictment.

Smith v. Judge Twelfth Dist., 17 Cal. 547.

96. Where an order was made by the district court of the eighth judicial district, whereby A. was ordered to be imprisoned forty-eight hours, and fined five hundred dollars for **contempt of court**, without setting

forth any of the facts whereon the order was based; *Held*, that a **certiorari** should issue to remove the proceedings for review into this court; *held, further*, that a mandamus was not a proper remedy in such a case.

People v. Turner, 1 Cal. 152.

97. Where an **injunction** granted on an *ex parte* application was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in **contempt**. The **remedy** of the plaintiff, if there was error in the order modifying the injunction, is **by appeal**; but he can not have a mandamus to compel the issue of attachment for contempt.

Fremont v. Merced M. Co., 9 Cal. 18.

98. Mandamus will not lie to compel a court to **proceed with the trial** of an action after an order has been made changing the place of trial. The remedy, if any injury is sustained, is by an appeal from the final judgment. *People v. Sexton*, 24 Cal. 78.

99. If the plaintiff in an action moves for a judgment of dismissal at his costs, and the motion is resisted by the defendant, and denied by the court, a writ of mandate will not be issued commanding the judge to enter a judgment of **dismissal**.

People v. Pratt, 23 Cal. 166.

100. In refusing to enter a judgment of dismissal in an action on plaintiff's motion, the judge acts judicially, and a mandamus does not lie to compel him to **reverse his decision** and render a different one. *Id.*

101. If, in acting judicially, the court commits an error, the **remedy is by appeal**, and not by mandamus. *Id.*

102. Mandamus will not lie to compel a **county judge to try a cause** on the ground that he has improperly dismissed the appeal taken from a justice's court.

People v. Weston, 28 Cal. 639.

103. Where the law, creating the county of Fresno, provided that the county judge to be elected "shall receive for his services such sum annually as shall be determined by the board of supervisors, not to exceed three thousand dollars, to be paid," etc.: *Held*, that the legislature did not by this clause fix the salary of the judge; and that mandamus for five hundred dollars—the difference between the three thousand dollars and the two thousand five hundred dollars fixed by the board some weeks after relator's election, as the annual **compensation of the judge**—does not lie. Hart v. Johnson, 17 Cal. 305.

104. If a county judge renders an erroneous judgment in a matter where he possesses jurisdiction, a writ of mandate will not be awarded to compel him to render a different judgment. Carriaga v. Dryden, 29 Cal. 307.

105. A judgment rendered by a court in a case where it had jurisdiction will not be dis-

turbed by a writ of mandate, however erroneous. *Id.*

106. A writ of mandate will not be issued by the supreme court to a county judge commanding him to recall an order made after final judgment, from which order an appeal could have been taken.

People v. Moore, 29 Cal. 427.

107. In forcible entry and detainer tried in the county court, on appeal from a justice's court, plaintiff having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the supreme court for mandamus to compel the court below to render judgment for treble damages: *Held*, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages.

Early v. Mannix, 15 Cal. 149.

108. Mandamus is not the proper remedy for the enforcement of a claim against a county, which has been presented to the board of supervisors of the county and by them rejected. In such cases, the statute authorizing the party to sue the county has given him a plain, speedy, and adequate remedy at law. The writ of mandamus belongs only to such as have legal rights to enforce, and find themselves without an appropriate legal remedy. *Crandall v. Amador Co.*, 20 Cal. 72.

109. When the board, officer, or tribunal against which the writ of mandate is asked has not the legal authority to perform the act required by the relator, the writ will be refused.

People v. Sups. S. F., 28 Cal. 420.

110. Mandamus does not compel the supervisors of a county to order a special election to fill vacancies in the offices of assessor and sheriff.

Packard v. Sups. Santa Barbara, 14 Cal. 102.

111. Where the board of supervisors of a county have canvassed the returns of an election, and, in the exercise of their discretion, declared the result of an election adversely to a party claiming to have been elected, a mandamus will not lie, upon the application of such party, to compel the board to issue to him a certificate of election.

Magee v. Supervisors, 10 Cal. 376.

112. A mandamus to a board of supervisors to issue a warrant for a specified sum, is irregular; it should direct them to audit the account, and issue warrants accordingly.

Tuolumne v. Stanislaus, 6 Cal. 440.

113. The constitutionality of the first section of the law of 1861, concerning intelligence offices in San Francisco, can not

be tested in a proceeding by mandamus against the board of supervisors to compel an order by them for the issuance of a license to a person applying therefor under said act.

Hall v. Supervisors S. F., 20 Cal. 591.

114. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of his lien.

Williams v. Smith, 6 Cal. 91.

115. In an application for mandamus to compel a sheriff to remove from possession of the premises under a writ of restitution, an occupant who was not a party to the action, it must be shown distinctly by the affidavits that his possession was acquired under the parties or subsequent to the filing of a *lis pendens*. If these matters are left in doubt the application will be denied.

Fogarty v. Sparks, 22 Cal. 143.

116. A mandamus will not lie against the clerk of the district court to compel him to issue execution on a money judgment, rendered in the court of which he is clerk.

Goodwin v. Glazer, 10 Cal. 333.

117. For all damages resulting from such refusal, the plaintiff has, in ordinary course of law, a plain and adequate remedy by an action on the bond of the officer, and it is well settled that the writ will not issue in such cases. *Id.*

118. This court will not issue a mandamus to the clerks of the district courts in the first instance. The action, or the refusal to act, of the clerks, in suits pending in the several courts of the state, can only be renewed in this court through the ruling, in relation to such action or refusal, of the courts of which they are the ministerial officers.

Cowell v. Buckelew, 14 Cal. 640.

119. The action of a justice's court, in granting or refusing a change of venue, can not be reviewed in an application for a mandamus. By this writ the justice may, in case of his refusal, be compelled to act, but his erroneous action can not be thus corrected. The remedy is by appeal.

Flagley v. Hubbard, 22 Cal. 34.

120. Title to an office can not be tried upon a mandamus, neither at common law, nor under the statute.

People v. Olds, 3 Cal. 167.

121. It will not lie where the office claimed is full, or against an incumbent *de facto*, unless the party be without remedy. *Id.*

122. A mandamus will not lie against a county treasurer to compel him to pay interest due on county bonds.

People v. Fogg, 11 Cal. 351.

123. The governor will not be compelled by writ of mandate to sign a patent for land

embraced in a sixteenth or thirty-sixth section, which has not been surveyed by the United States or which lies within the limits of a Mexican or Spanish grant.

Middleton v. Low, 30 Cal. 596.

124. If a board of water commissioners draws warrants upon the treasurer of the city, payable out of the "water fund," and the fund is then derived from "water rates," but before money comes into the fund to pay them, an act is passed by which the "water fund" was to be supplied, not only from such rates, but by taxation on the land supplied with water, the new "water fund" is not the one upon which the warrants were drawn, and mandamus will not lie to compel the treasurer to pay them out of the same.

Dubordieu v. Butler, 49 Cal. 512.

125. If there is an ordinance of a city prohibiting the treasurer from paying claims against the city before they have been audited and approved by the common council, mandamus will not lie to compel him to pay such claims, until thus audited and approved.

Id.

126. If there is an ordinance of a city prohibiting its treasurer from paying any warrant drawn on him, unless the claim upon which the warrant is based has been audited and allowed by the common council, mandamus will not lie to compel the treasurer to pay a warrant based on a claim which has not been thus audited and allowed.

Id.

127. The writ of a mandate will not issue commanding a justice of the peace to certify a cause pending before him to the district court for trial, on the ground that the question to be tried by the justice involves the possession of real property. In such case the party has his remedy by appeal.

Clark v. Minnis, 50 Cal. 509.

128. A public board is not in default so as to be subject to mandamus until after demand and refusal.

Talcott v. Harbor Com., 53 Cal. 199.

129. Mandamus will not lie to compel a sheriff to deliver a deed to a purchaser at a tax sale, containing recitals which are contradicted by the return of the tax sale.

Hewell v. Lane, 53 Cal. 213.

130. The writ of mandate is not the proceeding in which to try the title to land.

Babcock v. Goodrich, 47 Cal. 488.

131. The question of a county's title to a block of land on which it is erecting a county jail can not be tried in an application for a writ of mandate to compel the auditor to issue a warrant to a contractor for erecting a county jail on the land.

Id.

APPLICATION FOR, AND PROCEEDINGS THEREON.

132. The rules of the civil practice act are applicable to pleadings and proceedings in mandamus. *People v. Sups. S. F.*, 27 Cal. 655.

133. A proceeding to procure a writ of mandate is a civil action, and the general rules of the civil practice act are applicable to it.

Id.

Application and Petition.

134. An application for the writ of mandate must be prosecuted in the name of the real party in interest, and if the name of the people is used, and the people have no interest, and the relator alone is interested, the writ will be denied.

People v. Pacheco, 29 Cal. 210.

135. A private party applying for a writ of mandamus must have an interest in the subject-matter of the action, which is distinguishable from the mass of the community.

Linden v. Alameda Co., 45 Cal. 6.

136. Where the petitioner has no vested or specific interest in the proceedings, he is not entitled to the relief afforded by a writ of mandamus.

Harpending v. Haight, 39 Cal. 139.

137. A private person, whose only interest in the matter is the fact that he is an elector in the county, can not apply in his own name as plaintiff for a writ of mandate, to compel a board of supervisors of a county to order an election for the people to vote on the question of the removal of the county seat.

Linden v. Alameda Co., 45 Cal. 6.

138. The collector of taxes is not a necessary party in an application for a writ of mandate to compel an auditor to enter on an assessment roll the delinquent taxes of the preceding fiscal year.

People v. Ashbury, 46 Cal. 523.

139. An application for a writ of mandate to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people, and is not signed by the attorney-general, but by an attorney of the relator, will not be dismissed because not made in the name of some one interested, if the attorney-general unites in the brief in support of the application.

People v. Sups. S. F., 36 Cal. 595.

140. In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go, can be the relator.

People v. Alameda Co., 26 Cal. 641.

141. A complaint in mandamus, against the controller, is bad, if it fails to allege that there is "money not otherwise appropriated by law," out of which the compensation in question is to be paid.

Redding v. Bell, 4 Cal. 333.

142. If a county is compelled by law to subscribe to the stock of a corporation, the corporation must tender its books to the officers of the county and demand the sub-

scription, before it can apply for a writ of mandate.

O. & V. R. R. Co. v. Plumas Co., 37 Cal. 354.

143. In an application for a mandamus to a county treasurer, to pay county warrants, it is sufficient to aver in the petition that the warrants were drawn by the county auditor, as it will not be presumed that the auditor has violated his duty in issuing the warrants; but the county treasurer has a right to show in defense that the warrants were founded on a demand not legally chargeable against the county. *Connor v. Morris*, 23 Cal. 447.

144. A statement in a petition for a writ of mandate, that an election was held in a county to decide whether C. or S. should be the county seat, and that the board of supervisors canvassed the returns, and estimated the vote, and declared the result to be that S. had received a majority of the votes, is a sufficient averment that S. received a majority of the votes cast.

Calaveras Co. v. Brockway, 30 Cal. 325.

145. A taxpayer is a party beneficially interested in having all the property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ of mandamus to the assessor, to compel him to assess property subject to assessment. Mandamus is the appropriate remedy in such cases.

Hyatt v. Allen, 54 Cal. 353.

146. A petition for mandamus, to compel the president of the board of supervisors of the city and county of Sacramento to draw his warrant on the treasurer for audited claims against the city school fund, must, under the sixty-seventh section of the consolidation act of 1858 (stats. 1858, p. 287), aver that there is money in the treasury applicable to such claims. The president has no power to draw the warrant unless the money is in the treasury.

Cramer v. Sups. Sacramento, 18 Cal. 384.

147. Where a petition for a peremptory writ recites that one of said boards refuses to act on said report, and refuses to declare the proposed road a highway and to declare it open, etc., the mandate can proceed no further than to order them to take action on the report. *People v. Lake Co.*, 33 Cal. 487.

148. To authorize a mandamus, it must appear not only that the performance of the act, to enforce which the writ is asked, is a duty resulting from the office, trust or station of the board or party to whom the writ is to be directed, but that the performance has been requested and refused.

Id.; *People v. Romero*, 18 Cal. 89.

149. Where notice of the motion for a mandamus, and a copy of the papers on which the motion is founded, have been duly served on the district judge, this court may,

in its discretion, issue either an alternative or a peremptory writ in the first instance.

People v. Turner, 1 Cal. 143.

150. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, can be commenced in the county where the relator resides.

McMillan v. Richards, 9 Cal. 365.

151. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section 232 of the practice act, can be commenced in the county where the relator resides. The provision of the statute that actions against a public officer for acts done by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of the process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. *Id.*

152. The proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the mandamus can not determine these rights, or in any respect affect the interests of third parties. *Id.*

153. The facts, in an application to the supreme court for a writ of mandate to compel the board of supervisors of a county to count the votes of certain precincts cast at an election for the removal of a county seat, that the district court of the county does not hold a term for two months, that delay in making improvements at the county seat will be an injury, that it is the practice of the supreme court to give people's cases the precedence, that nearly all the people of the county are disqualified as jurors, and that the attorney-general resides at the capital of the state, and can not well attend court at the county, are not sufficient reasons why the application for the writ should not be made to the district court of the county.

People v. Sups. Kern Co., 47 Cal. 205.

Answer.

154. The writ of mandate can not be abated by another action pending for the same cause.

Calaveras Co. v. Brockway, 30 Cal. 325.

155. In an application for a mandamus to compel a district judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the district judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill, relator is not entitled to jury to try the issue, under section four hundred and seven of the practice act. *People v. Judge Tenth Dist.*, 9 Cal. 19.

156. In a proceeding against a board of supervisors, in its corporate capacity, to procure a writ of mandate, the answer of one, or more than one, of the supervisors in his or their own name or names, whether as supervisors or otherwise, can not be regarded as the answer of the board, and, on motion, will be stricken from the files of the court.

People v. Sups. S. F., 27 Cal. 655.

157. In such a case the answer should be in form—the answer of the board in its aggregate capacity. Id.

158. In such case, if answer is filed in due form as the answer of the board, the presumption is that it is the answer of the board; and the fact that it was sworn to by one member of the board does not make it his answer, nor is it necessary that such answer should aver that the board by resolution adopted it. Id.

159. In such case, if two answers are filed, each in form of the answer of the board, the court may ascertain which is the return of the majority. Id.

160. Where an alternative mandamus was issued to a justice of the peace to compel him to send up papers on appeal to the county court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ:" Held, his answer is no defense to the writ being made peremptory, as the fees may have been paid since the service of the writ.

People v. Harris, 9 Cal. 571.

161. A motion for a peremptory writ of mandate based on the pleadings in an application for such writ to the supreme court, to compel the board of supervisors of a county to order an election for a county seat under sections 3976 to 3985 of the political code, will be denied, if the answer denies that one third of the voters who voted, and whose names were on the great register at the election preceding the presentation of the petition to the board of supervisors, signed the petition. People v. Alameda Co., 45 Cal. 395.

162. If, in an application for a writ of mandate, made to the supreme court, the answer denies a material averment in the complaint, a peremptory writ will not be issued on the pleadings. Id.

163. The pendency of proceedings in quo warranto against the persons claiming to compose a corporation, to try their right to exercise corporate powers, is no defense to an action for a writ of mandate brought by the corporation to compel a county to subscribe to its capital stock and issue its bonds therefor. Such proceedings have no place in an answer, as grounds to procure a stay of proceedings of the mandate suit.

O. & V. R. R. v. Plumas Co., 37 Cal. 354.

164. The answer to a petition for a writ of mandate, presented to the supreme court,

may deny the allegations of the petition, upon information and belief.

People v. Alameda Co., 45 Cal. 395.

Replication.

165. In an application for a mandamus, the statute does not require a replication, except when, in the discretion of the court, it is necessary to explain or avoid facts set up in the defendant's answer.

Fowler v. Peirce, 2 Cal. 165.

Issues and Trial.

166. On mandamus against the sheriff by a purchaser at a sheriff's sale, of property as belonging to the city of San Francisco, on judgment and execution against the city for a deed, the value of the interest sold, or probably the leivable quality of the title, could not be inquired into, the city not being a party.

Seale v. Doane, 17 Cal. 476.

167. On mandamus by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale can not be tried.

People v. Irwin, 14 Cal. 423.

168. If a question of fact upon issues joined arises in a proceeding by mandamus commenced in the supreme court, that court will refer the matter to a district court, to try and determine the special fact in issue, and return the finding to the supreme court.

Calaveras Co. v. Brockway, 30 Cal. 325.

169. A petition for a peremptory mandate to the judge of a district court, to enter the name of the petitioner, who was the district attorney of Santa Clara county, as an attorney of record in a cause pending in said court, to which said county was a party, will be denied where it appears that, since the commencement of the proceeding therefor, the petitioner has ceased to be said district attorney, and said action has been finally disposed of and is no longer pending in said court.

Herrington v. Sawyer, 36 Cal. 289.

170. A motion for leave to intervene in an action made at any stage of the proceedings presents a judicial question, the decision of which can not be reviewed or controlled by this court by mandamus, however erroneous it may be.

People v. Sexton, 37 Cal. 532.

171. When the court below has entertained jurisdiction of an action, its proceedings, however erroneous, can not be reviewed on an application for a mandamus.

Beguel v. Swan, 39 Cal. 411.

172. But when the court has refused to act in the case, the question whether it rightfully so refused may be entertained. Id.

173. If, in an application for a writ of mandate, to compel a county treasurer to pay money, such treasurer stipulates as to the facts, without the advice of counsel, and no attorney appears for him, the court will order the proceedings to be stayed until a copy of the record is served on the district attorney and chairman of the board of supervisors. *Uhler v. Boyd*, 41 Cal. 60.

174. Upon an application to the supreme court for a writ of mandate to a board of supervisors, to compel such board to call an election to determine the location of a county seat, if an issue of fact, as to the number of voters who signed the petition for the election, is referred to a district court for trial, such district court will be directed to cause to be brought before it, by appropriate order, the original petition to the board, its records, and the great register of the county.

People v. Alameda Co., 45 Cal. 395.

175. If, on an application for a writ of mandate, to compel a board of supervisors to order an election to locate a county seat, the answer denies that one third of the voters whose names were on the great register signed the petition to the board of supervisors, the supreme court will order the question of fact as to whether the voters signed such petition to be referred to some district court for trial, and the verdict upon the question to be certified to the supreme court. *Id.*

176. A county treasurer can not be compelled by mandamus to pay on warrants, made payable out of a particular fund, more money than there is in that fund at the time the mandate issues, and a judgment which commands him to pay such warrants out of moneys that may thereafter come into the fund is erroneous.

Day v. Callow, 39 Cal. 593.

JUDGMENT.

177. In proceedings to procure a writ of mandate, a motion of the relator for judgment on the pleadings is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense to the action. Objections to the answer which are required to be taken by special demurrer, or by motion to strike out, will be disregarded on such motion.

People v. Sups. S. F., 27 Cal. 655.

178. An attachment will not be issued against a district judge for non-compliance with a writ of mandamus, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, where it does not appear from the papers on which the motion for the attachment is founded, that any application has been made to the court to vacate the order as commanded by the writ of mandamus,

and where it appears that, so far as the action of the judge in vacation is concerned, he has in substance complied with the command of the writ of mandamus; and in such case, it will not be deemed a disobedience of the writ that the court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ.

People v. Turner, 1 Cal. 188.

179. If the relator, in proceedings to procure a writ of mandate, proceeds by petition and notice for a peremptory writ without procuring an alternative writ, the court may grant any relief consistent with the case made by the petition and embraced within the issues, although it may be only part of that asked in the prayer of the petition.

People v. Sups. S. F., 27 Cal. 655.

180. One having the title to the office of district attorney, but not in possession, is not bound by a judgment in mandamus against a board of supervisors to which he was not a party, requiring the board to audit and allow the salary of another in possession of the office without title.

Dorsey v. Smyth, 28 Cal. 21.

181. The board of supervisors of the city and county of San Francisco have authority, and it is their duty to provide for the payment of judgments recovered against the city of San Francisco. They have no discretion, except between two courses of procedure. They must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation.

People v. San Francisco, 21 Cal. 668.

182. A motion by the applicant for a writ of mandamus, that the writ issue notwithstanding the matters alleged in the defendant's answer, amounts to a general demurrer to the answer.

Ward v. Flood, 48 Cal. 36.

183. If the court directs a writ of mandate to issue requiring the defendant, as an auditor, to issue a warrant for the treasurer to pay a sum of money to the petitioner, the clerk can not render a personal judgment against the auditor.

Sweeney v. Maynard, 52 Cal. 468.

APPEAL.

184. Judgment may be affirmed as to the mandamus, and reversed as to the costs.

McDougal v. Roman, 2 Cal. 80.

185. If, on appeal, the supreme court of the United States simply affirm the judgment of the circuit court, the judgment thus affirmed becomes final, and the circuit court has no jurisdiction on the return of the mandate of the supreme court to render a new judgment.

Mulford v. Estudillo, 32 Cal. 131.

186 On the return of a mandate from the

supreme court of the United States to the circuit court, affirming the judgment of the circuit court, a new judgment can not be rendered by the circuit court. Id.

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MARRIAGE.

1. Marriage is a civil contract, and no form is necessary for its solemnization. Where parties are able to contract, an open avowal of the intention and an assumption of the relative duties which it imposes, are sufficient to render it valid and binding. *Graham v. Bennett*, 2 Cal. 503.

2. Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage.

Letters v. Cady, 10 Cal. 533.

3. Where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; and that, in accordance with his wishes, she henceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful and affectionate wife should do: *Held*, that these were insufficient averments of the existence of a mar-

riage, and that the facts averred were only *prima facie* evidence of marriage. Id.

4. There is no presumption of law that a marriage took place at any particular point, nor that property, especially money "and other personal property," was acquired in any particular locality.

Dye v. Dye, 11 Cal. 163.

5. Proof that a man and woman had cohabited together for a long time as husband and wife, had mingled in society as such, and represented each other as such, is admissible for the purpose of proving a marriage, and in the absence of evidence to the contrary, conclusive as such, in all cases, except in actions of crim. con., divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced.

People v. Anderson, 26 Cal. 129.

6. The effect of a marriage, at common law, is to deprive the wife of all separate legal existence, rendering herself incapable of binding herself by a contract.

Miller v. Newton, 23 Cal. 554.

7. Courts of equity, however, for many purposes, treat the husband and wife as distinct persons, capable of contracting with and suing each other, and of having separate estates, debts, and liabilities. Id.

8. A marriage contracted without this state, which is valid by the law of the place where contracted, is valid in this state if the parties subsequently remove here, even though the marriage would have been invalid by the laws of this state if contracted here. *Pearson v. Pearson*, 51 Cal. 120.

9. A marriage is sufficiently established if there is evidence of a marriage in the present and also a contract *per verba de futuro, cum copula*. *Estate of McCausland*, 52 Cal. 568.

10. Where a man and woman cohabit together, and he promises to marry her, and a child is born to them, but she afterwards leaves him because he does not permit the marriage ceremony to be performed, and lives with another man, the facts do not constitute a marriage.

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THE LIEN.*Generally.*

1. The mechanic's lien law is in derogation of the common law, and must be construed strictly.

Bottomly v. Grace Church, 2 Cal. 90.

2. The mechanic's lien law of 1868 is not open to the objection that it is unconstitutional on the ground that it attempts to appoint agents for private persons, nor that it confiscates property, nor as to the notice required of owners as to responsibility for improvements, nor that it attempts to take away vested rights or to clothe private per-

sons with power to divest citizens of their property. Hicks v. Murray, 43 Cal. 515.

3. The lien of mechanics for labor performed and materials furnished towards the erection or repair of a building attaches, even though the employer has but an equitable interest in the land and building.

Crowell v. Gilmore, 13 Cal. 54.

4. Under the mechanic's lien act of 1856, the mechanic making the first contract, or first commencing work on a building, has no priority over others commencing work subsequently. The statute places all claimants on an equality, and directs the property to be sold and the proceeds applied to all without preference. Id., 18 Cal. 370.

5. This rule of equity would not apply if some mechanics began work before a mortgage was executed by the owner of the property, and some afterwards. In such case the first lien-holders would have priority over the mortgagee, while the latter would not. The first class would be paid in full before the mortgage; then the mortgage, then the last class, each lien-holder having equal claims with the others of his class. Id.

6. It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified. Isaac v. Swift, 10 Cal. 71.

7. It is not the province of the mechanics in such a case to determine the legality of the recorded title, but having contracted with notice of the incumbrances, they are postponed till the incumbrances are first paid. Ferguson v. Miller, 6 Cal. 401.

8. Where the owner of a lot contracted for the erection of a house thereon, and agreed to pay certain sums of money, as the work progressed, and, on its completion, to convey a certain other lot, for which purpose R. releases a mortgage on the lot, and during the work, the owner of the lot on which the building was being erected mortgaged it to R., and subsequently, on its completion, by agreement with the builders, gave his note for ten thousand dollars instead of the lot he was to convey; and the builders filed a notice of lien, and assigned note and lien to plaintiff: *Hehl*, that so much of the claim as represented the value of the lot which was to have been conveyed must be postponed to the mortgage. Soule v. Dawes, 7 Cal. 575.

9. The act of 1868, for securing liens of mechanics and others, does not, because it fails to give to laborers other than those working on mining claims a lien, violate the provision in the constitution, "all laws of a general nature shall have a uniform operation." Quale v. Moon, 48 Cal. 478.

10. Knowledge by a subcontractor upon a building that there is an agreement in writing between the original contractor and the owner is sufficient to put upon him

inquiry as to the contents of the writing and charge him with notice thereof.

Bowen v. Aubrey, 22 Cal. 566.

11. A mechanic's lien is in the nature of a mortgage—is a charge upon the land, and can only be **assigned in writing**.

Ritter v. Stevenson, 7 Cal. 388.

12. The lien of a **judgment** rendered after labor is commenced or material is first delivered is postponed to the lien of the material-man, or laborer, although the labor is completed and the last of the material delivered after the judgment is docketed.

Barber v. Reynolds, 44 Cal. 519.

13. A lien for labor or material under the lien act of 1862 will not be rejected because it was **filed** in the recorder's office for **too much**, unless it appears that it was a willfully false claim. Id.

14. Under the lien act of 1862, when there is no written contract for the construction of the building, the several liens of the material-men and laborers do not relate back to the day of the commencement of the building, but each lien **relates back** to and takes effect on the day the particular labor was commenced, or the material began to be furnished, for which the lien is sought to be enforced. Id.

15. A mere **mistake** in the use of a word in a claim filed to secure a mechanic's lien will not vitiate it, but the court will insert the word intended to be used.

McDonald v. Backus, 45 Cal. 262.

16. Where the contract provided that **payments** should be made on the certificate of the architect—who was required by the contract, among other things, to certify that all the work of the mechanics, laborers, and others employed by the original contractor, had been paid—his **certificate** is conclusive of the rights of all parties concerned, unless it can be shown that it was obtained by the owner by collusion or fraud.

Dingley v. Greene, 54 Cal. 333.

Who Entitled to.

17. The lien of the mechanic, artisan, and material-man is **avored in law**, because those parties have, in part, created the very property on which the lien attaches.

Tuttle v. Mulford, 7 Cal. 358.

18. One who advances money as a **loan**, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the mechanic's lien law.

Godeffroy v. Caldwell, 2 Cal. 489.

19. The statute concerning mechanics' liens was designed for two classes of laborers and contractors: First, **contractors or material-men**, who contract directly with the owner of the building himself; second,

laborers, subcontractors, etc., who have no privity of contract with the owner.

Cahoon v. Levy, 6 Cal. 29.

20. The first class have an actual **lie from the commencement of the work** until sixty days after its completion; the others have their remedy by giving **notice to the owner**, and their lien attaches by the service of such notice. Id.

21. S., who, as the tenant of D., was in possession of D.'s house and lot in Sacramento city, being desirous, for his own benefit, of having said house raised to the high grade, agreed with D., the owner, to raise the house at his own cost, upon condition that D. should extend the term of his lease for six years, and advance three thousand dollars, S. to pay thereafter fifty dollars per month more rent than he was then paying; whereupon S. contracted in writing with J. to do said work for the sum of six thousand one hundred and eighty dollars; which being completed, J. brought action against D. and S., under the provisions of the act of 1862 (stats. 1862, p. 384), in relation to the liens of mechanics and others, to recover an unpaid balance of said contract price, and to enforce therefor a mechanic's lien on D.'s interest in said house and lot: *Held*, first, that in the sense of said statute, S. "caused" said house to be raised, and that J. and S. were the persons who "contracted" therefor; and, second, that the only lien acquired by J. under said act was upon the **interest of S. as lessee** of said house and lot.

Johnson v. Dewey, 36 Cal. 623.

22. Under the mechanic's lien act of 1858, material-men, subcontractors, etc., have a lien upon the property described in the act to the extent, if so much be necessary, of the **contract price** of the principal contractor; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt. By giving such notice, the owner becomes liable to pay the subcontractor, material-men, etc., as on garnishment or assignment; but if the owner pay according to his contract, in ignorance of such claims, the payment is good.

McAlpin v. Duncan, 16 Cal. 126.

23. The statute gives one who has entered into a contract in writing to construct a building a lien on the same as security for the payment of the money becoming due to him according to the terms of the contract, but his lien can not be enforced for an amount exceeding the sum to become due the contractor. *Dore v. Sellers*, 27 Cal. 588.

24. P. and others contracted in writing with A., that the latter should erect a building for them, and in the agreement covenanted that he would not incumber or suffer to be incumbered the said building, or lot on

which it is erected, by any mechanics' liens or debts of material, labor-men, contractors, subcontractors, or otherwise." A. sublet the brick-work to C., who had notice of the existence of the written agreement: *Hell*, that C. was precluded by the condition in the original contract from acquiring a mechanic's lien upon the building for the work done by him. *Bowen v. Aubrey*, 22 Cal. 566.

25. If a contractor engages to construct a building in consideration, in whole or in part, of a debt then due from him to the employer, or of a sum paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advance payment can not become a lien upon the building.

Dore v. Sellers, 27 Cal. 588.

26. For extra work on a building by the contractor, in pursuance of a general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgage, given by the owner before the extra work was commenced, provided the work was done with the knowledge of the mortgagee, and without objection from him.

Soule v. Dawes, 14 Cal. 247.

27. The subcontractor or material-man, in order to hold a lien for work done for or materials furnished to the contractor, must comply strictly with the provisions of the act. *Davis v. Livingston*, 29 Cal. 283.

28. The lien which may be secured to subcontractors, laborers, and material-men through the original contractor, by a compliance on their part with the provisions of the act of 1862 in relation to liens of mechanics and others (stats. 1862, p. 384), must be determined and controlled by the terms of the original contract between the owner of the property and the original contractor. Of the existence of such original contract, and its terms, said lien-holders are presumed to have notice, and to have taken subcontracts, contributed labor, and furnished materials in furtherance of the work in strict subordination to its terms, and their right to be secured therefor, by way of their said lien, to the extent of the money to become due the original contractor under such contract, can not be divested or impaired by any subsequent agreement made between the owner and original contractor, without their consent or timely notice thereof to them. *Shaver v. Murdock*, 36 Cal. 293.

29. Upon compliance with the terms of the statute, the right of a subcontractor, laborer, or material-man to a lien must be determined and controlled by the terms of the original contract between the owner and the original contractor, of the existence of which contract, and of its terms, said persons are presumed to have notice.

Henley v. Wadsworth, 38 Cal. 356.

30. In the absence of fraud or misrepresentation by the owner, this presumption of full knowledge of the terms of the original contract is conclusive against all subcontractors, laborers, and material-men, and they are bound by the terms of the original contract, so far as any claim upon the owner, or right of lien upon his premises under the statute, are concerned. *Id.*

31. The employees of the contractor have no lien on the building as principals, and can not acquire a lien on the building independent of the one existing on the original contract, which they may enforce to the amount due them, so that the same does not exceed the sum for which the contractor has a lien. *Dore v. Sellers*, 27 Cal. 588.

32. If the contractor has paid the subcontractor according to the terms of his contract with him, and has not made prepayment, the employees of the subcontractor are not entitled to demand anything from the contractor or employer. *Id.*

33. The employees of the subcontractor can not intercept any money due from the employer to the contractor, nor can they enforce the lien of the contractor for any of the same, beyond what is due from the contractor to the subcontractor at the time. *Id.*

34. To entitle a material-man to enforce a lien upon a building for materials furnished, it must be alleged and proved that not only the materials have been used in the construction of the building, but they must have been, by the express terms of the contract, furnished for the particular building on which the lien is claimed.

Houghton v. Blake, 5 Cal. 240.

35. If the contractor agrees with the owner to erect a building and furnish the materials, for a sum certain, to be paid as the work progresses, with a reservation of twenty-five per cent. until completed, and he abandons the work, having collected all that is due him except the twenty-five per cent., one who has furnished the contractor with materials has no lien as against the owner. *Blythe v. Poultney*, 31 Cal. 233.

36. The right of a material-man to a lien on the land and building, as against the owner, for materials furnished the contractor, depends for its existence upon the fact of an indebtedness from the owner to the contractor at the time of or subsequent to the notice. *Id.*

37. Where the sale of materials, employed in the construction or alteration of a building, is made by a written contract, which is silent as to the purpose for which the articles sold were intended to be used, parol evidence is admissible to show such purpose and to establish thereby a mechanic's lien for the price in favor of the vendor. *Id.*

38. It is not necessary to the establish-

ment of a mechanic's lien that the labor or materials shall be employed in the making or erection of a building. It is sufficient if they are employed in the **alteration of a building** to adapt it to other than the original uses, or to change its form or structure. *Id.*

39. Under **Mexican law** a person who furnishes materials for the erection of a building has no lien on the building to secure payment for the materials furnished.

Stowell v. Simmons, 1 Cal. 452.

Macondray v. Simmons, 1 Id. 394.

40. When a person proceeds to erect a building without making any contract for the erection of the same, **material-men** who furnish the materials, and **mechanics** who labor on the building, in pursuance of section 17 of the lien law of 1862, are entitled to liens without making a written contract, even if the value of the material furnished or labor performed exceeds two hundred dollars.

Barber v. Reynolds, 33 Cal. 497.

41. The statute of April 12, 1850, "to provide for the liens of mechanics and others," has placed liens for materials and liens for labor on the same footing; and it is error in the court to refuse to distribute the proceeds in conformity to the statute.

Moxley v. Shepard, 3 Cal. 64.

42. It seems that the lien of a material-man can not take preference over the lien of a prior mortgage.

Walker v. Hauss-Hijo, 1 Cal. 183.

43. Where **machinery** is sold for the purpose of being placed in a building owned by the vendee, with a view of converting it into a manufactory, and is actually used for that purpose, the **vendor** has a mechanic's lien upon the building for the price.

Donahue v. Cronartie, 21 Cal. 80.

44. When a person proceeds to construct a building by purchasing material and employing labor, without making any **contract in writing** for the construction of the same, the parties thus furnishing material and performing labor are entitled to liens under the seventeenth section of the act of 1862 concerning mechanics' liens, even though the amount of a claim exceeds two hundred dollars; and the second section of said act, requiring contracts to be in writing, has no application to such claims.

Barber v. Reynolds, 44 Cal. 519.

45. Under the act of March 30, 1868, for securing liens of mechanics and others, a person is not entitled to a lien on a **reservoir** for the value of his services rendered in **cooking** for the men employed in constructing the reservoir, notwithstanding the cooking was done on the ground as the work progressed. *McCormic v. Los Angeles W. Co.*, 40 Cal. 185.

46. F. agreed to furnish all the work and material, and to erect a building for W., for the sum of twelve thousand five hundred

dollars, payable in installments, as the work progressed, except the sum of three thousand and fifty dollars, which was to be paid within thirty days after the completion and acceptance of the building. After proceeding with the work for some time, and receiving from W. the sum of ten thousand eight hundred and fifty-four dollars, which was one thousand four hundred and four dollars more than the payments stipulated to be paid prior to the completion of the building, F. abandoned the undertaking, when W. finished the building, at an additional expense of four thousand six hundred and ninety-eight dollars. A month after the abandonment of F. the plaintiff, a subcontractor, and others whom he represents, gave notice to W. of their claims against F., as mechanics and material-men, and by suit sought for the establishment of a lien against the building for the same: *Held*, that the **payment in excess** of one thousand four hundred and four dollars, by W. to F., was not to the prejudice of the plaintiff, and that the facts of the case created no lien in favor of the plaintiff, upon the property of W.

Henley v. Wadsworth, 38 Cal. 356.

47. It appeared at the trial of an action by W. against H. to foreclose a mechanic's lien under the act concerning the liens of mechanics and others (stats. 1862, p. 384), that H. entered into a contract with W., by which W. agreed to build upon the lot of H. a barn, "agreeable to the drafts, plan, and explanation hereto annexed, marked 'A,'" and H. agreed to pay for the same three hundred and twenty dollars, "upon the completion of said barn, as per specifications;" that, in fact, no draft, plan, or specifications were attached to the contract, but an unsigned paper was produced, and testimony received, under the objection of H., tending to prove that it contained the plans and specifications alluded to in the contract: *Held*, first, that "the specifications" were an essential part of the contract; second, that the reference made in the contract to "the specifications" being false, can not be helped out by oral evidence; and, third, that without "the specifications" there was not such "a contract in writing, subscribed by the party to be charged thereby," as is required by the second section of said act to entitle the contractor to acquire the lien therein provided for.

Warden v. Hammond, 37 Cal. 61.

48. Said act provides only for the acquisition by the contractor of a lien on the **interest of the employer** in the property sought to be charged, whether that be a fee-simple interest or less. *Id.*

49. T. was the owner of a lot of land, of which H. was in possession, under a contract of sale from T.; W. erected a building on the lot, under a contract made by him with H., and against T. and H. recovered judg-

ment enforcing a lien for the contract price on the interests of both T. and H. in the land: *Held*, that W.'s lien did not affect the interest of T., and that T. was improperly made a party to the action. *Id.*

49a. Where an insurance company loaned the owner of a lot and uncompleted building money for the purpose of finishing the building, and took from him a deed of trust conveying the fee, defeasible on the payment of the debt, and afterwards knowingly permitted the building to go on without giving notice that it would not be responsible therefor: *Held*, that under section 4 of the mechanic's lien law (stats. 1868, p. 589), the interest in the property held by the insurance company was subject to mechanics' liens for work done and materials furnished after the making of the trust deed.

Fuquay v. Stickney, 41 Cal. 583.

50. If the owner of land, or any one claiming an interest in it, knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent, it is just that he should be held to have acquiesced therein, as provided in section 4 of the mechanic's lien law (stats. 1868, p. 589), and the power of the legislature to enact that provision is clear. *Id.*

51. There is no constitutional objection to a statute securing a lien to material-men, who, at the instance of a contractor, furnish him with materials which are used in the construction of the building, provided the aggregate liens do not exceed the contract price, as fixed by the owner and contractor. *Whittier v. Wilbur*, 48 Cal. 175.

52. If the statute gives the material-man a lien on the building for materials furnished by him to a contractor who contracts with the owner, the contractor and owner can not deprive the material-man of his lien, by a clause in the contract, by which the contractor agrees to indemnify the owner against any liens taken by persons furnishing materials to be used in constructing the building. *Id.*

53. If the material-man obtains judgment against the owner, and against the property, the owner may deduct the amount of the judgment from any sum due the contractor, on the contract price. *Id.*

54. The lien of a subcontractor, under the act of March 30, 1868, for securing liens of mechanics and others, does not depend on, and is not suspended until the completion of the building.

Quale v. Moon, 48 Cal. 478.

55. In an action upon a mechanic's lien, it appeared that the plaintiffs, under a contract with the owner, furnished materials and performed labor upon a building; but that such materials were furnished and labor performed more than sixty days before filing the lien, with the exception of two

bolts, which were not used in the construction of the building, but which were claimed (and found) had been delivered in pursuance of the contract: *Held*, upon the facts stated in the opinion, that it did not appear that this was the case, and a new trial granted.

Barrows v. Knight, 55 Cal. 155.

56. Could the plaintiff, under such a contract, in any event, acquire a lien, except for the materials actually used in the construction? *Quære?* *Id.*

What Property Liable to.

57. The evident intention of the act, in relation to mechanics' liens, was to give mechanics and artisans a lien for all work done by them, upon any description of property. The first section gives a lien upon the superstructure itself as distinct from the land; and the fourth section gives a lien also upon the land, when the same is owned by a person who caused the superstructure to be erected. *McCreary v. Osborne*, 9 Cal. 119.

58. The object of the act was to give the mechanic a lien upon whatever interest the person who caused the superstructure had, and which could be sold under execution. *Id.*

59. Neither the mechanic's lien law of 1855 or 1856 gives a lien upon canals or ditches. The language of the statute is, "building, wharf, or other superstructure." A ditch is not a building, or a wharf, and in no sense can it be designated a superstructure.

Ellison v. Jackson Co., 12 Cal. 542.

60. The act of 1850 gave a mechanic's lien only upon buildings and wharves. The act of 1853 extended the act of 1850, so as to include in its provisions bridges, ditches, flumes or aqueducts constructed to create hydraulic power, or for mining purposes. The act of 1855 repealed the act of 1850: *Held*, the repeal carried with it the supplementary act of 1853, which extended the provisions of the original act. Without the original act there was no mode of enforcing the supplementary act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal. *Id.*

61. A lien for work or materials can not be acquired on a portion of a railroad, but must be filed on the entire road. The contractor who grades a section only of the road can not file a lien on that section alone.

Cox v. W. P. R. R. Co., 41 Cal. 18.

62. Neither a contractor nor a subcontractor can, from time to time, as the work progresses, file successive liens for work done on an entire contract. In such case but one lien can be acquired, and that must be filed within the time specified in the statute after the completion of the work. *Id.*

63. But one mechanic's lien can be acquired on a section of a railroad to be graded under an entire contract, and the con-

tractor can not, because payments are due from time to time, file successive liens as payments fall due. *Id.*

64. The statute of 1850, providing for the lien of mechanics and others, limits the structures on which parties can obtain such liens, to buildings and wharves. Under this act no such lien could be had on **bridges**.

Bert v. Washington, 3 Cal. 246.

65. Defendant employed plaintiff, a mechanic, to erect certain improvements upon a lot owned by the former. As part of these improvements plaintiff was to place on the lot a small frame house, which he had previously constructed, and make certain additions thereto; and for the house plaintiff was to receive a certain sum. Plaintiff complied with his agreement, and defendant gave him note for the amount due: *Held*, that although the mechanic's lien act does not probably afford a lien for the price of a **building already constructed**, and then sold to be put on a lot, still, as in this case the building sold was to constitute **part of a larger structure**, the erection of which was provided for by the agreement, and as it was used in accordance with the provisions of the agreement, it may be regarded as material furnished for that purpose, and hence within the statute giving a lien.

Selden v. Meeks, 17 Cal. 128.

66. Under the lien act of 1867-8, if the owner of the building makes **payments** to the contractor in good faith, under, and in pursuance of the contract, before receiving notice, either actual or constructive, of liens claimed by a material-man or laborer, for material furnished to, or labor done for the contractor, such material-man or laborer can not enforce a lien on the building for a **sum exceeding the balance due** on the contract, when notice is given.

Renton v. Conley, 49 Cal. 185.

67. *Held*, that the building upon which a lien was claimed, being a "dancing-hall, swings, and seats," that, at least, neither the swings nor seats were **buildings or structures** within the intent and meaning of sections 1183 and 1192 of the code of civil procedure, for which the corporation would be chargeable even with notice.

Lothian v. Wood, 55 Cal. 159.

68. The tenant defendant, having suffered default, the court adjudged that the plaintiff was entitled to a **vendor's lien** for the materials furnished, and that he should have the right to enter upon the premises and to remove and sell the same: *Held*, that the decision and judgment were outside the issues, and against law, and judgment reversed, and judgment directed to be entered in favor of the plaintiff for a lien upon such interest as the said defendant had in the land at the date of the accruing of the lien.

Id.

Liability of Owner.

69. Under the mechanic's lien act of 1856, the owner of a building may contract to pay for it as soon as completed; and he is not liable to material-men, until notice served on him, and then only to the extent of the sum due the contractor, at the date of the notice. *Knowles v. Joost*, 13 Cal. 620.

70. When the owner makes a contract for erecting or doing work upon a building, **no subcontractor** or person furnishing labor or materials for the original contract can acquire any **rights against the owner**, in contravention of the terms and conditions of the original contract.

Bowen v. Aubrey, 22 Cal. 566.

71. Where an original contractor subcontracts work upon a building there is **no privity between the subcontractors** and the owner, and the latter can not be made liable upon the subcontract. *Id.*

72. A **transfer of the property** before the lien is filed for record can not affect the lien.

Hotaling v. Cronise, 2 Cal. 60.

73. The contractor has his lien; but the flume being constructed for the company, on land selected by it, and paid for as the work progressed, was the property of the company, although they had power under the contract to reject the work when completed.

Hart v. Plum, 14 Cal. 148.

74. **Improvements** made by the owner of property, after the surrender of a lease by a tenant, upon whose leasehold interest a mechanic's lien had previously attached, can no more impair this lien, than if made by the tenant himself. *Gaskill v. Moore*, 4 Cal. 233.

When Lien Attaches.

75. The lien given by the statute to the mechanic or material-man, for work and labor performed or materials furnished in the construction of a building, commences and attaches to the property at the **time of the commencement of the work**, or the beginning to furnish the materials.

McCrea v. Craig, 23 Cal. 522.

76. The lien of the contractor, if filed in time, takes effect, by relation, from the date of the commencement of the work, and all persons who deal with the property during the work are charged with notice of the claim of the contractor. But if a party informs himself of the nature of the contract between the owner and builder, and takes a conveyance of the property, subject to it, no subsequent change of the terms of the contract can create an incumbrance which will have priority of his conveyance.

Soule v. Dawes, 7 Cal. 575.

77. The lien of a subcontractor filed, and notice given to the owner of a building, within thirty days after the completion of the work, under the act of 1855, attaches

from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, and before the filing and serving notice of lien.

Tuttle v. Montford, 7 Cal. 358.

78. The lien of a material man accrues at the time he has the materials, which he has contracted to furnish, ready for delivery at the place where he had agreed to deliver them.

Tibbetts v. Moore, 23 Cal. 208.

Waiver, or Forfeiture of.

79. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon the property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time.

Brennan v. Swasey, 16 Cal. 140.

80. If the party attempts to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit had been dismissed, and nothing was realized by the attachment.

Id.

81. A material-man who has furnished lumber for the erection of a building has no lien thereon for the price of the materials furnished, unless he files in the recorder's office of the county in which the building is situated, within sixty days after the completion of the building, notice of his intention to hold a lien for the amount due him, etc.; upon his failure to do so, the lien is lost.

Walker v. Hauss-Hijo, 1 Cal. 183.

82. The liens which, by the act of April 19, 1876, entitled "an act for securing liens to mechanics and others," are required to be exhibited and proved, upon publication of notice in some newspaper of the county, or be deemed waived, are liens arising under that act, and do not apply to other liens.

Whitney v. Higgins, 10 Cal. 547.

Notice, Requisites of, and Filing.

83. The notice of mechanic's lien, filed in the recorder's office, need not set out the items of the account; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, is sufficient.

Brennan v. Swasey, 16 Cal. 140.

Selden v. Meeks, 17 Id. 128.

84. A claim of a lien filed under the mechanic's lien law of 1867-8 must state the name of the person by whom the claimant was employed. The lien can be maintained only by a substantial observance of the provisions of the statute.

Wood v. Wrede, 46 Cal. 637.

85. The notice of a subcontractor or material-man, given to the employer, claiming a lien under the contract of the contractor for labor done or for material furnished to the contractor, should contain a statement that the amount for which the lien is claimed is due over and above all payments and offsets.

Davis v. Livingston, 29 Cal. 283.

86. If the subcontractor or material-man serves more than one notice claiming a lien for the same account, the several notices can not be considered together for the purpose of determining the sufficiency of notice to hold a lien, but each must stand on its own merits, and the lien will not exist unless one of the notices is sufficient in itself to give it.

Id.

87. The notice of a material-man claiming a lien for materials furnished the contractor need not state the particular character of the materials furnished, nor that the materials were used in constructing the building, and if there are several contractors, the notice is sufficient if it name one of them.

Id.

88. The lien may be recorded within sixty days after the completion of the building, and, by relation, will attach from the date of the commencement of the work.

Crowell v. Gilmore, 13 Cal. 54.

89. It is necessary to record a mortgage to give notice only to "subsequent purchasers or mortgagors without notice;" no mention is made of liens; hence it follows that a mechanic's lien will not precede an unrecorded mortgage of prior date.

Rose v. Munie, 4 Cal. 173.

90. In adjusting the conflicting rights of mortgagees, material-men, laborers, etc., under the act of 1868, "to secure the liens of mechanics and others," the rule laid down by the statute is the familiar one in equity, that he has the better right who is first in point of time.

Preston v. Sonora Lodge, 39 Cal. 116.

91. The words "payments and offsets" are substantially equivalent in meaning to the words "credits and offsets," as employed in the fifth section of the act.

Id.

92. If the person who claims a mechanic's lien under the act of 1868, signs the verification attached to the claim, this is a sufficient signing of the claim within the intent of the act.

Hicks v. Murray, 43 Cal. 515.

93. Under the mechanic's lien law of 1868, it is material that the claim for the benefit of the lien shall state the name of the owner or reputed owner of the premises.

Id.

94. The clause in the act of 1868, concerning mechanics' liens, which requires the person filing a claim for a lien to state therein the name of the person by whom he was employed, is intended to require the statement of a mere fact, and not of a conclusion of law.

McDonald v. Backus, 35 Cal. 262.

95. The claim for a lien filed with the county recorder, under the act of 1868, must state the name of the person to whom the materials were furnished, and the name of the owner or reputed owner of the premises.

Phelps v. M. G. M. Co., 49 Cal. 336.

96. To maintain a claim for a mechanic's lien, a substantial observance of the provisions of the law is required; and an omission to state in the claim the terms, time given, and conditions of the contract under which the work is done or the materials furnished, or to state the name of the owner or reputed owner, is fatal.

Hooper v. Flood, 54 Cal. 18.

97. In a claim of lien by a material-man it was stated that bricks of a specified value (quantity or number not stated) were furnished for the construction of defendant's building, between February 20 and April 14, 1877. In an action to foreclose the lien, the complaint alleged, and the court found, that the plaintiff commenced to deliver the bricks on the sixth day of February, and that the statement of February 20 as the date was a mistake; and that, between the former date and April 14, bricks were delivered by the plaintiff to the quantity and value alleged in the complaint: *Held*, that the plaintiff was entitled to recover only for the bricks furnished between the dates stated in the claim; and that, as this did not appear from the finding, a new trial was necessary.

Goss v. Strelitz, 54 Cal. 640.

98. A claim of lien is not an instrument in the nature of a written contract, to be reformed by a court of equity in appropriate cases; but it is a prerequisite to the maintenance of a proceeding which gives a plaintiff an extraordinary remedy, to secure the benefit of which he must comply with the terms of the statute.

Id.

99. Section 1188 of the code of civil procedure (quoted in the opinion) applies only to cases in which one claim is filed against two or more separate and distinct "buildings, mining claims, or other improvements owned by the same person," and not to a case where all the work was performed upon one and the same piece of property, although upon different portions of it.

Dickenson v. Bolger, 55 Cal. 285.

100. Material-men furnishing materials for the construction of a building under a contract with the owner, and persons directly employed by him to work on the building, are not "original contractors," within the meaning of sections 1187, 1194, code of civil procedure, and therefore must file their claims within thirty days from the completion of the building.

Sparks v. Butte Co. M. Co., 55 Cal. 389.

Description of Property in.

101. Describing the property with con-

venient certainty in the notice of lien is sufficient. *Hotaling v. Cronise*, 2 Cal. 60.

102. A mechanic's lien which describes the property as a "quartz mill, being at or near the town of Scottsville, in Amador county, known as 'Moore's new quartz mill,'" contains a sufficient description to hold the property, where there is no evidence that there was any other quartz mill at the place so designated, as to render it uncertain which was intended.

Tibbets v. Moore, 23 Cal. 208.

103. Where the lien describes the land around the building on which a lien is claimed in these words, "with such convenient space of land around the same as may be required for the convenient use and occupation thereof," the description is also sufficient; but it is proper for the court by its decree to define the amount and extent of the land connected with the building which is properly subject to the lien; and if the decree follows the description in the lien, it is doubtful whether the purchaser will acquire any land beyond that covered by the building. *Id.*

104. The following notice of mechanic's lien does not contain such a description of the premises as the statute contemplates: A dwelling-house lately erected by me for J. W. Connor, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. —. The fact that Connor owned no other building on that street would not cure the defect.

Montrose v. Connor, 8 Cal. 344.

105. Plaintiffs here can not object that the premises are not so described in the liens as to pass title under such sale. If from insufficient description R. & Co. got no title, plaintiffs have their remedy in ejectment.

Gamble v. Voll, 15 Cal. 509.

Account to be Filed.

106. Under the mechanic's lien act, it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded.

Mars v. McKay, 14 Cal. 127.

107. In a mechanic's lien it is not necessary to give the items of the work and materials in the statement of the lien filed, where the contract for the construction of the building is in a sum gross.

Heston v. Martin, 11 Cal. 41.

Effect of Notice.

108. Persons dealing with the property during the progress of the work are charged with notice of the claims of the mechanic.

Crowell v. Gilmore, 13 Cal. 54.

109. Where the notice of lien states that the materials were furnished to A. & Co., when in fact they were furnished to A., this does not invalidate the lien, for the material

fact is whether the materials were furnished for and used in the construction of the building on which the lien is claimed.

Tibbetts v. Moore, 23 Cal. 208.

110. When a mechanic or material-man commences proceedings to foreclose a lien, and publishes notice in accordance with the statute, for all persons holding and claiming liens to appear in court and exhibit the same with their proofs, the **exhibit of proofs** of liens by lien-holders, coming in under the notice, is not governed by the sections of the practice act relating to **interventions**, and the papers filed by them are not governed by the strict rules relating to pleadings in ordinary actions. *Id.*

111. If joint contractors apportion the job and compensation of constructing a building among themselves by a written contract to which the employer is not a party, it is **no defense** in an action by a material-man to enforce a lien for materials furnished one joint contractor, that when notice was given there was nothing due the contractor furnished, under the apportionment. *Davis v. Livingston*, 29 Cal. 283.

112. The lien of the material-man or laborer can be enforced for all sums to be paid the contractors and not due when the notice is given. *Id.*

ENFORCEMENT OF.

Generally.

113. The proceeding to enforce a mechanic's lien under the law of 1861 is a **special case**, within the proper meaning of that term as used in the constitution, of which the legislature might properly give jurisdiction to the county courts.

McNiell v. Borland, 23 Cal. 144.

114. The law of 1861, giving to county courts jurisdiction to enforce mechanics' liens, is not unconstitutional. *Id.*

115. To enforce a lien under the act of May 17, 1861, for securing the liens of mechanics and others, no complaint need be filed or summons issued; but, in lieu thereof, a **petition** is filed, and the clerk issues a notice, which is published.

Van Winkle v. Stow, 23 Cal. 457.

116. Material-men and mechanics who are entitled to a lien on a building, but whose claims are several without any community of interest in the claims themselves, may, under the statute, **join as plaintiffs** in an equitable action to establish and enforce their liens. *Barber v. Reynolds*, 33 Cal. 497.

117. The several parties who furnish materials for or perform labor on a building constructed without any contract in writing for building the same, may unite in an action to enforce their **several liens** under the act of April 20, 1862, in relation to mechanics' liens. *Id.*, 44 Cal. 519.

118. If a mechanic, in his claim filed under the act of 1868, to obtain a lien, states the name of the person by whom he was employed, and it turns out that such person was a member of a firm, and employed him on behalf of the firm, the mechanic, in an action to enforce the lien, may and should make all the members of the firm defendants, notwithstanding the name only of the one by whom he was employed appears in the claim filed with the recorder.

McDonald v. Backus, 45 Cal. 262.

119. An allegation in the complaint, that in his claim filed under the mechanic's lien law, the plaintiff described the premises as those purchased and occupied by M., is not a sufficient **averment of the ownership** of M., because it is not an averment in the complaint that M. owned the property, but an averment that the plaintiff has stated in his claim that M. owned the property, and does not aver who owned the premises at the commencement of the action.

Hicks v. Murray, 43 Cal. 515.

120. A contract was entered into between M. and S. for the building of a house by M. for S., according to specifications, in consideration of a gross sum in installments, all of which were to be paid as the work progressed, except the last, consisting of the sum of one thousand dollars, which was to be paid on the completion of the house. The contract contained certain provisions for deviations by M. from the specifications of the contract as the work progressed, to be made at the request of S., and among others, for "omissions from said contract," which "shall in no manner affect or make void the contract," but shall be deducted from said contract price by a fair and reasonable valuation: *Held*, first, that obviously said "omissions" were intended to be limited to things which, upon the conditions specified, might be entirely left out of the building, and did not extend to anything within said specifications which the owner might elect to take off the contractor's hands and perform or finish himself; second, that as against the plaintiff, who, as a material-man, under the provisions of the act of 1862, in relation to the liens of mechanics and others (stats. 1862, p. 384), was seeking to enforce a lien on said building for materials furnished in its construction, the court erred in permitting S., for the purpose of defeating said lien, to introduce evidence of a subsequent agreement between M. and S., which, as far as appears, was unknown to the plaintiff, by which S., in consideration of a deduction of two hundred dollars made by M. from said contract price, agreed to perform certain of the specified work in the completion of the building, and released M. from his contract obligation to perform the same; and, third, that said **subsequent agreement** was new and substantive in its character, and if made with-

out notice to plaintiff before his interests as a material-man could be affected thereby, was, as against him, **fraudulent and void**, under the tenth section of said act.

Shaver v. Murdock, 36 Cal. 293.

121. A decree for the sale of premises in a suit to enforce a mechanic's lien has the same and no greater effect upon the rights of purchasers and incumbrancers, prior to the commencement of the suit, than a similar decree would have upon the foreclosure of a mortgage. If such purchasers or incumbrancers are not made parties, they are not bound by the decree or the proceedings thereunder. *Whitney v. Higgins*, 10 Cal. 547.

122. Where a civil engineer's lien for work done for the defendants in the construction of a canal or ditch was filed in the recorder's office of the county where the ditch is located, on the sixth day of May, 1856, and suit was not commenced to enforce the lien until the twenty-sixth day of January, 1857: *Held*, that the time fixed by statute for the enforcement of the lien had expired before the commencement of the suit, and that the plaintiff was not entitled to a judgment giving a lien upon the property. *Green v. Jackson W. Co.*, 10 Cal. 374.

123. One claiming title to property under a sheriff's deed, executed on the foreclosure of a mortgage, may, in an action brought by him to quiet his title against one who claims under a sheriff's deed executed on the foreclosure of a mechanic's lien, in which foreclosure he was not a party, go behind the decree foreclosing the mechanic's lien, and show that no lien in fact existed.

Horn v. Jones, 28 Cal. 194.

124. Where the contract was made and the materials furnished while the lien law of 1858 was in force, but the notice of lien was not filed in the recorder's office until after the lien law of 1862 went into effect: *Held*, that the lien was not lost, but must be enforced in accordance with the provisions of the act of 1862.

McCrea v. Craig, 23 Cal. 522.

125. The party holding a lien on a leasehold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent, and a surrender of the lease to the lessor.

Gaskill v. Trainer, 3 Cal. 334.

126. The remedy given the subcontractor is simply in its nature an attachment without suit, but by notice; and having failed to give notice, he must yield to the claim of the attaching creditor.

Caloon v. Levy, 6 Cal. 295.

127. It follows that a garnishment served on the owner, in a suit against the head contractor after the commencement of the building, and before notice served, must prevail over the lien of the subcontractor. *Id.*

128. In a suit by a material-man to enforce a lien against a building for lumber sold to the contractor, etc., it must be averred and proved that the lumber was expressly furnished for the building in question; and it is not sufficient to show that it was used in such building.

Bottomly v. Grace Church, 2 Cal. 90.

129. A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor; therefore, where he mortgaged the property, and subsequently erected a building on it, for the cost of which a mechanic's lien was filed, the holder of the lien can not object to the legality of the mortgages, in the face of which he contracted.

Ferguson v. Miller, 6 Cal. 402.

130. R. & Co., defendants, had two mechanics' liens upon certain property; one filed October 30, 1854, the other filed December 8, 1854, against defendant, V. In 1855 R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in, and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: *Held*, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud.

Gamble v. Voll, 15 Cal. 507.

131. In a judgment enforcing a mechanic's lien, personal judgments can not be rendered against those defendants against whom no personal claim is established.

Barber v. Reynolds, 44 Cal. 519.

132. If, at the time the lien of a material-man or laborer accrued under the act of March 30, 1868, the owner of the premises was not in possession, but the same were in possession of a lessee whose term had not expired, and who caused the labor to be done or the materials to be furnished, a personal judgment can not be rendered against such owner, in an action enforcing the lien.

Phelps v. M. C. G. M. Co., 49 Cal. 336.

133. If, in an action to enforce such lien created by a lessee, the premises belonged to a corporation, and its president visited the same while the work was going forward, and

was informed of the same, it is, *prima facie*, sufficient to charge the corporation with knowledge of the fact that the work was being done, and if the corporation gives no notice that it will not be responsible, its estate in the premises may be sold for the lien as well as the estate of the lessee. *Id.*

134. If the owner of a building which is being erected makes payments to the contractor in good faith before receiving notice that a material-man claims a lien for material furnished the contractor, such material-man can not enforce his lien except for the balance, if any, due the contractor on the contract. *Wells v. Cahn*, 51 Cal. 423.

135. The amendments to the code of civil procedure concerning liens of mechanics and material men, adopted 1874, have not changed the above rule. *Id.*

136. Under the provisions of the code of civil procedure relating to liens of mechanics, the liens of **employees** of the original contractor are enforceable only to the extent of the money due on his contract, and in subordination to its terms. If the original contractor fails to perform his contract, or if he has performed it in part, and there is no money due to him according to its terms—or if, having performed it, he has been fully paid by the owner of the property, according to the contract, before notice of the liens—his employees are not entitled to enforce a lien upon the property.

Dingley v. Greene, 54 Cal. 333.

137. In an action to foreclose a mechanic's lien, a contractor or subcontractor is a proper party; but a mere **agent**, through whom purchases were made by the owner, is not. Accordingly, in such an action against F. and L., where the complaint alleged that the materials were furnished to the former as the agent of the latter: *Held*, that the court below erred in overruling a demurrer for misjoinder of parties, and that the error was not cured by a subsequent finding of the court that the materials were furnished to F. as a contractor, and not as a mere agent.

Hooper v. Flood, 54 Cal. 218.

138. A mechanic, in an action to enforce a lien for work and material on a building, may unite a cause of action for work and material furnished a contractor, with a cause of action for work and material furnished at the request of the owner.

Quale v. Moon, 48 Cal. 478.

139. If a person enters into the possession of a house and lot with the consent of the owner, and makes repairs on the house by permission of the owner, under a **parol agreement** with the owner to pay for such repairs, and to purchase the property, the mechanics and material-men who furnish the materials and do the work can enforce a lien on the premises for their labor and materials,

even if the person who makes the repairs does not effect a purchase.

Moore v. Jackson, 49 Cal. 109.

140. In such case the person who makes the repairs is the **agent** of the owner, and the owner's estate is bound by the lien. *Id.*

141. The evidence being conflicting as to performance by contractor, the finding will not be disturbed. **Demand for extra work** not sustained, because price not fixed according to contract.

Meigs v. Bruntsch, 54 Cal. 601.

142. If, in an action by a subcontractor to enforce a lien on a building, in a case where the contractor abandoned the contract before the building was completed, the owner relies for a **defense on a clause** in his contract with the contractor, which provides "that should said contractor refuse or neglect to supply a sufficiency of materials, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense will be deducted from the amount of the contract," he must aver, in his answer, that the contractor neglected to supply a **sufficiency of materials**, and was notified in writing to proceed with the work in three days, or that the owner would complete the house himself.

Quale v. Moon, 48 Cal. 478.

143. If, in such case, the owner relies on the fact that the sums he has paid the contractor before he abandoned the work, and the cost of completing the building, amounts to more than the contract price, he must aver, in his answer, that the sum paid the contractor was due when it was paid, and that the **aggregate of liens** sought to be foreclosed exceed the amount which was to be paid the contractor, and that the sums paid out by him after the abandonment by the contractor were paid to complete the building according to the terms of the contract. *Id.*

144. One who contracts with another for the building of a house does not thereby incur any **liability to the subcontractors** of the original contractors, except such as may be fastened upon him by proceedings under the mechanic's lien law; and therefore, where there has been no **assignment, or novation** of the contract, an action can not be maintained (otherwise than under the mechanic's lien law) by a subcontractor against the owner for work and labor done, and materials furnished in the construction of a building.

Downing v. Graves, 55 Cal. 544.

145. Knowledge of a fact, concerning the business or affairs of a corporation, acquired by a director or other agent, unless acquired in the management and conduct of its business, does not constitute **notice** to the corporation. So *held*, in an action against a corporation and its tenant to fore-

close a mechanic's lien, for materials furnished in the construction of a building by the **tenant on the leased premises**, and alleged to have been furnished with the knowledge of the corporation, where it appeared that a director of the corporation, on one occasion, was present during the construction of the building.

Lothian v. Wood, 55 Cal. 159.

Intervention in.

146. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And, where the suit had been pending some time, and the application to intervene was made just as the plaintiff was taking judgment, the application was properly refused. Hocker v. Kelley, 14 Cal. 164.

147. A suit to enforce a particular lien under the act is a proceeding to enforce all the liens against the property. And an intervention in a suit already pending, if filed within the six months, is as much a compliance with the act as an original suit.

Mars v. McKay, 14 Cal. 127.

148. When a proceeding is commenced to enforce a lien under the act of 1862, persons having a lien by mortgage upon the property upon which the lien is sought to be enforced have no right to intervene.

Van Winkle v. Stow, 23 Cal. 457.

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MESNE PROFITS.

1. If the court, in an action for mesne profits, finds the value of the rents, issues, and profits of the land during a certain period, it may be assumed that the finding is equivalent to a finding of the amount of damages sustained.

Haggin v. Clark, 51 Cal. 112.

2. In actions for mesne profits, the court will not interfere if, in cases where the plaintiff is entitled to recover more than the rental value of the land, the jury find, as damages, a gross sum made up of the value of the rents and interest; but the court can not, as

a matter of law, add interest to the amount of damages found by the jury or by the court.

Id.

3. In action for mesne profits, the value of the improvements placed on the land by the defendant before the plaintiff acquired title can not be set off against damages by way of mesne profits which accrued subsequent to the conveyance to the plaintiff.

Id.

METES AND BOUNDS.

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MEXICAN GRANT.

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GENERALLY.

1. The words "grant" and "seized in fee," as used in the stipulation of counsel, admitting certain facts for the purposes of the trial filed in this case, do not, *ex termini*, import a perfect grant with specific boundaries in favor of defendant's grantor, or that the grantee in said grant received juridical possession from the Mexican government. Seale v. Ford, 29 Cal. 104.

2. The **expediente**, consisting of the petition, plat, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee.

Gregory v. McPherson, 13 Cal. 562.

3. Where a Mexican grant refers, in its description of the premises, to the plat or map accompanying the *expediente*, the plat or map becomes, for the purpose of identifying the land, as much a part of the grant itself as if incorporated therein.

Seaward v. Malotte, 15 Cal. 304.

4. The words in the **petition of Sutter**, "not including, in said eleven leagues, the land which is periodically inundated with water in winter," and the words in the grant "without including the lands inundated by the impulse and currents of the rivers," mean the land which is regularly inundated during the winter, and refer only to what are known as **tule lands**. No other lands will meet the terms of the petition.

Cornwall v. Culver, 16 Cal. 423.

5. The grant is the operative instrument, and the **representations made to the governor** can not control the course or nature of the title. If those representations were in truth erroneous, and the mistake in them affected the grant in any respect, the fact could only be made available by the government.

Nieto v. Carpenter, 21 Cal. 455.

See secs. 123, 141, 144, 215, 234.

WHO MAY MAKE.

6. The authority to make grants of land was lodged solely in the **governor**. It was not shared by him with the departmental assembly. That body possessed no power to make any grant. Its power was restricted to approval or disapproval of the grant made. After its action, whether of approval or disapproval, it became the duty of the governor to forward the necessary documents, with the report of the territorial deputation, to the supreme government. Until the approval of the supreme government, the grant was subject to be defeated. With such approval, it was discharged of the **defeasance**, and became definitively, that is, finally, valid. Ferris v. Coover, 10 Cal. 589.

6a. A grant of land made by Mexico in California, during Mexican domination, re-

quired the approval of the departmental assembly. Taylor v. Escandon, 50 Cal. 428.

7. It was the **duty of the governor**, and not of the grantee, to submit the grant to the departmental assembly, and afterwards, with its report, to the supreme government. The neglect or refusal of the governor to make such submission could not impair the estate of the grantee in the land. It only operated as a suspension of the definite validity of the grant. Once exercised, the power of the governor over the land granted ceased. He could not recall or revoke the grant; nor, by any action or neglect, divest the estate granted. Id.

8. A grant may be made under other and different authority than that recited in the grant, and may be valid, although prohibited by the authority recited.

Brown v. San Francisco, 16 Cal. 451.

PETITION FOR.

9. A petition presented to a Mexican governor for the purpose of obtaining a grant of land is no part of the grant. It is only the declaration of the party who made it, or of the party by whose authority it was made, and is open to explanation.

Nieto v. Carpenter, 21 Cal. 455.

10. Jose and Sisto Berreyesa, in 1843, petitioned the governor of California for a grant of eight leagues of land, known as "Las Putas," and in their petition represented that they were married, and had children, and also a considerable number of cattle and horses, and needed land on which to place them. On this petition, after a favorable report from his secretary, the governor ordered that a title issue to the petitioners for so much of the land as they could settle. No title issued upon this order; but for some unexplained reason, the petitioners considered the concession which it directed as embracing four leagues of the tract solicited, and on the following day they presented a second petition, in which they stated that their families were very large, and included their parents, children and brothers, and besides that there were more than one hundred uncivilized Indians in their neighborhood whom it was necessary to maintain, and for these reasons prayed a grant to themselves of the other four leagues. The report of the secretary on this petition speaks of it as presented for the benefit of the petitioners, and of their parents, children and brothers. On this petition a grant was issued, conceding to Jose and Sisto the entire tract, and declaring it to be their property, and imposing upon them the usual conditions. This grant recited that the grantees had petitioned "for their personal benefit, and that of their families, and that of their parents and brothers." It being contended by the appellants, from these facts, that the parents and brothers of

the petitioners, as well as petitioners, were beneficially interested in the grant: *Held*, first, that no valid argument in favor of the petition of appellants could be drawn from the character of the first order of the governor, because the land which transferred the title was not issued upon it; second, that the second petition, and the report of the secretary upon it, taken together, showed that the parents, children and brothers were referred to only as inducements for enlarging the bounty of the government to the petitioners, and not as distinct additional beneficiaries; third, that the recital in the grant did not control the course of the title, that it only disclosed the inducements which operated upon the governor to make the grant, and that the language of the operative clauses entirely excluded the idea that any other person than the two Berreyesas who petitioned were to become invested with the title; fourth, that Jose and Sisto Berreyesa, the grantees, were invested by the grant with the full legal and beneficial title to the land, exempt from any trust in favor of the other members of the family.

Berreyesa v. Schultz, 21 Cal. 513.

CONDITIONAL GRANT.

11. The sovereign power may, in disposing of the national domain, annex such conditions to a grant as it sees fit; and in such case, a restriction against alienation inserted in a grant and authorized by law will not be held void on the ground that it is against the policy of the law.

Suñol v. Hepburn, 1 Cal. 254.

12. Questions as to the performance of the conditions contained in a grant can only be made by the grantor, and not by a mere naked trespasser.

Buckalew v. Estell, 5 Cal. 108.

13. On the eighteenth of June, 1841, Juan B. Alvarado, then governor of California, issued a grant of a tract of land designated in New Helvetia, comprising eleven square leagues within certain specified boundaries, to John A. Sutter, for himself and colonists, subject to the approval or disapproval of the supreme government and the departmental junta, and upon certain conditions: *Held*, first, that the grant was a conveyance of the land in full property, subject to be defeated by the subsequent action of the supreme government and departmental assembly; second, that the clause in the grant against the obstruction of the highways and the navigation of streams were reservations in favor of the public; third, that the conditions as to maintenance of the Indians of the different tribes in their possessions, and the conditions of cultivation and occupancy of the land with families, attached to the grant by force of the regulations of November 21, 1823, were conditions subsequent which

did not prevent the estate from becoming vested *eo instante* with the delivery of the grant, and for a non-compliance with which the estate could only be divested by the action of the government; fourth, that the approval of the supreme government and departmental assembly was not a condition precedent to the vesting of the title.

Ferris v. Coover, 10 Cal. 589.

14. Onerous conditions were not necessarily attached to grants issued under the colonization laws of Mexico.

Scott v. Ward, 13 Cal. 458.

15. Where a Mexican grant contained the following clauses designated in the instrument as conditions, namely: "First, neither the grantee nor his heirs can divide, nor alienate the premises granted to them, nor place upon said premises any mortgage or other charge, even though such mortgage or charge be for pious purposes, nor shall they convey the said premises in mortmain; second, he may inclose the premises without prejudice to the roads and easements; he shall enjoy the premises freely and exclusively, devoting them to such cultivation and use as he may see proper; third, when the property shall be confirmed to him, he shall ask the proper judge that he give him juridical possession in virtue of this title, for which purpose the boundaries shall be marked, and some landmarks shall be placed about said premises; fourth, the land which is embraced in this grant, is only that which is named in the petition of the grantee, and which is delineated in the sketch attached hereto, and the judge who shall give him possession thereof, shall make to this government a report of the quantity of land comprised in the grant:" *Held*, that these clauses were not properly conditions, and there was nothing in any of the provisions which was onerous or burdensome to the grantee, or which could be regarded as a valuable consideration, moving the government to make the grant. *Id.*

GRANT OF OVERFLOWED LAND.

16. If the United States has confirmed the title to land in this state acquired from Mexico during Mexican rule, and which the state would otherwise have owned by virtue of its sovereignty, the state has no power to dispose of the same.

Ward v. Mulford, 32 Cal. 365.

GRANT TO HUSBAND—HIS SEPARATE PROPERTY.

17. Whatever was expended by the community, existing between Noe and his wife, in performing the conditions attached to the grant, constituted a claim in its favor against the separate estate of Noe, but did not affect the title to the property; that was fixed by

the terms of the grant, which was to the husband alone. *Noe v. Card*, 14 Cal. 576.

18. Where a Mexican grant to a married man contained the following conditions: "First, neither the grantee nor his heirs can divide or alienate the premises granted to him, nor place upon the same any mortgage or other charge, even though such mortgage or charge be for pious purposes, nor shall he convey it in mortmain; second, he can fence it without prejudicing the crossings, roads, servitudes; he can enjoy it freely and exclusively, destining it to the uses or cultivation that best suits him, but in one year he shall build a house which shall be inhabited; third, he shall solicit, as soon as possible, the proper judge to give him juridical possession, by virtue of this title, by which the boundaries shall be set out, in which boundaries he shall put landmarks and some fruit or rustic trees of some utility; fourth, the tract of land which is of one square league, a little more or less, according to the sketch which goes with the *expediente*; the judge who may give the possession will have it measured according to the ordinances, mark out the boundaries, leaving the surplus which shall result to the nation for suitable uses; and, fifth, if he fail to perform these conditions he shall lose his right to the land, and it shall be denounceable by others;" *Held*, that the land granted was a donation and vested in the husband as his separate estate.

Hood v. Hamilton, 33 Cal. 698.

BOUNDARIES.

19. If the owner of a Mexican grant of land makes a conveyance of a portion of the same before it has been surveyed or patented by the United States, and in his deed describes the part conveyed as starting from the south-east corner of the rancho and running thence along the southern boundary of the rancho one third its distance, the south-east corner and southern boundary are to be construed as the corner and boundary to be established by the final survey mentioned in the patent of the United States, and not as the corner and boundary as understood by all parties when the deed was made, or as fixed by the juridical possession.

Maxey v. Thurman, 50 Cal. 321.

20. If a deed of a portion of a Mexican rancho describes one of the boundaries of the part sold as running westerly from the south-east corner of the rancho, "along the old road forming the southern boundary of said rancho, to a point distant by an air line from said south-east corner one third the length of the southern boundary;" to arrive at the point where the line "one third the length of the southern boundary" ends, the southern boundary and line one third its length must be run in **air lines**, and not along the old road. *Id.*

21. If the officer giving juridical possession of a grant made by the Mexican nation, gave possession of land outside the boundaries of the grant, the possession thus given was unauthorized and void, and conferred no title except as to the land within the boundaries. *Reed v. Ybarra*, 50 Cal. 465.

22. If a decree made by a court of the United States, confirming a Mexican grant of land, describes its boundaries by permanent natural objects, and also by courses and distances, with a mention of the quantity, the description by courses, distances, and quantity must yield to the boundaries by natural objects, if they do not agree.

De Arguello v. Greer, 26 Cal. 615.

23. It is error for the court to instruct the jury that, before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of the line is of no moment.

Seaward v. Malotte, 15 Cal. 304.

24. The Pulgas grant, in San Mateo county, is a grant by boundaries, and not by quantity, the description being, "tract known under the name of Las Pulgas, the boundaries of which are, on the south the creek of San Francisquito, on the north that of San Mateo, on the east the estuaries, and on the west the cañada de Raimundo," and "the tract of which mention is made if of four leagues of latitude and one of longitude."

McGarvey v. Little, 15 Cal. 27.

See sec. 156, et seq.

GRANT OF A TRACT WITHIN A LARGER TRACT.

25. On the twenty-first of January, 1842, the Mexican government granted to the Indian chief Francisco Solano a tract of land called Suisun, covering four square leagues, within exterior limits, embracing about eight leagues. On the fourth of March, 1840, the same government granted to Armijo a tract of land called Tolenas, covering three leagues, within exterior limits embracing from twelve to twenty leagues. The maps referred to in both grants cover the land in controversy. Upon final confirmation and survey a patent was issued January 18, 1857, by the United States to Ritchie, successor in interest to Solano, for four leagues of land, with the specific description of the official survey by the United States. This patent covers the land in dispute. The grant to Armijo, from whom defendant traced title, was confirmed by the United States district court, and stands on appeal to the supreme court. Assuming that Armijo occupied and claimed from the entire quantity comprehended within the map referred to in his grant, three specific leagues covering the land in contro-

versy: *Held*, that the patent is conclusive against the defendant, unless to show title superior to the patent under a confirmed Spanish or Mexican grant, located under those governments, or under the government of the United States; *held, further*, that the grants to Solano and Armijo passed a present and immediate interest in the quantity of land specifically designated in their respective grants, to be afterwards surveyed and laid off within the exterior limits of the general tracts by the government; that such survey could only be made under the former government by its officers, and could not be made by the grantees themselves; that the right of survey passed, with other public rights, to the government of the United States, and is to be exercised in pursuance of its policy and in conformity with its laws; that by its legislation the subject of surveys is intrusted to the executive department; that the location of confirmed grants, when the quantity granted is without specific boundaries, lying within a larger tract, rests exclusively with such department, and can not be reviewed or corrected by the judiciary, but is binding and conclusive upon it in actions of ejectment, except only when the patent issued thereon conflicts with prior rights of third parties, and then its inconclusiveness is maintained, only so far as may be necessary for the protection of such prior rights. *Waterman v. Smith*, 13 Cal. 373.

26. The grant to Armijo, being of three leagues within a much larger area, and no survey having been made, gave him no title to any specific three leagues of land, which would enable him to defend against ejectment on a patent. *Id.*

27. Where a grant is for four leagues of land, within a larger tract, the right to measure off the specific quantity granted rested with the former government, and upon the cession, passed with other public rights to the United States. That right is political, and can not be exercised by the judicial department. *Moore v. Wilkinson*, 13 Cal. 478.

28. The language of the court in *Fremont v. United States*, 17 How. 558, to the effect that a subsequent grantee of a tract with specific boundaries, within the general exterior limits of the grant in that case, would have acquired a superior and better title than the original grantee, shown to have no application to this case, for the reason that there the grant was of a specific quantity of land lying within limits embracing a much larger quantity, and within which other grants might be made; while here the grant is of a tract of designated, though uncertain, boundaries; but embracing no surplus to be the subject of other grants.

Leese v. Clark, 18 Cal. 535.

29. Where a Mexican grant cedes a specified quantity within a larger area, a se-

lection and location of the specific quantity may be made by the grantee under such circumstances, and accompanied with such disclaimers as to estop him from the assertion of any title or right to the possession of the remainder, existing within the exterior boundaries of the general tract, until by the action of the government it is determined that his claim under the grant shall be satisfied by land elsewhere selected.

Mahoney v. Van Winkle, 21 Cal. 552.

30. There is nothing in the nature of a colonization grant prohibiting the grantee from restricting his general right to the possession of the entire tract. And when the grantee selects his location and quantity, uses it, leases it, sells or mortgages it, and disclaims title to the remainder, the selection is obligatory upon him until the government overrules his election and assigns him the land elsewhere. *Id.*

31. No party but the government can question any selection made by the grantee under his grant. As against all other parties, it is sufficient for the grantee to show that the land selected lies within the boundaries designated in the grant. But to restrict the possessory right of the grantee to the selection made, the selection must be accompanied with such disclaimers as to the residue of the general tract as to operate as an estoppel upon him. *Id.*

32. Under the official segregation of the specific quantity granted, the entire tract within the exterior boundaries of the grant is exempted from pre-emption and settlement by the legislation of congress. *Id.*

33. A confirmee of a Mexican grant, after a decree confirming to him a specified quantity within exterior limits, fixed by the grant, embracing more than the quantity confirmed, may maintain, until an official segregation is made, ejectment for any portion of the land embraced within the exterior limits against one in possession claiming to be a pre-emptor under the laws of the United States. *Id.*

34. Where a Mexican grant cedes a tract land known by a particular name, and specifies, in pursuance of the grantee's petition, that a certain quantity is embraced within the limits of the tract, and also that any surplus above the specified quantity which, upon a survey and measurement by the government, may be found within its boundaries, is reserved for the benefit of the nation; such grant vests in the grantee the right to the possession of the entire tract, until by an official measurement and survey it has been determined that a surplus exists and the limits of the specific quantity granted are established. *Id.*

35. The grantee can not, in such case, himself make the measurement and segregation, but must await the action of the

government. He is therefore directly interested until the official segregation to protect the entire tract from waste and injury, and to improve it; and until then third persons can not question his right to the possession of the whole. *Id.*

36. The holder of a grant of land made by Mexico, of a specific quantity, to be located within the exterior limits of a larger tract, acquires a **vested interest** in the larger tract which entitles him to the **possession** of the same, and the rents and profits thereof, until the specific quantity granted is segregated by the government.

Rich v. Maples, 33 Cal. 102.

37. That a Mexican grant ceding a **specific quantity of land within exterior boundaries** embracing a larger quantity, conveys a title upon which an action of ejectment for at least the quantity specified may be maintained, has been several times decided by this court, and must be considered as settled so far as the question depends upon the judgments of the state courts. If before a juridical survey the grantee can recover any particular portion, he can recover the whole.

Mahoney v. Van Winkle, 21 Cal. 652.

PRESUMPTION AS TO CHARACTER OF.

38. Where a specific quantity of land has been confirmed to a grantee claiming under a Mexican or Spanish grant, or to his assigns, and a survey has been made of the quantity confirmed, which survey has been set aside by the United States district court, the presumption is that the grant was of a **specific quantity** to be selected and segregated within the area of a larger tract.

Thornton v. Mahoney, 24 Cal. 569.

39. Nor is it the province of a jury to determine whether a grant could fairly be presumed from a **possession** of a certain character.

Castro v. Gill, 5 Cal. 40.

40. The **presumption of validity** attends every grant issued by parties authorized to grant, when there is nothing on its face impeaching its validity. It is incumbent on those who contest its validity to support their objections. The burden of proof rests upon them. *Payne v. Treadwell*, 16 Cal. 220.

41. The general rule is that when the **acts of the officers of a foreign government** are brought in question in our courts, the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears.

Mott v. Reyes, 45 Cal. 379.

42. Nieto, under a permission from the Spanish government in 1784, to graze his cattle on a tract of land in Los Angeles, took possession of said tract and occupied it until his death in 1804; subsequent to which his

four sons continued the occupation under the same permission, but claimed to be the owners of the premises. In 1832, two of the sons died, both of them leaving widows, and one of them five children, surviving. In 1833, the two sons and the widows verbally agreed upon a partition of the premises, and to apply to the governor of the department for separate grants to them for the portions received by them respectively on their partition. A partition was accordingly made, and a petition was presented to the governor representing that in 1784 Governor Fages had granted the premises to their ancestor, Nieto, and given him the possession thereof, but that the title papers had been misplaced, and asking that separate titles be awarded to them for the several portions received by them on their partition. Upon the petition a decree was made by the governor, July 27, 1833, declaring that the parties were owners in fee of the premises, and designating the portion falling to each, and directing that juridical possession be given to them. Afterwards, December 21, 1833, a further decree was made by the governor directing the execution of the titles, and delivery of juridical possession, and in 1834 the several grants solicited were issued. In the grant to Josefa Cota, the widow having the five children, was a recital that she had shown herself entitled to the estate of the deceased Nieto, and the form of the granting clause was a declaration to her of the ownership of the land. Her grant contained the usual conditions annexed to grants in colonization. In 1843, the governor having released the condition against alienation, she conveyed the land to the defendant. The plaintiffs are the children of Josefa Cota and her husband, the son of Nieto, and seek to recover the land upon the ground that a title vested in them on the death of their father as his heirs, which their mother Josefa had no authority to convey. It was shown upon the trial that Nieto never had any title from the Spanish government, but only a written permission to graze cattle upon the tract of which he took possession: *Held*, first, that the presumption of the title from the **long possession** of Nieto and his children was repelled and destroyed by the instrument under which such possession was had; second, that by the possession under the written permission no title was acquired by **prescription**; third, that neither by the averments in the petition, nor by any of the **recitals** in the decrees of the governor, or in the grant to Josefa was she or the defendant estopped from denying that Nieto and his children had any title to the land; and, fourth, that the title remained in the Mexican government until the **decree of concession** made by the governor in 1833, which was followed by the grants of the separate parcels in 1834; and that therefore the plaintiffs had no title, and could not recover. *Nieto v. Carpenter*, 21 Cal. 455.

EFFECT OF ACT OF CONGRESS UPON TITLES.

43. The act of March 3, 1851, was passed for the purpose of carrying the treaty of Guadalupe Hidalgo into effect. It has there provided for protecting all titles, legal or equitable, acquired previous to the cession. *Teschemacher v. Thompson*, 18 Cal. 11.

44. No law authorizes a forfeiture of any rights of property, under a Mexican grant, for any act or omission on the part of the grantee since the treaty of Guadalupe Hidalgo. *Waterman v. Smith*, 13 Cal. 373.

45. By the act of March 3, 1851, the new government has designated the manner and conditions under which the right and power of location will be exercised, and declared the effect which shall be given to the proceedings had. Parties taking in subordination to the future action of the government, old or new, in determining the limits of an elder grant, are in no position to question those proceedings.

Leese v. Clark, 18 Cal. 535.

46. The act of March 3, 1851, to ascertain and settle private land claims in California, was passed to enable the government to execute its treaty obligations, and to ascertain what were public lands. By that act the government has announced the conditions upon which it will discharge its political duties to Mexican grantees, and at the same time separate and distinguish their rights from the public property. It has there required all claims to land to be presented within two years from the date of the act, and declared, in effect, that if upon such presentation they are found by the tribunal established for their investigation, and by the courts on appeal, to be valid, it will take such action as will result in rendering them perfect titles. But it has also declared, in effect, by the same act, that if claims constituting only interests in land, requiring measurement and segregation from the public domain, be not thus presented, it will take no action for their protection, and the claims will be considered and treated as abandoned. Legislation of this character is not subject to any constitutional objection. *Estrada v. Murphy*, 19 Cal. 248.

47. The act of March 3, 1851, does not mean that whenever a claim under a grant is not presented, the land shall be deemed absolutely a part of the public domain, but that it shall be thus treated so far as any light of the particular claimant is concerned. Other parties may have successfully asserted claims to the same land, with reference to whom it would be held as private property.

Id.

48. The United States, after the acquisition of California from Mexico, was bound to respect, not only perfect titles acquired

by the inhabitants under Mexican domination, but also to respect such equitable claims as had their origin in the action of the Mexican government, but were inchoate at the date of the succession, and to take such steps as were necessary to perfect the same.

Ward v. Mulford, 32 Cal. 365.
See secs. 52-61, 143, 148, 151, 155.

EFFECT OF REJECTION OF CLAIM.

49. By section 13 of the act of congress of March 3, 1851, establishing a board of land commissioners for the adjudication of private land claims in the state of California, the final rejection of a claim operates, *proprio vigore*, to restore the land included therein to the mass of the public domain, without further action by the land department of the government, and the same become subject, at once, to location, or appropriation, in any manner provided by law.

Rush v. Casey, 39 Cal. 339.

50. The final rejection of a Mexican land claim under the provisions of the act of congress of the third of March, 1851, operates, *proprio vigore*, to restore the land to the mass of the public domain.

McGary v. Hastings, 39 Cal. 360.

51. If a Mexican grant of land is rejected, from the time of its rejection the land becomes a part of the public domain of the United States, and open to pre-emption.

Page v. Fowler, 37 Cal. 100.

52. The act of congress of March 3, 1863, entitled "an act to grant the right of pre-emption to certain purchases on the Suscol rancho, in California," provided that it should be lawful for individuals, *bona fide* purchasers from Vallejo, or his assigns, of land on said rancho, to enter at one dollar and twenty-five cents per acre, said land so purchased, to the extent to which each had reduced to possession. Said rancho was claimed by Vallejo under a Mexican grant which had been rejected by the supreme court of the United States: *Held*, that the said act describes the specific tract of land which each individual purchaser from Vallejo is entitled to enter, and for that reason does not come within the rule laid down in *Chotard v. Pope*, 12 Wheat. 587, that when a party is authorized by act of congress generally to enter a given quantity of land within larger boundaries, he can not take lands upon which a pre-emption or some other right has attached; *h/d, further*, that said act withdraws the lands which had been purchased *bona fide* from Vallejo, and reduced to possession from the operation of the general pre-emption laws, and gives such purchasers and possessors a right to enter the same as against one who had taken steps to become a pre-emptor on the same, under the general pre-emption laws, before the passage of said act; *h/d, further*, that said act did not

confine purchasers from Vallejo or their assigns, to one hundred and sixty acres, but allowed them to enter to the extent of the possession of each.

Hutton v. Frisbie, 37 Cal. 475.

53. The statute does not prohibit a purchaser of land within the limits of the city of Vallejo, situated on said rancho, from presenting his claim for, and entering such land.

Durfee v. Plaisted, 38 Cal. 80.

54. The exception "of such lands as may be designated by the president," contained in the proviso to the fifth section of the act, has reference only to such designation as thereafter might be made. Id.

55. A patent issued pursuant to the provisions of the act of congress granting the right of pre-emption, etc., to the purchasers of the Suscol rancho, is the record of the government that the land was subject to entry by the patentees, and was entered by them in conformity to law; and is conclusive evidence of the regularity, as well as of the validity of the action of the officers, in confirming the title of the patentees as purchasers from Vallejo or his assigns. Id.

56. No one who does not connect himself with the source of title to the Suscol rancho will be permitted to inquire whether the conditions of the statute were complied with, or whether the officers issuing the patent rightfully performed their duty. Id.

57. A patent issued to two or more persons, by virtue of the act of congress of March 3, 1863, granting the right of pre-emption, etc., to the purchasers of the Suscol rancho, creates, presumptively, a tenancy in common in the patentees, as between them and third parties.

Frisbie v. Marquez, 39 Cal. 451.

58. It was the special duty of the register and receiver of the United States land office at San Francisco to take proof of the necessary facts entitling applicants, under the act of congress of March 3, 1862, relative to the Suscol rancho, to the benefit of that act; and where there is no charge of fraudulent proofs, the award of the register and receiver will be regarded as conclusive.

Marquez v. Frisbie, 41 Cal. 624.

59. By the act of March 3, 1863, relative to the Suscol rancho, all the lands included in the grant to Vallejo are withdrawn from the operation of the general pre-emption laws of the United States, and an attempt to pre-empt such lands under the general laws is futile and confers no title, either legal or equitable. Id.

60. One who claims the benefit of the act of congress, passed March 3, 1863, granting the right of pre-emption to purchasers from Vallejo, of land in the Suscol rancho, before the rejection of Vallejo's claim thereto by the supreme court of the United States, must

show that he purchased from Vallejo, or his assigns, and had reduced the land to possession before the time of said rejection of Vallejo's claim.

Tormey v. True, 45 Cal. 105.

61. The act of congress, approved March 3, 1863, granting the right of pre-emption to bona fide purchasers from Vallejo of the Suscol rancho, or portions thereof, gave to such purchasers the mere privilege of acquiring the title from the United States; and those who failed or refused to exercise that privilege lost all right to claim the benefit of the act. Sheehy v. True, 45 Cal. 236.

PATENTS.

Validity of.

62. Until the validity of a grant from the Spanish or Mexican government has been determined by the tribunals of the United States, under the act of congress of March 3, 1851, it can not be made the basis for impeaching a patent for the same premises.

Rico v. Spence, 21 Cal. 504.

63. Where the validity of the claim of the defendant, under a Mexican grant, had been recognized and confirmed, and a patent to him issued thereon by the United States: Held, that the plaintiff, relying solely upon an opposing unconfirmed grant from the Mexican government, embracing the same premises, could not call in question the rights of the defendant, either in law or equity. Id.

64. A patent of land from the United States passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed or fixed to its surface; in short, in everything embraced within the term "land."

Moore v. Smaw, 17 Cal. 199.

Fremont v. Flower, Id.

65. The United States occupy, with reference to their real property within the limits of a state, only the position of a private proprietor, with the exception of exemption from state taxation, and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals. Id.

66. The patent of the Mariposa estate from the United States issued to Fremont upon confirmation of a grant from the former Mexican government invested the patentee with the ownership of the precious metals which the land contains; it transferred to the patentee all interests which the United States possessed in the soil and everything included therein or connected therewith, and the rights of the owners (Fremont and parties who have become interested with him) in that respect can not be enlarged or diminished by any license

from the state. They hold the mining claims in the land independent of this section of the revenue act named, and may extract the gold themselves, or allow others to extract it upon such terms as they may judge most advantageous to their interests.

Ah Hee v. Crippen, 19 Cal. 491.

67. The act of March 3, 1851, "to ascertain and settle private land claims in California," does not restrict the operations of the patents issued by the United States upon confirmation of the claims to the interests acquired by the claimants from the former government, nor distinguish the patents so issued from other patents issued by the United States. Patents issued under the act are without words of reservation or limitation, except that they shall not affect third persons. Moore v. Smaw, 17 Cal. 199. Fremont v. Flower, Id.

68. By the patent, the government is estopped from asserting title to the premises, and if Fremont is estopped from asserting title against defendant, then it would have, by merely occupying the land as public land, rights superior to both, and that, too, in the face of an express prohibition of the sale by the government of the mineral lands. Boggs v. Merced M. Co., 14 Cal. 279.

69. A patent from the United States for land in California, issued upon a confirmation of claims held under grants of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. Id.

70. A patent from the United States upon the confirmation of a Mexican grant carries with it the ownership of the minerals in the land patented; and in ejectment for such land defendant can not set up, as against the United States, or as against parties claiming from the United States, the paramount proprietor, a title resting upon mining rules and regulations.

Fremont v. Seals, 18 Cal. 433.

71. The patent is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located or might have been located by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself can not question its verity, nor can parties claiming through the government by title subsequent.

Teschemacher v. Thompson, 18 Cal. 11.

72. A patent for lands under a confirmed Mexican grant and final survey, which shows upon its face that it includes lands embraced in a previously approved final survey of another confirmed Mexican grant, is not void as to that portion of the lands included in both surveys.

Yates v. Smith, 40 Cal. 662.

73. A note by the commissioner of the general land office, contained in a patent for lands, under a confirmed Mexican grant, to the effect that the lands granted in the patent included lands embraced in the final survey of a previously confirmed Mexican grant, does not operate to except the lands so included from the lands granted in the patent. Id.

74. A patent of a Mexican grant of land is not issued without authority of law, because the surveyor-general of California transmits to the general land office the plat and survey of the land certified and approved by him, instead of having the transmission made by the confirmee.

Chipley v. Farris, 45 Cal. 527.

75. The issuance of the patent is the last step in the proceedings for the confirmation of a Spanish or Mexican grant, under the act of congress of 1851. Id.

76. Neither the claimant of a Mexican grant, nor those claiming title through him, can introduce evidence in an action brought by them to recover possession of the grant, or a portion thereof, to show that the patent issued therefor was void. Id.

77. It is not necessary that a patent issued for a Mexican grant, under the act of 1851, for the settlement of private land claims in California, should be accepted by or delivered to the claimant or patentee. The patent takes effect when issued.

Miller v. Dale, 44 Cal. 562.

78. If the patentee to whom the patent is made, under the act of March 3, 1851, to settle private land claims in California, dies before the patent is issued, the title to the land therein designated becomes vested in the heirs, devisees, or assignees of the deceased patentee, the same as if the patent had issued during his life. Id.

79. A title to land founded upon the confirmation and survey of a Mexican grant, and a patent issued in pursuance thereof, or a confirmed survey, which is now equivalent to a patent, takes effect by relation at the date of filing the petition therefor, and will prevail over a subsequent patent issued upon a purchase from the United States.

Morrill v. Chapman, 35 Cal. 85.

80. A patent for a Mexican grant of land is a record which binds both the government and the claimant, and those deriving title from him, and can not be attacked

by either party, **except by direct proceedings** instituted for that purpose.

Chipley v. Farris, 45 Cal. 527.

Miller v. Dale, 44 Id. 562.

81. In ejectment between those claiming under a confirmed Mexican grant for which a patent has been issued, and those claiming under another confirmed grant for which no patent has been issued, the court can not inquire whether the **confirmation** which resulted in the issuing of a patent was obtained by the use of **false and fraudulent evidence**.

Miller v. Dale, 44 Cal. 562.

82. A patent is a record of the government which can not be assailed on the ground that it was obtained by false or fraudulent evidence, in a collateral action in which it is used as evidence as a source of title.

Id.

83. A patent of a confirmed Mexican grant of land issued by the United States can not be called in question in an action brought by those claiming under it to recover possession of land, by evidence showing that the Mexican government had granted to the grantee **more than eleven leagues** of land, previous to the grant on which the patent was issued.

Kimball v. Semple, 25 Cal. 440.

84. A patent issued by the United States for a confirmed Mexican or Spanish grant will not be vacated by a state court because the grantee had received a donation of more than eleven square leagues of land from Mexico or Spain before he received the grant confirmed.

Semple v. Hagar, 27 Cal. 163.

85. Both the officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent for a Mexican grant.

McGarrahan v. New Idria Co., 49 Cal. 331.

86. Neither the president nor any officer of the government has any power to dispose of the public domain, or to sign or cause the seal of the United States to be affixed to a patent, except such as is conferred by a statute of the United States.

Id.

87. A patent to a Mexican grant of land can not be issued until after a final confirmation.

Id.

88. While the recitals of fact contained in a patent are binding on all concerned, an opinion of the executive officers as to matters of law, indicated either by the act of issuing the patent, or by the recitals contained therein, is not conclusive.

Id.

89. A patent for a Mexican grant of land, issued while an appeal to the supreme court from the decree of the district court confirming the same is pending, is void.

Id.

Title by.

90. The patent establishes the title of the patentee, from the date of the grant; the

character of such title depending, up to the issuance of the patent, upon the nature of the grant, and the proceedings of the former government in relation thereto; whether the grant were of a specific tract segregated from other land by defined boundaries; or whether the grant were of a certain quantity of land lying in a larger tract, and in the latter case, whether juridical possession had been given to the grantee.

Stark v. Barrett, 15 Cal. 361.

91. Conveyances by the grantee previous to the patent pass only his right under the grant. But the patent establishes the validity of all properly executed intermediate transfers of the grantee's interest.

Id.

92. Even if it were necessary, as against trespassors, to establish the existence and validity of the grant, the recitals in the patent are of themselves sufficient evidence for that purpose.

Id.

93. Until such partition, the grantee is entitled to the use and possession as co-tenant, in such parcel, with the other owners.

Id.

94. The government of the United States issued a patent for a Mexican grant to Meyer, Bennitz, Hendy, Glein, and Duncan, jointly. Prior to the issuing of the patent, Meyer and Bennitz conveyed to Bihler; and Glein and Hendy conveyed to Platt. Subsequently Bihler brought suit against Platt, but not against Duncan, to quiet title to a specific part of the grant claimed under a deed from Rufus, the original grantee. The plaintiff alleged in his complaint that he was the owner in fee simple absolute of the land in controversy; Held, that the legal title conveyed by the patent vested in the five patentees as tenants in common, and that whatever equities the plaintiff had founded on the specific conveyance must be determined in an action with appropriate pleadings, in which all the necessary parties are before the court.

Bihler v. Platt, 52 Cal. 550.

95. If a patent for a confirmed Mexican grant of land recites the decree of confirmation and the plat and certificate of survey of the surveyor-general, giving the courses and distances, and the certificate states that the land confirmed is bounded as therein described, and the decree bounds the land on the sea shore on one side, but the calls and plat of the survey extend from the interior to the sea shore, and then extend along the sea shore in places at and below low tide to a point on the shore, and the patent grants the land described in the survey, the patent will be construed as conveying the land only to the high-tide line along the shore.

More v. Massini, 37 Cal. 432.

96. The map is an important part of the patent, and in questions of location is often

entitled to as much, and perhaps more, weight, than the courses and distances.

Black v. Sprague, 54 Cal. 266.

97. The same rule prevails when the distance is called for upon a traveled highway.

People v. Henderson, 40 Cal. 29.

98. To a patent issued upon the confirmation of a grant from the Mexican governor of lots within the limits of the pueblo, the same operation and effect should be accorded as to any other patent, regular upon its face, issued by the United States, upon the confirmation of a claim under a Mexican grant, pursuant to the act of congress of March 3, 1851. *Leese v. Clark*, 18 Cal. 535.

99. A patent is the last act of a series of proceedings taken for the recognition and confirmation of the claim of the patentees to the land it embraces, the first of which is the petition to the board of land commissioners. With respect to such proceedings it takes effect by relation at the date of the first act. As the deed of the United States, it is to be regarded as if it had been executed at that time. It passes whatever interests the United States may then have possessed in the premises. It operates in consequence as an absolute bar to all claims under the United States having their origin subsequent to the petition. *Id.*

See also *Stark v. Barrett*, 15 Cal. 361.

100. It is also a record of the government, showing its action and judgment with respect to the title of the patentees at the date of the cession. By the treaty of **Guadalupe Hidalgo**, the United States stipulated for the protection of the rights of property of the inhabitants of the ceded territory. Independent of the treaty stipulations, the inhabitants were entitled to such protection by the law of nations. The obligation thus devolved upon the government, upon the acquisition of the country, was political in its character, and to be executed in such manner as it might judge expedient. To execute this obligation required an inquiry into the nature and extent of the claims asserted to property at the date of the treaty. This inquiry involved an investigation into the genuineness of the title papers of the patentees, and an ascertainment of the quantity, location, and boundary of the property claimed. The patent is the final act on the part of the government, resulting from such inquiries; and as to all the matters of fact and law essential to authorize its issuance, it imports absolute verity. It can only be vacated and set aside by direct proceedings instituted by the government, or by parties acting in the name and by the authority of the government. **Until thus vacated, it is conclusive**, not only as between the patentees and the government, but between parties claiming in privity with either by title subsequent. *Id.*

101. Where claimants had, prior to the issuance of a patent, published a notice that they had become the owners of the grant, specifying its boundaries, and warning off trespassers: *Held*, that they were not estopped from claiming, under their patent, land outside of those boundaries.

Moore v. Wilkinson, 13 Cal. 478.

When takes Effect.

102. The survey having been made in July, 1855, Ritchie having died in July, 1856, the patent, dated January, 1857, is to be regarded as if it had received the signature of the president at the completion of the segregation of the land.

Waterman v. Smith, 13 Cal. 373.

103. The patent, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the board of land commissioners. But as the record of the government of the existence and validity of the grant it establishes the title of the patentees from the date of the grant, such title depending, up to the issuance of the patent, upon the character of the grant and the proceedings of the former government in reference to it; whether it were of a specific tract separated from other lands by larger extent; and in the latter case whether or not the quantity had been located by official authority. *Teschemacher v. Thompson*, 18 Cal. 11.

104. A patent takes effect, by relation, at the date of the presentation of the petition of the patentee to the board of land commissioners. And where such petition was presented in March, 1852, at which time the pre-emption laws of the United States were not extended to California, the rights, if any, of parties claiming under those laws are subordinate to the result of the proceedings then pending by the grantee before the tribunals and officers of the United States.

Moore v. Wilkinson, 13 Cal. 478.

105. The patent took effect as the deed of the United States at the date of the presentation of the claim under the grant to the board of land commissioners in August, 1852. It is the record of the government, that on that day the land it embraces was within the boundaries designated by the grant and subject to appropriation to satisfy the claims of the heirs of the grantee, and until vacated it imports as against the government, and all parties claiming under the government by title subsequent, absolute verity. It can only be impeached by the government by direct proceedings for its annulment or limitation, and such proceedings, unless accompanied by injunction from the court in which they are taken, can not, before decree, impair the rights of the patentees, or those claiming under them; and the institution of the suit

of the United States constituted of itself no ground for granting the injunction.

Ely v. Frisbie, 17 Cal. 250.

106. A patent of the United States, issued to a confirnee of a Spanish or Mexican grant, under the act of congress of March 3, 1851, treated simply as the deed of the United States, is in its operation like the deed of any other grantor and passes only such interest as the United States possessed, the deed taking effect by relation at the date of the presentation of the petition of the patentee to the board of land commissioners. But such patent is not merely a deed of the United States; it is a **record of the government**—of its action and judgment with respect to the title of the patentee existing at the date of the cession of California—and as such record is **conclusive evidence of title** in the patentee at the time the jurisdiction of the subject passed from the Mexican government to the United States.

Leese v. Clark, 20 Cal. 387.

107. A patent of the United States, following a final decree affirming the validity of a Mexican grant in a proceeding instituted before the United States land commission to obtain a confirmation of the grant, takes effect by **relation** at the date of the presentation of the petition to the land commission, and is to be regarded, so far as all intermediate conveyances are concerned, as having been executed at that time.

Touchard v. Crow, 20 Cal. 150.

108. Where, on the twenty-fourth day of February, 1852, H. and others filed a petition before the United States land commission for a confirmation of a grant of land from the Mexican government, and in the United States district court, to which the proceedings had been appealed to, a final decree of confirmation was rendered in November, 1855, upon which a patent subsequently issued: *Held*, that a deed made by H. on the thirtieth day of July, 1852, of his interest in the land embraced in the grant, passed the **legal title subsequently acquired** by the patent. Id.

109. A patent takes effect by relation from the first step in the proceeding for confirmation of the grant.

Yount v. Howell, 14 Cal. 465.

CONFIRMATION.

110. Since the act of congress of 1860, taking the **approval of surveys** of Mexican grants from the executive department and placing it in the judicial, the final confirmation of a grant is the final judgment of the court on the question of **location**, and not the issuance of a patent.

Mahoney v. Van Winkle, 33 Cal. 448.

111. A decree of confirmation of a grant by the United States land commission

and the United States district court can not be impeached in an action of **ejectment** between a party claiming under the grant and a third party. Rose v. Davis, 11 Cal. 133.

112. If a decree confirming a Mexican grant of land confirms it by metes and bounds, subject to "deductions" of certain ranchos (naming them) within the exterior bounds of the confirmed grant, and then provides that the excepted ranchos are excluded from the confirmation, the confirmation extends only to such lands as are not included within the **excepted ranchos**.

San Jose v. Uridias, 37 Cal. 339.

113. A confirmation of a grant of land made by Mexico, under the provisions of the act of congress of March 3, 1851, necessarily requires a confirnee, and, although the confirmation may inure in law or in equity to the benefit of other persons than the confirnee, yet the person whose claim is confirmed is the **confirnee**.

Schmitt v. Giovanari, 43 Cal. 617.

114. One who bought land included in a Mexican grant before the presentation of a petition for its confirmation became entitled to have a confirmation of his claim, but if he **neglected to apply** for the same, and suffered his grantor to present a petition and have a confirmation made to such grantor, he must, in order to obtain the benefit of the confirmation, so far as the legal title is concerned, rely on the **estoppel** springing from his **vendor's deed**, unless there is a clause in the decree of confirmation giving him the benefit of the same. Id.

115. The construction given by the supreme court of the United States to its decree confirming a Mexican grant of land in California is of **binding authority in the state courts**. Id.

116. A decree of a court of the United States confirming a Mexican grant to one who had purchased from the original grantee, and which declared that the confirmation should be without prejudice to the legal representatives of the original grantee, and should inure to the benefit of any person who owned the land by any title derived from the original grantee, gives a **perfect title to a purchaser** from the confirnee, who bought from him before he presented his petition for a confirmation to the commissioners appointed under the act of congress of March 3, 1851, as against one who bought from him after the confirmation. Id.

117. The board of land commissioners, or the United States court, in passing upon and confirming a Mexican or Spanish grant of land, must necessarily find, not only that the alleged grantee was in fact the grantee of the Mexican or Spanish government, but also that he was competent to take the grant. Semple v. Hagar, 27 Cal. 163.

118. The board of United States land com-

missioners, established by the act of congress entitled "an act to ascertain and settle private land claims in the state of California," passed March 3, 1851, had jurisdiction of a claim presented by the grantees for the confirmation of a Mexican grant, made in 1839, by Alvarado, then governor, of lots within the limits of the pueblo of San Francisco; and such claim was not required to be presented to the board by the corporate authorities of the city.

Leese v. Clark, 18 Cal. 535.

119. The second provision of section 14 of the act, requiring the claim to any city, or town, or village lot, where the city, town, or village existed on the seventh of July, 1846, to be presented to the board by the corporate authorities, does not extend to all lots situated within the limits of the city, town, or village which thus existed, but only to lots belonging to or claimed by such city, town, or village, thus authorizing, with other provisions of the section, the corporate authorities to present, under one general claim, the interest of the city, town, or village, and the separate interests of individuals under concessions from those authorities. *Id.*

120. The confirmation of a claim, whether made to corporate authorities or to individuals, can only be for the benefit of the claimants or parties deriving title through them. It can not inure to the benefit of parties holding adversely to the title confirmed, as there exists no privity of estate between them and the confirmer. *Id.*

121. The judgment of the board of land commissioners, the tribunal of original jurisdiction, is sufficient evidence of such confirmation, unless the judgment be reversed or its operation suspended by an appeal which is still pending.

Sanders v. Whitesides, 10 Cal. 88.

122. In ejectment on a Mexican grant, the decree of the land commission confirming it, rendered final by the withdrawal on the part of the United States of any appeal therefrom, and an order of the district court permitting the claimant to proceed thereon as on final decree, are conclusive evidence of the validity of the grant, of its recognition by the United States, and also of the location of the specific quantity granted, the decree in the case confining the claim under the grant to a particular tract, describing it with specific boundaries.

Natoma Co. v. Clarkin, 14 Cal. 544.

123. Such a decree and order, in connection with the grant, are as conclusive as to the title of plaintiffs as a patent, provided the premises are within the designated boundaries. *Id.*

124. A patent could have no greater effect upon the title; the patent would save the parties the necessity of proving anything beyond it, and limit the evidence in the case

to matters arising upon mesne conveyances under the original grantee, but so far as the title is concerned, the boundaries of the land being given, its segregation in other words from the public domain being made by the decree itself, nothing further could be required. *Id.*

125. A decree of the United States district court, confirming a claim under a Mexican or Spanish grant, which has become final by the refusal of the government to prosecute an appeal therefrom, and by stipulation of the district attorney, settles forever the question of the validity of the grant.

Mahoney v. Van Winkle, 21 Cal. 552.

126. Where by the decree of a court of the United States a specific quantity of land is confirmed to a grantee, from the Mexican nation, or to his assignee, to be selected and surveyed within the exterior boundaries of a larger tract, the confirmer, by virtue of the grant and the confirmation, is entitled, until a final survey, to recover possession of any portion of the land embraced within the exterior boundaries of the larger tract, except as against a person holding title from or the right of possession under the government. *Carpentier v. Thirston*, 24 Cal. 268.

127. The decree of the United States district court recognizing a grant and affirming its validity having become final by the refusal of the United States, through their counsel, to prosecute any appeal therefrom, is conclusive as to the validity of the grant upon the United States, and all parties claiming under them by title subsequent.

Soto v. Kroder, 19 Cal. 87.

128. The want of confirmation of a grant by the departmental assembly, or of any report of the grant, or of the proceedings with reference to it, to the supreme government of Mexico, did not prevent the title from passing to the grantee, and it is not material whether that title be regarded as a legal or an equitable one; in either case it carried with it a right to the possession of the premises against intruders. *Id.*

129. The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination—the judgment of the appropriate department of the government that the survey does conform to such decree. That determination or judgment is not the subject of review by the judiciary. It is conclusive upon the courts in actions of ejectment as the adjudication of a competent tribunal, upon a subject within its exclusive jurisdiction.

Moore v. Wilkinson, 13 Cal. 478.

130. Where land is held by an imperfect or merely equitable title under a Mexican colonization grant in the usual form, requiring approval of the departmental assembly and juridical possession from the magistrate

of the vicinage, and being for a certain quantity of land within exterior limits embracing a much greater amount, such grant must have been presented to the United States board of land commissioners for confirmation, or it will be deemed as abandoned, and be treated by the courts as non-existent, whatever may have been its original validity; and the land, so far as a party claiming under the unconfirmed grant is concerned, will be regarded as public land of the United States. *Estrada v. Murphy*, 19 Cal. 248.

131. The fact that land claimed under a Mexican grant has been confirmed to A., who presented his claim under the grant, and that therefore such land is private land as to A., does not make the land private land as to B., who claims under the grant, but never presented his claim to the land commissioners for confirmation. As to him, the land is public land. *Id.*

132. The confirmation under the act operates to the benefit of the confirmer, and parties claiming under him, so far as the legal title to the premises is concerned. It establishes the legal title in the confirmer, and this must control in the action of ejectment. *Id.*

133. Whatever doubts may exist as to the validity of the legislation of congress, so far as it requires the presentation to the board of claims where the lands are held by perfect titles acquired under the former government, there can be none as to the validity of the requirement with respect to claims where the lands are held by imperfect or merely equitable titles. *Id.*

134. Mexicans whose titles to lands by grant from Mexico or Spain were perfect at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the board of commissioners appointed under the act of congress of March 3, 1851, nor did they forfeit their lands to the government by a failure to present their claims for confirmation. *Minturn v. Brower*, 24 Cal. 644.

135. Holders of titles to lands which were perfect at the date of the treaty could, if they so elected, submit them to be passed upon by the commissioners, but were not bound to do so. *Id.*

136. If, at the date of the cession of California to the United States under the laws of Mexico, there remained anything to be done by the Mexican government, in order to vest the grantee of land in California with title to the specific land claimed by him, his title was imperfect, and it was necessary for him to present it to the land commissioners for approval within two years from the passage of the act of March 3, 1851, under the penalty of having the land become a part of the public domain if he failed to do so. *Stevenson v. Bennett*, 35 Cal. 524.

137. Pueblo lands are not exempted from the operation of the above rule. *Id.*

138. A Mexican grant was confirmed by the United States, excepting certain tracts included within its exterior boundaries, granted to private claimants. Land claimed as part of a tract thus excepted was excluded by an official survey of the tract: *Held*, that the land thus excluded is a portion of the land confirmed in the larger tract.

San Jose v. Trimble, 41 Cal. 536.

139. A confirmation of a portion of a Mexican grant to a purchaser of such portion from the grantee does not have the effect of confirming to the grantee and purchasers from him the entire grant.

Brown v. Brackett, 45 Cal. 167.

140. The legal title to a Mexican or Spanish grant of land vests in the confirmer and their assigns.

Hartley v. Brown, 46 Cal. 201.

141. If a Mexican or Spanish grant of land was imperfect or inchoate, the fee remained in the government until the confirmation and final survey by the United States, if not until the issuing of the patent. Until then, the grantee had only an equitable title. *Wilkins v. McCue*, 46 Cal. 656.

142. If it is admitted by the plaintiff on the trial that he has title under a patent issued for a Mexican grant within less than five years before the commencement of the action, and the defendant recovers judgment, and the plaintiff claims title by prescription, it will be presumed, in support of the judgment, that the grant was an imperfect one, and conveyed only an equitable judgment. *Id.*

143. The essential and substantive acts under the law of 1851 are the confirmation and survey. The patent is only evidence of the pre-existing title made perfect by these acts. Upon the original grant, final confirmation and approved survey, the plaintiff might have relied, without reference to the patent. *Waterman v. Smith*, 13 Cal. 373.

144. The fact that a grant was not approved by the departmental assembly does not impair the title. Such approval simply discharges the grant from liability to defeasance by the Mexican government, except for breach of its conditions subsequent. *Id.*

145. A decree of the board of land commissioners or of a court of the United States, confirming a Mexican or Spanish grant of land, can not be attacked in another action, on the ground that the grantee was not competent to take the grant, by reason of having received a grant of more than eleven square leagues of land before he obtained the grant confirmed.

Sample v. Hagar, 27 Cal. 163.

146. If after a decree confirming a survey

of a Mexican grant, made in pursuance of the act of June 14, 1860, a decree is made confirming a survey of another **prior grant** covering the same land, and the confirmee in the first decree is a party to the second decree consenting thereto, he is bound by it.

Treadway v. Semple, 28 Cal. 652.

147. A title depending upon the confirmation and survey of a Mexican grant takes **effect by relation** at the date of filing the petition, and will prevail over a subsequent patent issued upon a purchase from the United States.

Merrill v. Chapman, 34 Cal. 251.

148. Where claimants under Spanish or Mexican grants have never presented their claims for confirmation, under the act of March 3, 1851, such **claims** are to be treated as **non-existent**, and the land, so far as they are concerned, is to be considered as part of the **public domain**.

Rico v. Spence, 21 Cal. 504.

149. Where the parties each claimed the same premises under independent Mexican grants, and the defendant, with knowledge of the plaintiff's claim, proceeded to obtain a confirmation of his claim and a patent therefor: *Held*, that no **equities** could arise in favor of the plaintiff, and against defendant, from the latter's knowledge of the adverse claim; nor was he, by reason of this knowledge, affected with notice of any equitable rights of plaintiff.

Id.

150. An imperfect grant of land, made by the Mexican government in California before its acquisition by the United States, must have been **presented** to the authorities of the United States **for confirmation** under the provisions of the act of congress to settle private land claims in California.

Taylor v. Escandon, 50 Cal. 428.

151. After the passage of the act of congress of June 14, 1860, giving the United States district court authority over surveys, a **judicial approval of a survey** was a final confirmation within the intent of the sixth section of the statute of limitations of this state, as amended in 1855.

Morris v. De Celis, 51 Cal. 55.

152. If, after the death of the grantee of an unconfirmed Mexican grant, his **heirs** petition for and obtain a confirmation of the title to them, and the patent issues to them, they become vested with the legal title, and if the administrator of the grantee sells the land under an order of the probate court, the patentees will prevail in **ejectment** against the purchaser at such **sale**, if the defendant does not set up and establish an equitable defense.

Hartley v. Brown, 51 Cal. 465.

153. If a Mexican grantee dies and his heirs petition for and obtain to themselves a confirmation of the grant, and the patent issues to them, the **legal title** vests in the **heirs** and their grantees, and does not inure

to the benefit of one who purchases at a probate sale made by the administrator of the grantee, so as to vest in him the legal title.

Id.

154. If the tribunals of the United States confirm lands to a **pueblo**, excepting therefrom grants made within the limits of the pueblo to other parties, whether confirmed before the pueblo confirmation, or afterwards upon proceedings then pending, a confirmation of one of such grants is conclusive as against the pueblo, and can not, in a collateral action, be questioned by one claiming under the pueblo.

Umbarger v. Chaboya, 49 Cal. 525.

155. By the act of congress of 1851, "to ascertain and settle private land claims in California," the duty was not imposed on the commissioner or the United States courts to determine the precise character of the claims presented for confirmation, but to determine whether claims should be declared valid under the **treaty of Guadalupe Hidalgo**, the law of nations, and the laws, usages, and customs of the government from which the claim was derived.

Chipman v. Hastings, 50 Cal. 310.

SURVEY.

156. The **location** of the specific quantity may be made by a survey of such quantity, or by grants with specific boundaries of such parts of the general tract as will reduce it to such specific quantity. Either course will give **precision to the claim** of the grantee. So long as there remains within the general tract sufficient land to satisfy the quantity specified in his grant, the grantee is without remedy.

Waterman v. Smith, 13 Cal. 373.

157. Assuming that the grant upon which the patent to the plaintiffs was issued was one of **quantity** only, requiring at the cession the action of the government to give it location, the duty devolved upon the new government to make the location. This was essential to perfect the equitable title of the grantees.

Teschemacher v. Thompson, 18 Cal. 11.

158. Although the grant contemplates a **measurement by the proper officers** of the former government of the specific quantity granted, and only in that way, by the laws of that government, could the specific quantity be definitely and permanently located; yet it was competent for the grantee himself to make a **temporary selection** and location which would be binding and effectual as against intruders and trespassers, and all parties, until the action of the government in the matter.

Riley v. Heisch, 18 Cal. 198.

159. The language used in Waterman v. Smith, 13 Cal. 416, and Moore v. Wilkinson, *Id.* 489, to the effect that the right of location rested exclusively with the government, and was not left to the grantee, or subject to

any control by him, must be taken as referring to a definite and permanent location, by which the title becomes attached absolutely to some particular tract. A temporary selection or location of the land, or of some portion of it, must be made by the grantee in executing the conditions to which the grant is subject. Such temporary selection and location are evidenced by occupation or cultivation of the land, its sale or lease, or any ordinary use by the grantee according to the custom of the country. *Id.*

160. Where a grant was made by the governor and received by the grantee, there still remained another proceeding to be taken for the investiture of a complete title. The proceeding was a **judicial delivery** of the possession. This proceeding was an essential ceremony when there was any uncertainty as to the precise bounds of the land granted, and involved a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement—in other words, a location of the land.

Leese v. Clark, 18 Cal. 535.

161. The **system of locating**, by final survey, Mexican and Spanish grants of land in California, under the act of congress of March 3, 1851, was essentially **modified** by the act of congress of June 14, 1860.

Treadway v. Semple, 23 Cal. 652.

162. When the survey of a Mexican grant has become final by approval, its segregation and location are complete without the issuance of a patent.

Mahoney v. Van Winkle, 33 Cal. 448.

163. As the government acts in the location of a Mexican grant only through its appointed tribunals and officers, if it discover that **imposition and fraud** have been practiced upon them, and have produced a result which otherwise would not have been obtained, it may itself institute proceedings to vacate the confirmation and patent, and annul or correct the location. But unless the government interferes in the matter, junior grantees are remediless.

Leese v. Clark, 18 Cal. 535.

164. The **private survey** of Fremont in 1849, and his presentation of the same to the board of land commissioners, as embracing and identifying the tract he claimed, and subsequent public and repeated disclaimers by him, at the time the defendant took possession of the premises in controversy in 1851, and after the decision of the supreme court of the United States in his case, do not estop him from claiming the premises under his patent. The **representations and disclaimers** made by him previous to this final survey and approval, were clearly made under a misapprehension of his rights. These representations and disclaimers, under the circumstances, and under the law governing the location of land under floating Mexican grants, were not more

than expressions of opinions as to what ought to be its location, or of a desire where it should be located. The law was as well known to defendant as to Fremont. Both must be presumed to have known it, although both were equally mistaken in its rule. There was no actual fraud in the conduct of Fremont, and to estop him by his declarations and disclaimers, under the circumstances, would be inequitable and unjust.

Boggs v. Merced M. Co., 14 Cal. 279.

165. There is no obligation resting upon the claimant of land under a Mexican grant, or upon the United States surveyor-general, to give **notice of the official survey**, directed by the final decree of confirmation, to any one, and it is of no consequence how secretly or how openly the survey is made. *Id.*

166. A **private survey** of a Mexican grant, made by the claimant, and presented with his petition to the board of land commissioners for confirmation of the grant, is not binding upon the government. And, although in the case of Fremont, the claim was confirmed by the decree of the board to the land embraced within such private survey so presented, yet, as that decree was reversed by the district court, and as, when the case was remanded to the district court, from the supreme court, it was accompanied with directions to take further proceedings in conformity with the opinion of the latter court, which opinion directed that a survey be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California; and as the district court did, accordingly, in entering its final decree, order that the land be so surveyed, and as the survey was, in accordance with this decree, made by the surveyor-general, and the patent was issued to Fremont in accordance therewith, this is the only survey which has any standing in court, and there is no ground for the charge of fraud because this survey differs from the private survey made by Fremont, and annexed to his petition for confirmation. *Id.*

167. Such survey could only be made under the former government by its officers, and could not be made by the grantee himself. The right of survey passed with all other public rights, to the government of the United States, upon the cession of the country, and is now to be exercised by its officers, and in conformity with its laws. By the legislation of congress, the subject of surveys is intrusted to the executive department of government, and is not left to the direction or control of the grantee. The action of that department in the location of confirmed grants, when the quantity granted is without specific boundaries, lying within a larger tract, is conclusive and binding upon him. It may be true that under the recent decision of the supreme court in the *Fossat* case, the United States district court pos-

asses jurisdiction to control the location made upon its decree, whilst the proceedings for confirmation are pending before it, but, subject to this qualification, the action of the department in the case mentioned is a finality with the claimant. *Id.*

163. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant can not set up fraud in the survey, or the procurement of the patent, to defeat the action. If the defendant have vested rights, so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent, not that it was void. The rights of the defendant would, in that case, be effectually protected by the provisions of the fifteenth section of the act of March 3, 1851, and the patent would be like a second deed to premises previously granted, and pass, as to the property, no interest. *Id.*

169. Nor would the fraud alleged in the answer here, and supposed to consist in a variance between the private survey made by Fremont, and the official survey by the surveyor-general, and concealment of this latter survey, avail defendant in avoiding or resisting the patent, even if presented in an original or cross bill. *Id.*

170. Under the act of congress of June 14, 1860, the confirmation of a survey is a judicial act, and the decree of confirmation has the force of *res adjudicata* against all persons, whether they intervened or not.

Yates v. Smith, 38 Cal. 60.

Yates v. Smith, 40 *Id.* 662.

171. The approval of a final survey of a Mexican grant can not have the force of a patent unless such effect is given to it by statutory enactment; and the act of congress of July 1, 1864, is silent as to the effect an approval of a survey shall have.

Miller v. Dale, 44 Cal. 562.

172. The approval of a final survey of a Mexican grant of land by the United States courts, under the act entitled "an act to expedite the settlement of titles to lands in the state of California," approved July 1, 1864, is not equivalent to a patent for the land. *Id.*

173. The act of congress of July 1, 1864, "to expedite the settlement of titles to lands in the state of California," makes it the duty of the surveyor-general to transmit the survey to the land department, and every act, from the confirmation of a survey to the issuing of a patent, is an official act; and where there is any neglect or unnecessary delay in issuing the patent, the confirmee is not responsible for it.

Shartzer v. Love, 40 Cal. 93.

174. If the patent purports to convey the land described in the approved survey of a

Mexican grant, and the decree of confirmation comprises a greater area than the approved survey, the claimant has no title except to the land described in the approved survey. *Chipley v. Farris*, 45 Cal. 547.

175. If the decree of confirmation of a Mexican grant does not accord in its description of the land with the approved survey, and the patent conveys the land as described in the approved survey, the claimant a title is confined to the land as described in the approved survey, even if the decree of confirmation is inserted in the patent. *Id.*

176. The boundaries mentioned in the approved survey must prevail over those mentioned in the decree of confirmation. *Id.*

177. If the decree of confirmation covers land not included in the approved survey, and not conveyed by the patent, the claimant has no title to the surplus which is not conveyed by the patent. *Id.*

178. After a decree is made confirming a Mexican grant of land, a survey is necessary to fix and determine the boundaries of the land confirmed; and when such survey has been made and approved as required by law, the courts will not go behind it and look into the decree to ascertain what are the boundaries of the grant.

San Diego v. Allison, 46 Cal. 162.

179. The proceedings of the district court of the United States, under the act of congress of June 14, 1860, relative to surveys of Mexican grants of land, are of a judicial nature. *Semple v. Ware*, 42 Cal. 621.

180. If the owner of a Mexican grant, who has obtained a confirmation of his survey, is bound by a subsequent confirmation of a survey embracing the same land under another grant, the latter confirmee is equally bound by the decree approving and confirming the first survey; and in such case the court will look behind the confirmations, and ascertain which has the prior equity. *Id.*

181. If the final confirmation of a Mexican grant was made by the board of United States land commissioners, and not by the district court, the district court had no jurisdiction under the act of congress of June 14, 1860, to adjudicate on the survey, unless the survey had been returned into court and remained pending there at the time of the passage of the act.

Morris v. De Celis, 51 Cal. 55.

182. The elder grant gives the better title, where it calls for a specified and ascertained parcel of land. *Crockett, J.*

Yates v. Smith, 38 Cal. 60.

183. But if a grant calls for a specified quantity of land, to be located within certain larger exterior limits, the government thereby reserves to itself the exclusive right to locate the quantity granted. *Id.*

184. If the government subsequently

granted to another a portion of the **overplus** within certain designated bounds, this is *pro tanto* a location of the first grant, and an unequivocal declaration that the first grant should not be so located as to include the land embraced in the second. *Id.*

185. In such case, the confirmation of the survey under the second grant ought not to be affected by the **subsequent confirmation** of the survey under the first grant, there being more than sufficient land within the exterior limits called for in the grants to satisfy the requirement of both. *Id.*

186. Where two imperfect grants of land were made by the Mexican government, both of which were confirmed by the United States, and their final approved surveys, made under the act of congress of July 1, 1864, lapped over each other, and for one a patent was issued by the United States: *Held*, that the owners of the grant for which no patent had been issued could not recover, from those claiming under the other grant, possession of the land where the surveys **conflicted**. *Miller v. Dale*, 44 Cal. 562.

187. Until the act of congress vesting the supervision and control of surveys of confirmed Mexican grants in the United States district court, there was no absolute finality to the survey until it had received the **approval of the commissioner of the land office**, as well as that of the surveyor-general for California; and the only authoritative evidence of such approval was the **patent**. *Johnson v. Van Dyke*, 20 Cal. 225.

188. A survey made by the surveyor-general of the United States for California to establish the location of a confirmed grant, under the act of congress of 1860, is of no binding force until it has become final in one of the modes pointed out by the act. Until then it is only a **preliminary proceeding**, not binding either upon the government or the claimant.

Mahoney v. Van Winkle, 21 Cal. 552.

189. Where an inchoate grant was made by Mexico of a valley (giving its name), which valley was bounded by a range of hills, and the United States confirmed the grant, and in surveying the same fixed its boundary at the foot of the range of hills, leaving out their slope, and the grantees who were parties to the act of confirmation made no objection to this survey: *Held*, that the grantees and their privies were bound by this action of the government, and it was conclusive. *De Arguello v. Greer*, 26 Cal. 615.

190. The act of congress, approved June 2, 1862, entitled "an act for the survey of grants or claims of lands," does not make a survey, which has been approved by the surveyor-general, of a Spanish or Mexican grant of land, **prima facie evidence** of title. *McGarrahan v. Maxwell*, 28 Cal. 75.

191. The act of congress, approved June 2, 1862, entitled "an act for the survey of grants or claims of lands," did not repeal by implication the act of 1860, nor did it make any change in the law regulating the survey of land in California derived from the Spanish or Mexican governments, except in requiring the survey to be made on the application of the claimant, on his paying the **expense of survey**. *Id.*

192. A judgment of the supreme court of the United States affirming an order directing a survey of a Mexican grant to be made according to a survey and plat on file, makes the survey and plat referred to a part of the judgment by adoption.

Mahoney v. Van Winkle, 33 Cal. 448.

193. The doctrine of *Waterman v. Smith*, 13 Cal. 411, that in the case of an imperfect grant of a certain quantity of land within exterior limits containing a much larger quantity, the interest of the grantee attaches to no definite portion of the tract until such portion has been measured and segregated by official authority, and that the right to thus segregate belongs solely to the government and can not be exercised by the grantee, at least so as to bind the government; and of *Teschmacher v. Thompson*, 18 Cal. 12, that the possession of this right imposes on the government of the United States the duty of exercising it so as to protect the interest of the grantee; and that this duty or obligation is political in its character, and hence can be discharged at such times and upon such terms as the government may deem expedient, recognized and affirmed.

Estrada v. Murphy, 19 Cal. 248.

194. Under the Mexican law the segregation was effected by **delivery of juridical possession**, which could only be made after the approval of the concession by the departmental assembly, and was therefore often delayed for years, yet in California the grantee took possession at once upon the issuance of the grant, and his possession was respected both by the authorities of the government and adjoining proprietors.

Mahoney v. Van Winkle, 21 Cal. 552.

195. Where the calls of a deed do not identify the land with certainty, the mere fact that at the time of the delivery of the deed the grantee paid to the grantor the purchase money raises no presumption that the grantor segregated and placed him in the possession of a particular tract as the land conveyed. *Schenk v. Evoy*, 24 Cal. 104.

196. If, pending proceedings for confirmation of a Mexican grant of a specific quantity of land to be located within the exterior limits of a larger quantity, a survey is made of the quantity confirmed, and a plat thereof is filed with the court for information, and if after the confirmation the court sets aside a subsequent survey and orders a new survey

to be made in accordance with the first survey, and the new survey does not accord with the first, and is set aside by the **supreme court of the United States**, which court at the same time affirms the order directing the survey to be in accordance with the first, this judgment of the supreme court operates as a final location and segregation of the grant, without any further proceedings or survey.

Mahoney v. Van Winkle, 33 Cal. 448.

197. A judgment of a court of the United States directing a survey of a Mexican grant of land to be made in accordance with a survey and plat on file, is a final segregation and location of the grant. Id.

198. The confirmed survey of a confirmed Mexican grant of land has the same effect and validity as if a patent for the land surveyed had been issued by the United States.

Scale v. Ford, 29 Cal. 104.

See secs. 205, 232.

TITLE.

Validity of.

199. When a permission to occupy certain lands, for grazing purposes, was granted by the governor of California, under the crown of Spain, to a Californian, and after the death of the grantee or tenant, his heirs made application to the authorized officers of the Mexican government, the then sovereign power, for a cession of the same land, setting forth the loss of the original grant of possession, made to their ancestor; upon which a decree was made, by the Mexican governor, declaring them to be entitled thereto, and reciting that the governor had seen the original grant to the ancestor, under which decree a grant or deed was made to the heirs: *Held*, that the latter was a recognition of the title in the ancestor, and not an original grant to the heirs. Nieto v. Carpenter, 7 Cal. 527.

200. The transfer of the sovereignty of California from Mexico to the United States did not affect the right of the inhabitants to their land which they had acquired from Mexico or Spain before such transfer.

Ward v. Mulford, 32 Cal. 365.

201. Where, in ejectment on a patent from the United States, reciting that the patentee had presented his claim to the board of land commissioners, and that the claim was founded on a Mexican grant made to Pablo Gutierrez "in the summer of 1844, by Captain John A. Sutter, who, according to the records of the board, derived his authority to grant from Governor Micheltorena on the twenty-seventh day of December, 1844," etc., it was objected to the introduction of the patent in evidence that it rested on a grant from one who had no authority to grant: *Held*, that even conceding Sutter had no such authority, still, the tribunals estab-

lished by the United States government for the express purpose of ascertaining and determining the validity of grants claimed to have been issued by the Mexican government having passed upon this grant and pronounced it valid, its validity can not be questioned, either by the government or by individuals claiming under the government, either collaterally in ejectment, or directly in any other form of proceeding; that the validity of the grant has become the law of the case. Mott v. Smith, 16 Cal. 533.

202. A grantee of land in fee may deny that he received any estate by the conveyance. With the execution of the conveyance the transaction between the parties is closed. Thenceforth the grantee holds the property for himself, and is neither bound to surrender possession to his grantor, nor to maintain the validity of his title.

San Francisco v. Lawton, 18 Cal. 465.

203. Though mere trespassers on land within the calls of a patent are strangers to the proceedings of the former or present government, still they are strangers against whom the recitals of the patent are conclusive. They are strangers to the premises. To entitle themselves to any consideration they must show some title, or color and claim of title, and having in this way connected themselves with the premises, they would be strangers against whom the recitals could not operate, according as their title is derived from a paramount source, or is anterior in time from the same grantor, or has been the foundation of an adverse possession.

Stark v. Barrett, 15 Cal. 361.

204. Where the heirs having made partition, and under the decree the grants were made severally to the heirs, a grant made to the widow of one of the heirs (they having children) in accordance with the decree, injured to the heirs of her deceased husband by their marriage, and a sale by her of the land was void. Nieto v. Carpenter, 7 Cal. 527.

Effect of Judgment on.

205. The proceedings had under the act of congress of June 14, 1860, after the return of a survey and plat of a Mexican grant into the district court, are strictly judicial in their character, and the decree rendered by the court upon the survey is *res adjudicata*, and final and conclusive upon the rights of all those who become parties to it.

Treadway v. Semple, 28 Cal. 652.

206. The judgment of the board of commissioners appointed by the United States to inquire into the validity of titles acquired from Mexico or of the courts of the United States on appeal, affirming a title derived from Mexico, when final, is conclusive upon the government and upon all persons claiming under the government by title subsequent. Ward v. Mulford, 32 Cal. 365.

207. A judgment of the board of land commissioners, or of the district court of the United States, that the claim of the petitioner to a Mexican or Spanish grant is valid, and that the same be confirmed, vests in the petitioner the legal title, notwithstanding he petitioned as administrator with the will annexed of the estate of the grantee, by which will the land was devised to several different persons, himself among the number, and stated the contents of the will in his petition, and prayed that the land might be confirmed to the parties entitled thereto, and notwithstanding his appointment as administrator was void.

O'Connell v. Dougherty, 32 Cal. 458.

208. In such case the devisees under the will, other than the petitioner, have an equitable title, and the confirmee holds the legal title as trustee for the benefit of the devisees.

Id.

Inchoate Titles.

209. Where the titles to lands in California were inchoate and imperfect at the date of the treaty, it was necessary to submit them to the board of commissioners for confirmation within the time prescribed by the act of congress of March 3, 1851; otherwise they became forfeited, and from that time such lands were deemed, held, and considered as part of the public domain of the United States.

Minturn v. Brower, 21 Cal. 644.

210. Such grant (to Sutter) passed a present and immediate interest to the grantee in the quantity of land specifically designated—eleven leagues—to be surveyed and laid off within the exterior limits of the general tract designated in the grant, by the officers of the government.

Cornwall v. Culver, 16 Cal. 423.

211. So long as a grant of land made by Mexico in California was imperfect or inchoate, the right to determine the validity of the grant and give it precise location remained in the Mexican government until California was transferred to the United States, and with that event this right passed to the United States, and when this right is exercised by the United States the grantee is bound by its decision, and can not demand more or other land than that allotted to him.

De Arguello v. Greer, 26 Cal. 615.

212. If a grant of land made by Mexico in California before its cession to the United States required as one of its conditions that the land should be measured by the proper officer, and **juridical possession** should then be given to the grantee, until the measurement and delivery of possession, the legal title remained in the Mexican nation, and the grantee acquired only an imperfect or inchoate title.

Id.

213. When a survey or juridical pos-

session by competent authority was requisite in order to attach a Mexican grant of land to any specific tract of land, the grant was inchoate or imperfect.

Steinbach v. Moore, 30 Cal. 498.

214. The claimant of a Mexican grant, whose title is not perfect, and for that reason requires confirmation, does not acquire a perfect title except by means of a patent, or a survey confirmed in accordance with the act of June 14, 1860.

Chiple v. Farris, 45 Cal. 527.

215. An approval of a Mexican grant of land by the departmental assembly, and the giving of juridical possession, are necessary to create a definite grant.

Miller v. Dale, 44 Cal. 562.

216. Where there is nothing in the grant, nor in any of the documents to which it refers, by which to fix the lines of one of the sides of the tract intended to be granted, or to determine the particular quantity, the concession does not confer upon the grantee a perfect title to any specific parcel of land. The cases of Minturn v. Brower, 24 Cal. 644, and United States v. Peralta, 19 How. 340, commented on and explained.

Banks v. Moreno, 39 Cal. 233.

217. The question reserved, as to whether the governor of California, when it was a part of Mexico, had the power, after a grant of land had been made to a party in due form of law, afterwards to annul and vacate it, on the ground that it was fraudulently obtained, and grant the land to another. Id.

218. A license to occupy land temporarily, called a provisional grant, granted by the governor of California before the acquisition of California by the United States, conveyed no title, legal or equitable, to the land, and was revocable at pleasure. Id.

219. Certain acts and orders of the governor of California, when it was a part of Mexico, made in relation to a former grant of land, reviewed and discussed, and held not to be a revocation of such former grant, and not to amount to a grant, themselves, but to be only a license to occupy. Id.

220. If an order made by the Mexican government for license to occupy land be treated as a grant of land, it does not make a perfect grant, but only an inchoate title.

Miller v. Dale, 44 Cal. 562.

221. If a petition made to the Mexican government for a concession of land asks for a certain number of leagues, more or less, within boundaries which are indefinite, the concession gives only an inchoate title. Id.

222. It was the practice of the Mexican government to consider a long possession, held under such provisional grant or license, as entitling the occupant to some sort of priority of right to purchase when the land came finally to be disposed of; but this pri-

ority did not rest on any legal obligation which the government was under to such occupant. *Mott v. Reyes*, 45 Cal. 379.

223. Two parties were contesting before the governor of California, while it was a part of Mexico, the validity of their respective grants, to the same tract of land, being grants which each had of a specific quantity within the exterior limits of a larger quantity; in the mean time the governor granted to one the **sobrante** within such exterior limits: *Hell*, that this grant of the **sobrante** did not impair the rights of the other, whose grant was the better one. *Id.*

224. The title to a quantity of land granted by Mexico, with **undefined boundaries**, to be located within designated exterior boundaries, is imperfect in its character, and further action on the part of the government of the United States is necessary to attach it to a particular tract.

Gardiner v. Miller, 47 Cal. 570.

See secs. 225-237.

Perfect Titles.

225. The title to the land passed to **Sutter** by his grant; an estate vested in him, subject to be defeated by the action of the Mexican government by direct rejection, or, in case of non-compliance with its conditions, by proceedings to that end. But, until one or the other of these proceedings had taken place, the title continued in Sutter unimpaired. Neither of these proceedings were had under the Mexican government, and, at the date of the cession of California to the United States, his title remained in full force. *Ferris v. Coover*, 10 Cal. 589.

226. Under the former government, Sutter was entitled to the possession of the land under his grant. To avoid a denouncement and a possible forfeiture of his estate, he was required to occupy and cultivate the land, and its possession was his right, which could have been enforced. It was a right to the use and enjoyment of property, and as such was guaranteed by the stipulations of the treaty. It accompanied his grant, and, like any other right of property, may be enforced in our courts. The action of ejectment will lie directly upon the grant to recover the land, or any portion thereof, embraced within its boundaries. *Id.*

227. The grant from Alvarado to Sutter, of June, 1841, passed to Sutter a title to the land it embraces, subject to be defeated by the subsequent action of the supreme government and departmental assembly, and carried with it a right to the possession, use, and enjoyment of the land, which right can be asserted in our courts.

Cornwall v. Culver, 16 Cal. 423.

228. A grant by a **Mexican officer duly authorized**, and made in accordance with the Mexican laws applicable to California,

and before the acquisition of the country by the Americans, is a title protected by the law of nations, as well as by the treaty of Queretaro, and can not be disturbed.

Reynolds v. West, 1 Cal. 322.

229. Even though the title of a grantee, in a particular case, to a specifically described or designated tract be perfect, without further action by our government, yet if such action be had, and the grantee accepts the land described in his patent as satisfying his claim, no other persons can object that a portion of the land thus taken is without the boundaries of the grant, unless their prior rights are interfered with. This is a matter between the government and the grantee, with which **strangers** have no concern.

Moore v. Wilkinson, 13 Cal. 478.

230. A final decree of the United States courts, confirming a Mexican grant, establishes conclusively the legal title of the grantee to the premises at the date of the presentation of his petition to the land commission. And where the confinee claims in his petition as successor in interest of the original grantee of the Mexican government by virtue of mesne conveyances from him, the decree is equally conclusive of the validity of his derivative title as to that of the original grantee.

Clark v. Lockwood, 21 Cal. 220.

231. The titles of such persons to their lands, which were perfect at the time of the acquisition of California by the United States, remained as valid under the new government as they were under the old; and without having been presented to the board of commissioners for confirmation, may be asserted and maintained in the courts of the country. *Id.*

232. The confirmed survey of a confirmed Mexican grant of land gives to the confinee a title which can not be defeated by an older Mexican grant of a specific quantity within larger boundaries, embracing both, the survey of which has not been finally confirmed.

Seale v. Ford, 29 Cal. 104.

233. A title to land derived by grant from the governor of California before its cession to the United States was not a perfect title so as to excuse its presentation to the board of land commissioners, while any further act was required on the part of the Mexican government, or that of the United States as its successor, in order to invest the claimant with the entire legal title to and absolute possession of the specific lands granted.

Steinbach v. Moore, 30 Cal. 498.

234. A grant of land of "four hundred varas" by the Mexican government is understood to mean four hundred varas square, unless the description is controlled by other parts of the grant requiring a different form for the land granted. *Id.*

235. The duty of the government attaching at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. The patent, therefore, to the plaintiffs, considered as issued upon a grant of that character, is evidence that the grantees possessed at the date of the cession a vested interest in the quantity of land mentioned in the grant—a right to so much land to be afterwards laid off by official authority; that the premises in controversy were then subject to appropriation in satisfaction of the quantity granted; and that the government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees and attached it to the tract as surveyed.

Teschmacher v. Thompson, 18 Cal. 11.

236. To constitute a complete and perfect grant to a specific parcel of land it must, in some method, appear on the face of the instrument or by the aid of its descriptive portions, not only that a specific parcel was intended to be granted, but it must also be so described that the particular tract intended to be granted can be identified with reasonable certainty.

Banks v. Moreno, 39 Cal. 233.

237. A grant of land by Mexico did not convey a perfect title, unless there was a segregation and a judicial delivery of the possession of the quantity of land granted.

Schmitt v. Giovanari, 43 Cal. 617.

See sec. 134.

Actions Involving Mexican Title.

238. The holder or assignee of a grant issued by a California governor without approval by the departmental assembly or judicial possession, can not, in an ordinary action of ejectment, recover against the confirmer of the federal government having an approved survey.

Estrada v. Murphy, 19 Cal. 248.

239. If pueblo lands are confirmed to a town or city, as the successor of a Mexican pueblo, and the decree excludes from the confirmation certain ranches granted by the Mexican government within the exterior boundaries of the pueblo, the confirmer can not maintain ejectment as against those claiming under the excepted grants within the pueblo, until they have been finally confirmed and located by an approved survey. The action can not be maintained while an appeal to the supreme court is pending from an order of the district court of the United States confirming the survey of the excepted ranches. *San Jose v. Uridias*, 37 Cal. 339.

240. One who, without the permission of the grantee, takes possession of land within the boundaries of a Mexican grant, whether perfect or inchoate, before the final survey is

made by the United States, is guilty of an ouster, although when he entered into possession he was informed by the grantee that the possession so taken was not within the limits of the grant.

Love v. Shartzer, 31 Cal. 437.

241. In an action of ejectment, under a Mexican grant, this court is bound to regard the decisions of the United States supreme court, establishing the rule that a conditional grant from Mexico conveys a good title, without performance of the condition sufficient to maintain ejectment, and admissible to qualify the plaintiff's actual possession. The land must belong either to the United States or the claimants under the grant, the question as to the right of this state not being raised; and where the highest federal tribunal, having full authority to decide these questions, has voluntarily abandoned the claim of title of the government, it would appear strange that the courts of this state should question the rule so established. Certainly a mere intruder can not gainsay it.

Gunn v. Bates, 6 Cal. 263.

242. For land within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant, although no official survey and measurement has yet been made by the officers of the government, and although it may appear, when such survey and measurement are made, that there exists, within the exterior limits of the general tract, a quantity exceeding the eleven leagues.

Cornwall v. Culver, 16 Cal. 423.

243. *Cornwall v. Culver*, 16 Cal. 423, holding that for land within the boundaries of the general tract granted to Sutter, situated in the county of Sacramento, the circumstances of Sutter's possession and control being shown, ejectment will lie directly upon the grant, although no official survey and measurement have yet been made by the officers of the government, and although it may appear when such survey and measurement are made, that there exists, within the limits of the general tract, a quantity exceeding eleven leagues, affirmed.

Riley v. Heisch, 18 Cal. 198.

244. The grant to Sutter gave of itself a right of possession; and, therefore, whether the title it created be legal or equitable, it will support ejectment. *Id.*

245. If the confirmation of a Mexican grant of land is made to the children of the grantee, they have the legal title, and they and their assigns will prevail in ejectment against one claiming title under a sale made by the administrator of the grantee, when no equitable defense is set up.

Hartley v. Brown, 46 Cal. 202.

246. The title which passes to the confirmer and patentee of a Mexican grant, when such confirmer and patentee is not the

grantee, does not inure to the benefit of a purchaser at a sale made by an administrator of the grantee, so as to vest in him the legal title. *Id.*

247. In ejectment, the legal title must prevail where there is no valid equitable defense set up. *Id.*

248. A defendant in ejectment claiming under the government of the United States as a mere pre-emptioner, can not show that the land described in the grant from the Mexican government and petition to the land commissioners is different from that embraced in the patent.

Yount v. Howell, 14 Cal. 465.

249. Where the plaintiff in ejectment derives title from a United States patent, issued upon confirmation of a Spanish or Mexican grant, the defendant will not be permitted to introduce proof of the invalidity of the grant for the purpose of impeaching the patent. *Pioche v. Paul*, 22 Cal. 105.

250. Where plaintiff in ejectment relies on a Mexican grant, confirmation, and patent, and there is no dispute as to the land being within the limits of the patent, a title arising subsequent to the grant upon which the patent issued constitutes no defense, and the jury have only to pass upon the question of damages so far as the legal issues in the case are concerned.

Weber v. Marshall, 19 Cal. 447.

251. A party who claims the benefit of the act of April 2, 1866, staying proceedings in actions for the recovery of land embraced within the exterior limits of unsurveyed Mexican or Spanish grants, must show that he was a bona fide settler upon the demanded premises, dwelling thereon.

San Jose v. Shaw, 45 Cal. 178.

Possession under.

252. The limitation of quantity was a controlling condition of the grants in question, and the delivery of juridical possession was an essential ceremony, under the government of Mexico, to perfect the title of the grantees to the specific quantity designated.

Waterman v. Smith, 13 Cal. 373.

253. If the grant to Sutter contains more than eleven leagues of land, until the surplus is legally determined by a survey and measurement by the officers of the government, no individual can complain. The government alone can determine and set apart the surplus; and, until its action in the matter, the right of the grantee remains good to the possession of the entire tract within the designated boundaries.

Ferris v. Coover, 10 Cal. 589.

254. Whether the premises in controversy in this suit are included within the grant is a question of fact, to be submitted to the jury. *Id.*

255. The evidence in this case, showing that the land within Sacramento county was in possession of Sutter, by permission of the former government, for years previous to the cession to the United States; that it was subjected by him to such uses as he desired; that he had absolute control over it, without disturbance by any one, exercising the rights of a proprietor, to the knowledge of the government, and with its recognition of their existence; that he asserted ownership of the land, under the grant from Alvarado, and that for years after the conquest and treaty his claim and possession were unquestioned; his title, whether it be regarded as a legal or equitable one, is sufficient, under these circumstances, to enable him, and those holding under him, to recover or maintain possession, in the courts of the state, at least until the United States intervene, and determine, through the appropriate departments, that his claim, under his grant, shall be satisfied by land elsewhere selected.

Cornwall v. Culver, 16 Cal. 423.

256. A grant by the Mexican or Spanish government of a specific quantity of land within the area of a larger tract gave to the grantee such an interest in the entire tract as entitled him to the right to its exclusive possession, as against all persons except those having an interest in or right to the possession of the same, or some part of it, under the government, until such time as the government segregated the quantity granted from the general tract.

Thornton v. Mahoney, 24 Cal. 569.

257. Until the government of the United States restricts the possession of those claiming under a Mexican or Spanish grant, by a segregation and location of the quantity granted, the grantee or his successor in interest is entitled as against third persons without title to the possession of all of the land within the exterior boundaries described in the grant. *Id.*

258. If a grant has been confirmed and a survey of the quantity confirmed has been made by which it has been located within the exterior boundaries of the larger tract mentioned in the grant, and an appeal has been taken from an order confirming the survey, the grantee or his assignee is entitled to the possession of all the land within the exterior boundaries of the grant until the final determination of the appeal. *Id.*

259. A party whose Mexican grant to a specific quantity of land within the exterior boundaries of a larger tract has been confirmed by the United States district court has a right to the possession of all the land within the exterior boundaries of the larger tract, until the government of the United States shall segregate the part confirmed by a final and approved survey.

Mott v. Reyes, 45 Cal. 379.

260. Occupation and cultivation can have no greater effect than a private survey. They were without binding effect upon the Mexican government, and are equally inoperative under the new.

Waterman v. Smith, 13 Cal. 373.

261. The actual possession of a small portion of a large tract of land, with a claim of title to the whole, will not enable a party to maintain a possessory action under Mexican law, where it appears on the face of the papers, by virtue of which he claims, that his title is a nullity.

Suñol v. Hepburn, 1 Cal. 254.

Third Persons, Who are, Rights of.

262. The "third persons" against whose interests the action of the government and patent in this case are not conclusive, under the fifteenth section of the act of March 3, 1851, are those whose title accrued before the duty to the government and its rights under the treaty attached.

Teschmacher v. Thompson, 18 Cal. 11.

263. In the present case the United States, upon the cession of the country, took the premises in controversy charged with the equitable claim of the Mexican grantees, and have since perfected the claim into a perfect title. But for such equitable claim the United States would have held the title in trust for the new state, but the claim existing, the state and all other parties hold in subordination to the action of the government respecting it. The rights and power of the government to protect and thus perfect the equitable claim were superior to any subsequently acquired rights or claims of the state or of individuals. Subsequent events, not originating with the grantees, can have no effect upon the validity of their claim, or the duty of the government respecting it. *Id.*

264. The "third persons" within the meaning of the fifteenth section of the act of congress, who can controvert the location of a grant, upon which a patent has issued, are those whose title to the premises patented not only accrued before the duty of the government and its rights under the treaty attached, but whose title to such premises was at that date such as to enable them to resist successfully any subsequent action of the government affecting it.

Leese v. Clark, 18 Cal. 635.

265. The term "third persons," used in the fifteenth section of the act of congress, does not include intruders; nor pre-emptioners claiming under the laws of congress; nor locators of school warrants; nor any other persons whose interests have been acquired since the acquisition of the country, when obligation to protect existing rights of property devolved upon the United States. They refer, not to all persons other than the United

States and the claimants, but to those who hold independent titles arising previous to the acquisition of the country. The latter class are bound by the decree and patent, for they do not hold in subordination to the action of the government, nor by any title subsequent, but by title arising anterior to the conquest. *Id.*

266. Persons having an inchoate or imperfect grant of land made by Mexico in California before its cession to the United States are not "third persons" within the meaning of the fifteenth section of the act of congress passed March, 1851, entitled "an act to ascertain and settle private land claims in the state of California."

De Arguello v. Greer, 26 Cal. 615.

267. "Third persons," mentioned in said act, are those who have an interest in the land which would enable them to resist successfully any action of the government respecting it. *Id.*

268. Third persons, within the meaning of the act of congress of 1851, against whose interest the final confirmation and patent of a Mexican grant are not conclusive, are those, and those only, who have such claim of title that they could, under the stipulations of the treaty of Guadalupe Hidalgo, and the law of nations, withstand the government of the United States, if it were claiming the land for itself. One claiming under an inchoate Mexican grant which has been confirmed, and the final survey of which has been approved under the act of July 1, 1864, is not such third person. *Miller v. Dale*, 44 Cal. 562.

Conflict between Two Grants.

269. If the plaintiff has title under a confirmed survey of a confirmed Mexican grant, and the defendant under an unconfirmed survey of a confirmed grant, which he claims to be a perfect grant, the burden of showing a perfect grant rests on the defendant.

Seale v. Ford, 29 Cal. 104.

Estoppel.

270. The grantee of land from the Mexican government is not estopped from recovering possession of the same according to the boundaries finally surveyed by the United States from the fact that such grantee, before such survey, told the occupant that the land in controversy was public land, and not within the limits of his grant, and that the occupant, after being thus told, put valuable improvements on the land.

Love v. Shartzer, 31 Cal. 487.

271. Where the dividing line between the two grants was fixed by an award between the parties, the award was conclusive until the action of the government. But the government having issued a patent to Ritchie of a portion of the land included in the gen-

eral tract designated in the grant to Armijo, it does not lie in the mouth of the latter to complain, there still remaining of such general tract more than sufficient to satisfy the specific quantity granted to him. If the patentee accepted the land described in his patent as answering his claim, other persons can not complain, even if a portion of the land thus taken was without the boundaries of his original claim.

Waterman v. Smith, 13 Cal. 373.

272. If two Mexican grants of land, made to different persons, are confirmed, and surveyed so as to overlap each other in part, and the owner of one becomes a party to the proceedings relating to the confirmation and survey of the other, he is bound by the proceedings, and estopped from afterwards denying that this grant was properly located. Semple v. Wright, 32 Cal. 659.

273. The government having, by a solemn decree, declared that the original title was in the ancestor, is estopped from denying such admission or regranteeing the premises to another.

Nieto v. Carpenter, 7 Cal. 527.

274. If the claimant of a Mexican grant of land which gives a perfect title presents the same to the board of land commissioners for confirmation under the act of congress of 1851, and it is confirmed and surveyed, and the survey is approved and a patent issued, but by the survey a portion of the land included within the juridical measurement of the Mexican authorities is excluded, the claimant is estopped from afterwards asserting title to the land not included in the survey made by the United States.

Cassidy v. Carr, 48 Cal. 339.

275. The claimant of an inchoate Mexican grant, who has commenced proceedings to have the grant confirmed by the United States courts, has not the same title, within the meaning of the above rule, that he has after the grant has been confirmed, surveyed, and patented, and is not therefore estopped, after the patent issues, by a judgment in ejectment rendered against him before the confirmation, survey, and issuance of the patent. Armesti v. Castro, 49 Cal. 325.

276. Although the state courts may adjudicate rights claimed under an inchoate Mexican grant, yet if such adjudication be adverse to the claimant the judgment will not conclude him from asserting his rights in a new action, if, when his claim is confirmed and patented, the land formerly in litigation is within the calls of his patent. Id.

Recitals in.

277. The recitals in the grant must be governed by those of the decree in conformity to which it was issued. Nor is this conclusion altered by the fact that the grant to the heirs contained the usual conditions in-

serted in all original grants from the Mexican government.

Nieto v. Carpenter, 7 Cal. 527.

278. The recital in the grant that the grantee solicited the land for his personal benefit and that of his family does not control the operative words of the grant.

Scott v. Ward, 13 Cal. 458.

279. A map, referred to in a grant for the purpose of identifying the land, is to be regarded as a part of the grant itself, as much so as if incorporated into it.

Ferris v. Coover, 10 Cal. 589.

Evidence Relating to.

280. If, taking the grant and map together, any portion of the description must be rejected, reference will be had to the circumstances under which the grant was made, and the intentions of the parties, and **parol evidence** is admissible in such case for that purpose. That portion will be rejected, and that construction adopted, which will give effect to the **intentions of the parties**.

Ferris v. Coover, 10 Cal. 589.

281. In ejectment for land within Sutter's Fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition "named New Helvetia" be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing "Sutter's Fort," and the inclosures and settlements around it, was known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his inclosures at the fort; the evidence would be *prima facie*, if not conclusive proof, that the **premises were covered by the grant**.

Morton v. Folger, 15 Cal. 275.

282. In an action of ejectment the plaintiff showed that the premises in controversy were part of a tract called Laguna de la Merced, which, in 1835, was granted by the Mexican government to one Galindo upon a petition representing the tract to be a league in length and a half of a league in width, more or less; that the grant reserved to the nation any surplus that might be found above this quantity; that Galindo and his successors in interest had possessed the entire tract, which embraced a surplus, until 1853; that they had obtained from the United States tribunals a decree confirming to

them the land, to the extent of the quantity specified, to be selected within the boundaries of the general tract; that no official segregation had been made of this quantity by either government, and that plaintiff was a purchaser from the confirmees. The defendants claimed that their possessions, though within the tract, were outside of a selection which they alleged had been made by plaintiff's grantors in such manner that they and he were estopped from claiming the balance. To show this, defendants offered to prove that previous to June, 1853, the lands occupied by them had been "townshipped and sectionized" like other public lands of the United States; that in September, 1853, the grantors of the plaintiff caused a survey to be made of the specific quantity designated in the grant; that the claimants under the grant assented to such survey when made; that afterwards some of the grantors sold, mortgaged, and leased portions of the land lying within the survey, and to the defendants and others publicly disclaimed having any title to or interest in the residue of the general tract; that acting under such disclaimers and acts of some of the said grantors, they made their locations; and that they were not within the lines of the said survey. The court, on objection of plaintiff, excluded this testimony, and on appeal: *Held*, that the evidence offered did not tend to prove an estoppel or a selection binding on the plaintiff, and was therefore properly excluded, three of the claimants (who were seven in number) being at the time infants, and two of them being under the disability of coverture.

Mahoney v. Van Winkle, 21 Cal. 552.

283. In ejectment on a patent, defendant introduced a witness who stated that he knew where the defendant resided; that he knew where Dry creek was, and where it entered Bear river; that he knew no other Dry creek than the one named, and did not think there was any other creek by that name between the foot-hills and the mouth of Bear river. He was then requested to state, if he knew, whether the lands occupied by the defendant for the last two years or more, or any part thereof, lay below Dry creek and Bear river, the counsel declaring the object of the inquiry to be to show that the lands were not within the calls of the patent or grant. To this inquiry objection was made and sustained, on the ground that it did not relate to the starting point or monument named in the patent; the court offering at the time to allow the witness to be asked whether the lands were situated below the oak tree marked as the commencement or first monument of the patent: *Held*, that the court below did not err in ruling out the testimony, because the question put to the witness did not, as it should have done, limit the inquiry to that Dry

creek, at the junction of which the marked oak tree stood; it appearing from a map, incorporated into the patent, that there were two streams emptying into Bear river, within the calls of the patent, each of which was termed Dry creek, and that below one of them, and above the other, the premises in controversy were situated; and it further appearing that the description in the patent commenced at an oak tree marked with an X and certain figures and letters, at the junction of Dry creek and Bear river, and the map designated the position of the tree, the starting point, as at the mouth of the lower Dry creek. *Mott v. Smith*, 16 Cal. 533.

284. In ejectment for land in Sacramento county, claimed under Sutter's grant by Micheltorena to Leidesdorff, in October, 1841, it is competent evidence to show that the tract of country now embraced by that county is included within the boundaries of the grant to Sutter.

Cornwall v. Culver, 16 Cal. 423.

285. The judiciary must determine whether the prior rights of third persons have been interfered with by the survey and patent, but it can not correct the one nor the other. The survey and patent are conclusive in actions of ejectment.

Moore v. Wilkinson, 13 Cal. 478.

286. The decrees of the board of land commissioners, and of the district court, are not indispensable to a recovery in ejectment on a grant, but are admissible, and conclusive against the government, and against those holding by its license or permission.

Id.; *Gregory v. McPherson*, 13 Cal. 562.

287. In an action of ejectment, where both parties claim under confirmed Mexican grants, evidence that the original grantor of one of the parties had obtained grants from the Mexican government, exceeding eleven leagues in extent, prior to the grant under which the party claims, is inadmissible.

Yates v. Smith, 40 Cal. 662.

288. When the plaintiffs, in ejectment, rely for title on a Spanish or Mexican grant, and prove a confirmation of the same under the act of 1851, for the settlement of private land claims in California, and it appears that a patent has been issued for the same, the plaintiffs must, if requested, produce the patent in evidence, or their testimony will be stricken out. *Chiple v. Farris*, 45 Cal. 527.

289. When the survey made by the surveyor-general of the United States, on an imperfect confirmed Mexican grant of land, becomes final, such survey is conclusive evidence in an action of ejectment against one claiming under the grant, of the boundaries of the tract confirmed.

Gallagher v. Riley, 49 Cal. 473.

290. The Mexican government granted a tract of land to P., who sold the same to S. and others, except a half league in the south-

east corner. S. and his co-tenants, in their petition for the confirmation of the grant, stated that the half league belonged to H., and after a confirmation the patent issued to S. and his co-grantees and H. in such form as to make them tenants in common of the legal title. The half league, by consent of S. and his co-grantees, was afterwards set off to H. in partition. P. then sold it, and S. brought an action to recover the land against his grantees. H. was not a party to the suit, nor to any of the antecedent proceedings for confirmation, nor to the partition, nor was any conveyance from P. to H. offered in evidence: *Held*, that the **statement in the petition of S. and others that H. owned the half league, and the insertion of his name in the patent, and their acts setting it off to him in partition, were not evidence as against P. or those claiming under him that P. ever conveyed to H., or that H. ever owned the land, and that the defendants so far as appeared had acquired P.'s title.** *Salmon v. Symonds*, 30 Cal. 301.

* 291. If the plaintiff in ejectment relies on a **confirmed Mexican grant** as his source of title, he must prove that the demanded premises are included within the decree of confirmation.

Brown v. Brackett, 45 Cal. 167.

ADMISSIBILITY OF COPIES.

292. Certified copies of grants made by the surveyor-general of the United States are inadmissible in evidence, unless the absence of the originals is attested for.

Hensley v. Tarpey, 7 Cal. 288.

293. An affidavit, showing that the surveyor-general has adopted a rule, refusing to allow the originals to be taken from the files, is a sufficient predicate. *Id.*

294. A certificate of the surveyor-general, that the paper "is a true and accurate copy of a document" on file in his office, is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant.

Natoma Co. v. Clarkin, 14 Cal. 544.

295. A duly certified copy of a Mexican grant from the United States surveyor-general's office, is admissible in evidence against the objection that the absence of the original is not accounted for. But it is admissible only when the original itself would be. The statute (acts of 1857, p. 317) simply removes the objection to the copy as **secondary evidence.** *Id.*

296. In ejectment, plaintiff, relying upon a Mexican grant and a decree of the United States board of land commissioners, offered in evidence a copy of the decree taken from the office of the United States surveyor-general, with a certificate by the surveyor-general that "the foregoing is a

correct copy of the decree of confirmation made by said board of commissioners in the case therein mentioned, together with the indorsements thereon, as the same is on file in my office;" defendant objecting that the copy was not properly certified: *Held*, that the **certificate complies sufficiently with the statute, the terms of which need not be literally pursued.**

Young v. Emerson, 18 Cal. 416.

297. A copy of a **Mexican grant**, taken from the United States surveyor-general's office, is not admissible in evidence without accounting for for the **non-production of the original grant**, where the party offering the copy does not rely upon a certified copy of the grant, under the act of 1857, but upon **proof aliunde** that the copy was correct. *Soto v. Kroder*, 19 Cal. 87.

298. Where reliance is placed, not on the production of a certified copy of the grant under the statute of 1857, but on **proof aliunde** of the copy; and where the original, as a document in the custody of a public officer, can not be taken from his office, proof of that fact must be made as preliminary to the introduction of the copy. *Id.*

299. Under the act of 1857, a copy of a Mexican grant, certified by the United States surveyor-general to be a true and accurate copy of the grant on file in his office, is admissible in evidence "with the like effect as the original," without **proof that the original could not be produced.** *Id.*

300. Such certified copies are admissible in evidence whenever the originals, if produced, would be admissible; the object of the statute being to remove objections to the copies, on the ground that they are secondary evidence. *Id.*

301. Where it is proven that the **signatures of the governor and secretary of the department of California to a grant, at the time of its date, are genuine, then a copy duly certified under the act of 1857 is admissible in evidence.** *Id.*

See **LAND.**

302. When a **bill of sale** of a lot of land contains no description of the land sold, but is written on the back of a copy of the grant of the lot, made by an alcalde, while California was a part of Mexico, and refers to this copy for a description of the lot, the copy may be received in evidence for the purpose of **identifying the lot sold**, and such copy constitutes a part of the bill of sale. *Sill v. Reese*, 47 Cal. 294.

303. Since no registry law existed in California under the Mexican government, and it was necessary for each proprietor to keep within his own control his muniments of title, the **presumption** is that when a person sold to another an undivided half of a lot granted by an alcalde, and indorsed a con-

veyance of the same on the grant, referring to the grant for a description, that he kept the original, and delivered to the person to whom he sold a copy of the grant and a duplicate of the conveyance indorsed thereon; and under such presumption, such copy and duplicate conveyance indorsed thereon are admissible in evidence. *Id.*

304. A translation of the *expediente* of a Mexican grant of land, unaccompanied by the original, or a certified copy of the same, is not admissible in evidence.

Bixby v. Bent, 51 Cal. 590.

305. It is no objection to the admission of a Mexican grant in evidence after its final confirmation that there is no evidence that the grantee, previous to the issuance of the grant, ever presented a petition to the governor expressing his name, country, and religion, and the number of his family, or that the grant ever received the approval of the departmental assembly, or that the grant, or any proceedings in reference to it, were ever reported to the supreme government of Mexico. *Soto v. Kroder*, 19 Cal. 87.

306. The United States v. Cambuston, 20 How. 59, does not so hold; and if it does, still the objection that the grantee never presented the petition would be available only against the confirmation of the grant. After such confirmation has become final, it is too late to press the objection. *Id.*

307. A survey of a confirmed Mexican or Spanish grant of land, which has been approved by the surveyor-general, without the publication of the notice required by the act of 1860, is of no effect as evidence.

McGarrahan v. Maxwell, 28 Cal. 75.

ALCALDE GRANTS.

Authority of Alcalde.

308. Under the laws of Mexico and the decrees of the departmental assembly of California, the *ayuntamiento* and the *alcaldes* had power to grant limited portions of the municipal lands of the pueblo. The American *alcaldes*, appointed after the conquest, had the same authority, as the municipal law remained unchanged until 1850.

Welch v. Sullivan, 8 Cal. 163.

309. The authority to grant such lands was vested in the *ayuntamiento*, and in the *alcaldes* or other officers who at the time represented it, or had succeeded to its "powers and obligations."

Hart v. Burnett, 15 Cal. 530.

310. *Alcaldes* in California had all the powers and jurisdiction of judges of first instance in districts where there were no judges of first instance.

Panaud v. Jones, 1 Cal. 488.

311. All grants made by the *alcalde* from the beginning of 1833, to near the end

of 1839, were made by the authority of the *ayuntamiento*. *Cohas v. Raisin*, 3 Cal. 443.

312. The grants made in 1844 by *alcaldes* were made by virtue of their office, as constituting the municipal government of this pueblo, under Governor Micheltorena's proclamation of November 4, 1842. *Id.*

313. A grant of land made by a Mexican *alcalde* before the war will be presumed to have been made in the course of his ordinary and accustomed duties, and within the scope of his legitimate authority; and the burden of proof lies on him who controverts the validity of such a grant, to show that it is not made by a competent officer, or in the forms prescribed by law.

Reynolds v. West, 1 Cal. 322.

314. A grant by an *alcalde* of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city, in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such *alcalde*, and the lot granted will be presumed to be within the limits of the pueblo.

Payne v. Treadwell, 16 Cal. 220.

315. The powers and authority which had been conferred by law upon municipal officers of the pueblo to grant pueblo lands were not suspended, *ipso facto*, by the war with Mexico, or by the conquest, and the fact that such officers, during the military occupation, and after the complete conquest and cession, were Americans, or held their office under American authority, did not change the powers and obligations which, by the existing laws of the country, belonged to such municipal officers. And the same presumptions attach to their grants of lots, whether made before or after the conquest and cession. *Id.*

316. A grant of a lot in San Francisco, made by an *alcalde*, whether a Mexican, or of any other nation, raises the presumption that the *alcalde* was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the pueblo.

Cohas v. Raisin, 3 Cal. 443.

317. The statement of an *alcalde's* official character, in the commencement of a grant signed by him, is sufficient to show that he acted in his official capacity, without a *descriptio officii* appended to his signature. *Downer v. Smith*, 24 Cal. 114.

318. An *alcalde* in San Francisco had, in 1849, authority as such to make grants of the lands of that pueblo, and the same presumptions in regard to the regularity and effect of his proceedings attach to him as to other officers. *White v. Moses*, 21 Cal. 34.

319. It is too late to question the authority of an *alcalde* elected in 1846. If in-

valid, his acts, as a **de facto officer**, must be held good by this court.

Cohas v. Raisin, 3 Cal. 443.

320. A grant of a fifty-vara lot, at the Mission Dolores, made by a Mexican alcalde in 1812, where the grantee took possession, inclosed the lot, and built a house thereon, is a title under which a party may recover possession as against one who claims under a lease executed by the priest of the Mission in 1849. It seems that the **priest** had no **authority to lease lands** appertaining to the Mission after the cession of California to the United States, and that a title thus derived is invalid.

Brown v. O'Connor, 1 Cal. 419.

321. An alcalde of the **pueblo of San Francisco**, after the conquest and before the incorporation of the city of San Francisco and the adoption of the constitution of the state, could make a valid grant of pueblo lands, as such officers had been, before the conquest, accustomed to do: *Held*, accordingly, that such a grant, made in the usual form, and with customary formalities, was valid.

Scott v. Dyer, 54 Cal. 430.

322. Cases commented upon: *Cohas v. Raisin*, 3 Cal. 443; *Dewey v. Lambier*, 7 Id. 347; *White v. Moses*, 21 Id. 34, and *Broad v. Broad*, 40 Id. 496, affirmed; and *Alexander v. Roulet*, 13 Wall. 386, distinguished.

Id.

323. *Held*, in view of the stipulation in this case, that certain questions only were involved—that other questions could not be considered.

Id.

324. Such a grant operated to deprive the pueblo and its successor, the city of San Francisco, of the **right to open streets** through the land granted, except upon compensation paid or secured, and in pursuance of proceedings prosecuted for the purpose. *Id.*

325. In San Francisco, where, under Mexican domination, there was no judge of the first instance, the alcalde was authorized to perform all the functions of such judge, and the rule of the common law applicable to the **judgments** of courts of general jurisdiction was applicable to the judgments of such alcalde.

Braley v. Reese, 51 Cal. 447.

Form and Effect of Grant.

326. Admitting the power of American alcaldes to grant lands within the pueblo, it only extended to lands which had not been previously granted by the superior authorities of the department under the former government. Nor does it matter in any respect whether the grant of those authorities passed a **legal or an equitable title**. The moment they assumed the control of the property and passed any interest in the same, all granting power of the subordinate officers

of the pueblo, with respect to the property, ceased.

Leese v. Clark, 18 Cal. 535.

327. Persons holding alcalde grants made in 1847, for lots within the pueblo of San Francisco, took their grants in subordination to the future action of the government, old or new, in determining the limits of elder grants for lands within the pueblo, made by Mexican governors, and are not "**third persons**," within the fifteenth section of the act of congress, who can question the action of the government in locating such **elder grants**. Such persons can not resist a patent for lands based upon confirmation of an elder grant.

Id.

328. A claim to land in a pueblo, under a grant made by the governor of California before its cession to the United States, was not a **conveyance in fee** of land in severalty, so as to excuse its presentation for confirmation to the board of land commissioners, appointed under the act of congress of March 3, 1851.

Steinbach v. Moore, 30 Cal. 498.

329. A grant by an alcalde in 1849 of pueblo lands in San Francisco was not invalidated by the fact that it was made in pursuance of a **sale at public auction**, by order of the town council.

White v. Moses, 21 Cal. 34.

330. Although neither the **delivery** of an alcalde's grant nor the **payment of the municipal fees** was necessary to vest title in the grantee, yet if immediately after a grant was made to two persons, and signed and recorded in due form by the alcalde, the grantees appeared before him, and one of them verbally renounced his right in the lot granted, the alcalde might amend his record by indorsing on the back of the grant the renunciation, and the fact that the other person might have the entire lot, and the lot then became the sole property of the one not renouncing.

Lick v. Diaz, 37 Cal. 437.

331. The power vested in an alcalde to grant lots implies the **power to modify** the grant, with the consent of all parties in interest, while the proceedings are *in fieri* and so long as anything remains to be done by the granting power.

Id.

332. It was competent for one of the grantees of a lot made by an alcalde to two persons, at any time before the proceedings were completed, to decline the grant, and consent that the grant be made to his co-grantee, and the alcalde might then modify the grant by an indorsement thereon, making it inure to the benefit of such co-grantee, and the title would then vest in him alone.

Id.

333. Such **modification** of an alcalde's grant is not a **transfer of title** from one co-grantee to another, but an exercise of the granting power.

Id.

334. When an alcalde has made a grant to two persons jointly, and has delivered possession and completed the proceedings, the title vests in the two jointly, and an indorsement then made by the alcalde on the grant, without the consent of the grantees that one of them has renounced, and that the grant shall inure to the benefit of the other, **does not divest the title** of the one said to have renounced. Id.

335. Upon an issue as to whether an alcalde's grant was declined and renounced, **evidence** that at the alleged time the pueblo was a small place, and a renunciation of the lot could not have well transpired without a knowledge of the witnesses, is inadmissible. Id.

336. The fact that one of the co-grantees in an alcalde's grant, before the proceedings to vest title were completed, appeared before the alcalde and consented to renounce his interest in the grant, and declined the same, and requested it to be made to the other co-grantee, may be shown by **parol testimony**, provided the alcalde has made such modification of the grant by an indorsement thereon. Such testimony may be rebutted by parol testimony on the other side tending to show that such were not the facts. Id.

337. If the **delivery of a deed** of concession made by an alcalde was essential to pass the title, the **presumption** is that the delivery was made at the time the deed was executed. Whether such delivery was essential, not decided. Lick v. Diaz, 30 Cal. 65.

338. Where an alcalde made a deed granting a lot to two persons jointly, and afterwards certified on the same piece of paper that one of them had renounced his right, and the lot had become the property of the other, such certificate is insufficient to establish the fact of **renunciation**, but the presumption is that the title remained in the person alleged to have renounced. Id.

339. After a grant of a lot had been made by an alcalde of Yerba Buena to two persons jointly, and possession had been delivered, a **certificate** made by the alcalde, written on the same piece of paper as the grant, stating that one of the grantees has renounced his property in the lot, and that it shall be the property of the other, does not divest the grantee so alleged to have renounced of his title, unless it appears that he authorized the alcalde to make the certificate. Id.

340. Where a petition for a grant of land was presented to an alcalde without the **signature of the petitioner**, but the prayer of the petition was granted by a writing immediately following the petition: *Held*, that the grant was valid, notwithstanding the want of the petitioner's signature.

Reynolds v. West, 1 Cal. 322.

341. Where it appeared that the petition-

er's husband was the owner of two fifty-vara lots at the time the concession was made to her: *Held*, that it would be **presumed** that the act of the alcalde in making the grant **was in conformity with law**, until it should be shown that the petitioner's husband had received the lots which he held, as a concession of public lands, and not by purchase from an individual. Id.

342. Where the grantor of defendant obtained an alcalde's grant to a town lot in 1843, and was put in possession thereof and commenced building thereon (his grant containing the usual condition of building within one year) and was compelled to suspend the erection of his house, and the lot remained unoccupied till 1849, when he went again into possession and built a house, which possession was maintained till the bringing of this suit; and the plaintiff's grantor obtained a grant of the same lot in 1847, but never went into possession: *Held*, that there was **no forfeiture of the grant** of defendant's grantor on the ground of non-performance within the time, unless something else was done to produce it.

Holliday v. West, 6 Cal. 519.

343. And where the grant of plaintiff's grantor was never recorded, and it appears that owing to **mistakes** having occurred in the granting of lots, grants having in some instances been made to two persons for the same lot, the alcalde, about six months after giving the grant to plaintiff's grantor, gave notice to all persons to appear and have their grants adjusted, which notice was complied with by defendant's grantor, but not by plaintiff's grantor, the former being then again placed in possession, it seems that no inference arises that the granting power had resumed the land, as by a forfeiture of defendant's grantor, for the purpose of granting the lot to plaintiff's grantor. Id.

344. The only conclusion is that the second grant was made by **mistake**, and that the second grantee was perfectly aware of the invalidity of his grant, and either made no legitimate effort to obtain possession, or did so and failed. Id.

345. When an entry of a grant made by an alcalde was duly entered in the book of official records, attested by his signature, a **delivery** of the same, or a copy thereof, was not necessary in order to give effect to the grant and vest the title in the grantee.

Donner v. Palmer, 31 Cal. 500.

346. Delivery, as applied to private conveyances, has no application to grants made by the government, evidenced either by an alcalde's grant or a patent. Id.

347. Alcalde's grants were intended to be **gifts, and not sales**, and when the grantee was required to pay a municipal tax or fee, its payment was not a condition precedent to the exercise of the granting power, nor did a

failure to pay it defeat or invalidate the grant. Id.

As Evidence of Title.

348. The title acquired by **San Francisco** by virtue of the act of congress of March 3, 1851, to the pueblo lands, must inure to the benefit of *bona fide* holders under her grants. *Cobas v. Raisin*, 3 Cal. 443.

349. Where a party sues for a lot in the former pueblo of San Francisco, and deraigns his title from the city, *le is, prima facie*, entitled to recover. *Seale v. Mitchell*, 5 Cal. 401.

350. A grant of a lot in a pueblo made by a governor of California before it was ceded to the United States conveys no title to the grantee unless the same was presented to and confirmed by the board of land commissioners. *Merle v. Dixey*, 31 Cal. 130.

351. A plaintiff suing for a lot in **San Francisco** may rest his case, *prima facie*, upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the Presidio square in the manner directed by the ordinances. *Payne v. Treadwell*, 16 Cal. 220.

352. A grant of a lot in San Francisco by a justice of the peace, under the Mexican government to the husband, subject to the conditions, that within one year, the lot shall be fenced and a house constructed thereon, and that certain municipal fees, established by law, be paid, is a donation, and not a purchase, and the lot constitutes the separate property of the grantee. *Noe v. Card*, 14 Cal. 576.

353. Where the grant of an alcalde recited that he made it by virtue of the authority in him vested and in pursuance of the order of the town council: *Jeid*, that his general authority to make the grant as alcalde was not limited by the recital, and that the grant was admissible in support of the title of the grantee without proof of any order of the town council. *White v. Moses*, 21 Cal. 34.

354. Where the original grant of an alcalde is contained in the book of grants kept by him, no proof of a delivery of the grant is required. The production of the book has the same force and effect upon the question of delivery as the production of an original deed or grant would have by one claiming under it. *Downer v. Smith*, 24 Cal. 114.

355. If the party to an action relies upon the record of a grant in the record-book of alcaldes' original grants to prove his title to a lot in San Francisco, and claims that entries on the margin of the record and cross lines of cancellation on the same were placed there after the grant was made, to defraud him, it may be shown that the municipal fees for the grant were never paid, and that the grant was never delivered; also, the circum-

stances under which the grant was made, and by whom and under what circumstances it was canceled on the record, may be shown. *Rico v. Cunningham*, 29 Cal. 492.

356. Alcaldes' grants of lots in pueblos in California, made while the Spanish or Mexican laws were in force, were required to be first entered in a book to be kept by the alcaldes for that purpose, and then to be signed and attested by the proper officer. A copy or summary statement of the proceedings as contained in this book, also signed and attested by the proper officer, was then to be given to the grantee as evidence of his title. *Donner v. Palmer*, 31 Cal. 500.

357. The record of such grants so kept in this book became an official record of the same, and primary evidence of the facts recited therein. Such record is not secondary evidence, subordinate to the certified copy of the same, to be given to the grantee, and if any distinction as evidence exists between the record in the book and the certified copy, the higher degree or rank must be accorded to the record in the book. Id.

358. To entitle such record of a grant to be received in evidence it is not necessary to produce or prove the loss of the certified copy of the same given to the grantee. Id.

359. The fact that such official record of alcalde's grants was not kept by American alcaldes strictly in accordance with the regulations of the king of Spain, made in 1789, called the "plan of Pitic," does not make them secondary evidence, for it is either primary evidence or of no value whatever as evidence. Id.

360. Whenever book A of original alcaldes' grants made by American alcaldes in San Francisco contains a full copy of the paper delivered to the grantee, with the genuine signature of the alcalde appended thereto, it was kept substantially according to the regulations of the king of Spain, and is an official record and primary evidence. Id.

361. Whenever book A does not contain a full copy of the paper delivered to the grantee, but a summary of the proceedings sufficient to show an application for a grant, and that a grant was made, over the genuine signature of the alcalde, these entries are also an official record and primary evidence of the grant to which they refer. Id.

362. The best evidence of an alcalde's grant is the official public record of the acts of the alcalde by whom the grant was made. In the absence of this, and of all secondary proof to establish the genuineness of the grant, a copy of a record of a grant made in a book seen in the office of an alcalde is not admissible in proof, more especially if the grant claimed was made nine months before the record, and it be not shown that the

alcalde in whose charge it was seen continued in office until the date of the record.

Garwood v. Hastings, 38 Cal. 216.

363. A confirmation by the **Van Ness ordinance** of the title to a lot granted by an alcalde inures alike to the benefit of all the tenants in common of the lot.

Broad v. Broad, 40 Cal. 493.

364. An alcalde granted a lot in the pueblo of San Jose to P., describing it as "situated to the south of the house of the citizen Feliz Buelna and in this municipality." *Held*, that the description may be construed to mean south of the lot of Buelna.

Romie v. Casanova, 45 Cal. 131.

365. A grant by an alcalde, of a lot in a pueblo, "twenty-five yards in front by fifty in depth, and bounded south-east by Chaipa Garcia's house and lot," was valid, and conveyed ownership to a definite tract of land, if Chaipa Garcia occupied a lot in the pueblo, and a lot twenty-five by forty yards could be located immediately to the north-west of hers.

Halloway v. Galliac, 47 Cal. 474.

366. An entry subsequently made by the alcalde, in his book of records, immediately below the grant, in these words, "the above is located fronting twenty-five varas on Market place, and forty varas fronting on San Carlos street," does not affect the grant, and may be disregarded. It does not grant any land, but undertakes to locate a lot already granted and definitely described.

Id.

367. When an alcalde granted a lot by a description sufficient to pass the title, his jurisdiction over the subject-matter ended.

Id.

368. An alcalde's grant of pueblo land in San Francisco made after the acquisition of California by the United States, was inoperative and void if the granted land was within the tract reserved by the president of the United States for public purposes.

Naglee v. Palmer, 50 Cal. 641.

369. Upon an issue as to whether an alcalde's grant was declined and renounced, evidence that at the alleged time the pueblo was a small place, and a renunciation of the lot could not well have transpired without a knowledge of the witnesses, is inadmissible.

Lick v. Diaz, 37 Cal. 437.

Alcaldes' Books.

370. The book of accounts kept in the office of an alcalde is admissible in evidence, as a register of the acts of that officer, belonging to the office.

Kyburg v. Perkins, 6 Cal. 674.

371. The books of record of deeds, mortgages and other instruments kept by alcaldes previous to the organization of the state government, which were transferred to the custody of the county recorder by the act of

April 13, 1850, entitled "an act concerning the transfer of certain records, conveyances and papers," have been placed, by the twenty-first section of the act of March 26, 1851, entitled "act concerning county recorders," upon a footing with other records kept by the county recorders; and certified copies of instruments found therein are admissible in evidence under the same circumstances as are certified copies of records made by the recorders themselves, namely, upon proof of the loss or the inability of the party to produce the originals.

Touchard v. Keyes, 21 Cal. 202.

372. One who introduces and reads in evidence the record of a grant of a lot in the record book of original grants made by an alcalde in San Francisco prior to the establishment of civil government in California, may also be required to exhibit to the jury whatever words are found in the margin of the record showing that the grant was not taken, and the cross lines on the same, if there are any.

Rice v. Cunningham, 29 Cal. 492.

373. An entry of a grant of land in the pueblo de San Jose, made in the book of alcalde's grants, is entitled to be received in evidence, upon proof that the persons by whom it is signed were the alcalde and clerk of said pueblo at the time it bears date, and that their signatures are genuine, and that the book was one of the books of the alcalde's office in which alcalde grants were entered, and that the book belonged to the recorder's office of Santa Clara county.

Downer v. Smith, 24 Cal. 114.

374. The fact that blotter B, so called, in the possession of the recorder of San Francisco, shows a certain number of lots granted by the alcalde in a particular year, does not raise the presumption that he did not grant other lots during the same year.

Sill v. Reese, 47 Cal. 291.

375. Book A of original grants, in the custody of the recorder of San Francisco, is admissible in evidence when introduced to prove that other grants were made than those found in blotter B.

Id.

376. Certified copies of instruments found in the books of records of deeds, etc., kept by alcaldes, and which have been transferred to the custody of county recorders, are admissible in evidence under the same circumstances as are certified copies of records made by the recorders themselves.

Garwood v. Hastings, 38 Cal. 216.

PUEBLO LANDS.

Generally.

377. Before the military occupation of California by the army of the United States, San Francisco was a Mexican pueblo, or municipal corporation, and was invested with title to the lands within her boundaries.

Cohas v. Raisin, 3 Cal. 443.

378. By the laws of Mexico, towns were invested with the **ownership of lands.** Id.

379. Under the Mexican laws, **municipal lands** become the absolute **property of the pueblo**, subject only in their disposition to the general laws of Mexico. Id.

380. The **occupation and subsequent acquisition of California** by the United States did not suspend or determine any rights or interest of San Francisco in such lands. And if any interest passed to the government of the United States by the said acquisition, it has been reconveyed by the act of congress of March 3, 1851, entitled "an act to ascertain and settle the private land claims in California." Id.

381. A pueblo, when once legally established, became entitled to **four square leagues** of land, to be surveyed in the form of a square or quadrangle, and marked by boundaries which could be readily known by official authority.

Stevenson v. Bennett, 35 Cal. 424.

382. If, at the date of the cession of California to the United States, a pueblo existed which was entitled to four leagues of land, but the same had not been surveyed and had its **boundaries** marked by official authority, the title of the pueblo to the land was imperfect, and the same became a part of the public domain, unless an **application** was made to the **land commissioners** for its confirmation within two years from the passage of the act of congress of March 3, 1851. Id.

383. It does not follow, because the **inchoate title** of the pueblo of which said land was a part was older than the Mexican grant under which said conferee claimed the same, that the former was the better title. The decree by which the title of the city of **San Francisco** was confirmed to said pueblo expressly excepted Mexican grants from its operation; moreover, the exercise of the power by the governors of California under the Mexican government to grant lands within pueblos has been so long acquiesced in, and so many titles depend upon a recognition of the power, that it ought not now to be drawn in question, except upon the most cogent considerations.

Bernal v. Lynch, 36 Cal. 135.

384. **San Francisco** was at the date of the conquest and cession of California, and long prior to that time, a **pueblo**, entitled to and possessing all the rights which the law conferred upon such municipal organizations.

Hart v. Burnett, 15 Cal. 530.

385. Such pueblo had a certain right or title to the lands within its general limits; and the portions of such lands which had not been set apart, or dedicated to common use, or to special purposes, could be granted in lots by its municipal officers to private persons in full ownership. Id.

386. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriffs' sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. Id.

387. One who claims title to pueblo lands in San Francisco as a beneficiary under the act of congress of March 8, 1866, and of **Order No. 800**, must show that his possession on the eighth of March, 1866, was *bona fide*. *McCreery v. Sawyer*, 52 Cal. 257.

388. According to the rules of measurement the *fuero legal* of the pueblo of San Francisco is bounded on three sides by water, and hence the fourth line must be drawn for quantity east and west, straight across the peninsula, from the ocean to the bay. The four square leagues, exclusive of the military reserve, church buildings, etc., constitute the municipal lands of the pueblo of **San Francisco**. *Payne v. Treadwell*, 16 Cal. 220.

389. The center of the old **Presidio square** is the initial point for a survey of the four square leagues to which the pueblo is entitled and the survey is to be made, according to the *ordinanzas de tierras y aguas*, in all directions, i. e., north, south, east, and west, so as to include in all the four square leagues, making up for deficiencies in one direction (where these exist by reason of water being reached, etc.) by including the quantity thus deficient in another line or lines. Id.

390. Where the land granted by an **alcalde** is shown to be within the limits of the four square leagues thus measured, the **presumption** attaches that it was pueblo land, grantable as such, and that the **alcalde** grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the **alcalde**, or by proof that this was land reserved as a fort site, etc., or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. Id.

391. The act of congress of 1851 operates as a **grant to the city of San Francisco** of all the **vacant lands** within her limits, and the confirmation of the United States land commission is final as to the boundaries therein laid down, the appeal therefrom having been dismissed.

Welch v. Sullivan, 8 Cal. 165.

392. Persons who now contest a grant by competent authority within the city limits must rely on a sufficient title, issued by competent authority prior to July 7, 1846. Id.

393. The **confirmation of the title** of the city of San Francisco by the board of United States land commissioners, and the dismissal of the appeal by the attorney-gen-

eral, have settled that no title to lands, within the limits of that city, can hereafter be acquired from the United States.

Norton v. Hyatt, 8 Cal. 539.

394. It follows that any title accruing to individuals, since July 7, 1846, must have been derived from the local authorities of the city. Id.

395. The regulation forbidding grants to be made within two hundred varas of the water line of the bay had reference only to a portion of the present city front. Id.

396. A claim to land within the boundaries of the former pueblo of San Francisco, taken up under the statutes of this state, is void. Judson v. Malloy, 40 Cal. 299.

397. The holder of a title, derived from such claim, though in possession of a part of the lands, and claiming title to the whole, upon the rule of Hicks v. Coleman, 25 Cal. 122, does not come within the proviso to the sixth section of the statute of limitations of 1855, nor the second proviso to the sixth section of the amendatory act of 1863. Id.

398. When California was elected into a state of the American union, it succeeded to the power which the government of Mexico had before exercised of its municipalities, in respect to the control and disposal of the pueblo lands, so soon as the title of the pueblo, or its successor, and the nature of the trust on which the lands were held, should be recognized by the proper tribunals of the United States.

San Francisco v. Canavan, 42 Cal. 542.

399. Neither the former pueblo nor the city or county of San Francisco, as its successor, ever held an indefeasible proprietary interest in the pueblo lands. Such lands are held in trust for certain municipal purposes. Id.

400. Congress relinquished and granted to the city of San Francisco the right of the United States to certain pueblo lands within its limits, to hold in trust, to dispose of, and convey the same to parties in possession thereof, on such conditions as should be prescribed by the legislature. One of the conditions prescribed by the legislature, by which a person in possession, or who had been unlawfully ousted, was to become entitled to the benefit of the act of congress, was, that prior to a certain time, all taxes which had been assessed during the five years preceding, shall have been paid: *Id.*, no title vested in one in possession, or who had been ousted from possession, unless he, or some one acting in his behalf, had paid such taxes; *he'd, also*, that the same rule prevailed as to the payment of an assessment imposed on the land as a condition precedent to vesting title.

Dupond v. Barstow, 45 Cal. 446.

How Held.

401. These municipal lands, to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution. Hart v. Burnett, 15 Cal. 530.

402. The decision in Hart v. Burnett, 15 Cal. 530, cited and followed upon the following points: That the city of San Francisco succeeded to the rights of the pueblo of Yerba Buena in the lands of the pueblo; that these lands were held in trust for the public use of the city; that they were not, either under the old government or the new, the subject of seizure and sale under execution; that the title of the city was unaffected by sales of the sheriff under executions against her; and that a defendant in ejectment, relying solely upon his possession, may set up the invalidity of such sales, or of the title derived therefrom, in defense to the action.

Fulton v. Hanlow, 20 Cal. 450.

403. Under the laws of the Indies, whenever a pueblo was formed by a grant to a founder, or the union of ten or more families, or the foundation of a presidio, or the secularization of a mission, each pueblo was entitled in property to certain tracts of land within the limits of the town to be set apart by them, called commons, pasture-grounds, and municipal lands, by virtue of their organization as pueblos.

Welch v. Sullivan, 8 Cal. 165.

404. Whether the Mexican government retained any power to make grants within the limits of a pueblo or not, the right of the pueblo to have the municipal and common lands assigned was an acknowledged equity, charged with which the United States government succeeded to the fee. Id.

405. The act of congress of 1851 operates as a grant to the pueblos of all lands within their limits, vacant and ungranted, on the seventh of July, 1846. Id.

406. Such a confirmation is higher evidence of title than a patent, because it is a direct grant of the fee by the sovereign, through the legislative department, while a patent is only a ministerial act. Id.

407. Whether under the Mexican law the municipal lands of the pueblo could be sold at forced sale or not, the act of congress of 1851, vested the city with the fee of the land, and by the common law, adopted 1850, it became liable to execution sale. Id.

408. Whether the municipal lands of a pueblo could be sold at forced sale or not, under Mexican law, the act of congress of 1851 creates a new tenure, and operates a confirmation of the fee in the town or city, and by the adoption of the common law in

1850, its lands became liable to execution sale. *Id.*

Authority to Grant or Lease.

409. Under the Mexican law the power to grant or lease pueblo lands was vested in the municipal authorities; but this power was limited to the granting of **house lots for building purposes**, and lots two hundred varas square, called *suertes*, for cultivating or planting, as gardens, vineyards, orchards, etc.

Redding v. White, 27 Cal. 282.

410. A lease of four hundred acres of pueblo land for ninety-nine years, made by the municipal authorities of a pueblo in California in 1847, was **void for want of power** in the authorities to make the lease. *Id.*

411. The pueblos, under the laws of Spain and Mexico, had the right to dispose of certain lands within their limits, to defray **municipal expenses**.

Welch v. Sullivan, 8 Cal. 165.

412. The municipal law remained unchanged after the conquest, until 1850, and grants of pueblo lands by American alcaldes were grants by the pueblo of its own property, which it had a **right to transfer**. *Id.*

413. A patent of the United States for lands of a pueblo, confirmed under the act to settle private land claims in California, is issued in pursuance of authority conferred by said act, and is admissible in evidence.

Canfield v. Thompson, 49 Cal. 210.

414. The pueblo, now San Francisco, retained, during the war, all its rights to municipal lands which had been conferred upon it previous to the war. The **right to alienate** is incident to that of ownership. The fact that this right was exercised by the municipality from 1835 to 1850 without question or restriction, would prove the usage and custom in the absence of law.

Cohas v. Raisin, 3 Cal. 443.

415. The pueblo (now San Francisco) had the same right to dispose of its property during the war as a natural person. *Id.*

416. Grants made after the fifteenth of September, 1847, must be presumed to be made by the **authority of the ayuntamiento**, or council, so long as that body existed. *Id.*

417. The authorities, as to the **presumption** in favor of the validity of grants made by public officers, cited and approved.

Payne v. Treadwell, 16 Cal. 220.

418. The grants made by **justices of the peace** from 1839 to the end of 1843, were made by virtue of authority conferred on them in the absence of alcaldes, by the departmental junta, in virtue of article 180 of the law of March 17, 1837.

Cohas v. Raisin, 3 Cal. 443.

419. A justice of the peace of San Fran-

cisco in 1849 had no authority as such to make grants of the pueblo lands of that city, and a grant made by him is inoperative for any purpose whatever.

Hubbard v. Barry, 21 Cal. 321.

420. The **political head of the department** of California possessed authority to grant lands within the pueblo of San Francisco, and in numerous instances exercised it; such authority was paramount, and its exercise could not be interfered with or defeated by any subsequent action of the pueblo or its officers.

Leese v. Clark, 18 Cal. 535.

421. The **governor and departmental assembly** of California had power to make grants of lands within the general limits of pueblos, and the official acts of such officers, within the general scope of their powers, are presumed to have been done by lawful authority. *Brown v. San Francisco*, 16 Cal. 451.

422. The fact that such grant recites the **law of 1824**, and the **regulations of 1828**, and no others, does not raise the inference that the grant was made only under the authority of that law and those regulations. *Id.*

423. The **regulations of secularization**, by Governor Figueroa, August 9, 1834, limiting the extent of land to be granted to any one individual to four hundred varas square, did not apply to pueblo lands, and did not limit the general power of the governor and departmental assembly to grants of four hundred varas square. *Id.*

424. Where land, within the general limits of the pueblo of San Francisco, and also within the limits of the old "Mission," was granted to an individual by the governor and departmental assembly, in 1839-40, before the "Mission" had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be **presumed to be grantable**, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Id.*

425. By the laws, usage, and custom of Mexico, the **alcaldes** were the **heads of the ayuntamientos**, or town councils; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns. *Cohas v. Raisin*, 3 Cal. 443.

426. As to the pueblo lands of San Francisco, the agents of that municipal corporation can sell or dispose of them only in the way, and according to the **order of the legislature**; and, therefore, the legislature may, by law operating immediately upon the subject, dispose of this property, or give effect to any previous disposition or attempted disposition of it. The property itself is a trust, and the legislature is the prime and original

controlling power, managing and directing the use, disposition, and direction of it.

Payne v. Treadwell, 16 Cal. 220.

427. Parties who do not claim under any conveyance from the authorities of the pueblo of San Francisco, and are **strangers to the title**, can not object to alcalde grants of land therein, that they are not made in furtherance of the trust for which the lands were assigned to the pueblo. It is no concern of theirs whether the ayuntamiento, in authorizing alcaldes to grant, abused its power or not. *Id.*

428. If the grants in question, issued in March, 1850, pursuant to the order of the ayuntamiento, were issued improperly, in cases where the laws at the time in force did not contemplate, it is for those succeeding to the rights of the pueblo to interfere. Until such interference the title must be held good as against **third persons**. *Id.*

429. An ordinance of an ayuntamiento directing the proper functionary to make a grant of a lot to a person named therein, if he should find that no other person had a better right thereto, does not pass any title to the person named. Beach v. Gabriel, 29 Cal. 580.

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MEXICAN LAW.

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- 26. *Generally.*
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- 55. MINES AND MINING LAWS.
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GENERALLY.

1. Conditions which require the performance of services are not onerous in the sense of the Spanish law, so as to convert the transaction into one of contract, when they are rendered by the grantee for his own benefit; they are only so when rendered for the benefit of the grantor or parties other than the grantee. Noe v. Card, 14 Cal. 576.

2. Under Mexican law a person who furnishes materials for the erection of a build-

ing has no lien on the buildings to secure payment for the materials furnished.

Macondray v. Simmons, 1 Cal. 393.

3. The missions established in California, prior to its acquisition by the United States, were political establishments, and in no manner connected with the church.

Nobili v. Redman, 6 Cal. 325.

4. The fact that monks or priests were at the head of those institutions proves nothing in favor of the claim of the church to universal ownership. *Id.*

5. The lands settled by the missions were not conveyed to any one, but remained the property of the government; and even the church buildings thereon did not become the property of the church corporate until the decree of secularization of 1833. *Id.*

6. The Catholic church can only claim any of the mission property under the decree of secularization, and subject to its limitations. *Id.*

7. The fact that a Spanish name can be translated into English so as to mean nothing does not alter or affect its potency as a name descriptive of a place.

Castro v. Gill, 5 Cal. 40.

8. The republic of Mexico, after the revolution of 1824, fully recognized the rights of the towns in their commons, pastures, and municipal lands.

Welch v. Sullivan, 8 Cal. 165.

LAWS, AND POWER OF OFFICERS.

9. As a general rule, the laws of a conquered or ceded territory remain in force until changed by the new sovereign. But a strict application of this rule would, in many cases, be unjust; and the Mexican laws on the subjects of **usury** and **implied warranty** in the sale of land may be deemed to have been abrogated by the customs and usages of American emigrants, before any formal act of legislation abolishing those laws.

Fowler v. Smith, 2 Cal. 30.

10. An ayuntamiento was a **municipal body**, and could take and exercise only such powers as were conferred upon it by the will of the sovereign, as expressed in the laws creating it.

Branham v. San Jose, 24 Cal. 585.

11. No ordinance of an ayuntamiento which transcended the powers conferred by the decree of March 20, 1837, was of validity until it had been submitted to, and approved by, the governor of the department, and an ordinance of an ayuntamiento, authorizing the blowing up of buildings in case of a fire, would transcend the powers conferred by that decree, and would be invalid unless approved by the governor of the department.

Dunbar v. San Francisco, 1 Cal. 355.

12. The civil law, except so far as it has been expressly adopted by the legislative

power, is without authority, either in Spain or Mexico. *Panaud v. Jones*, 1 Cal. 488.

13. In what cases **conciliacion** was necessary under the Mexican law, and in what cases unnecessary, considered.

Von Schmidt v. Huntington, 1 Cal. 55.

14. Under the Mexican law, which formerly prevailed in this country, the proceeding of conciliacion was necessary, before the institution of a suit in one of the ordinary courts; and it seems that it was the proper and regular proceeding to be taken, even since the acquisition of the country by the Americans. The want of it, however, is to be regarded but as a formal and technical defect, which this court, on appeal, is authorized to disregard, by the statute of February 28, 1850, and the court will not reverse a judgment merely because the formality of a conciliacion has not been gone through with before the commencement of the suit. *Id.*

15. Under the Mexican law, **custom** is sometimes allowed not only to control, limit, modify, and interpret the general rules of the system, but even to establish a rule in direct contravention of the positive written law. Thus custom may attain the force of law, not only when there is no law to the contrary, but when the effect of it is to overturn the previous law which stands in opposition to it. *Id.*

16. The Mexican law of **escheats** did not remain in force in California until the ratification of the treaty of Guadalupe Hidalgo. *People v. Folsom*, 5 Cal. 373.

17. By the civil law, an **escribano** may act in the double capacity of *escribano* and witness in the execution of a will.

Panaud v. Jones, 1 Cal. 488.

18. *Prima facie*, the governor of California, under the Mexican dominion had the power to make a **grant of mission lands** to an individual, and a demurrer to a complaint setting forth such grant, on the ground of want of authority in the governor, is not sustainable. *Den v. Den*, 6 Cal. 81.

19. The Spanish law allows legal interest, which is where the parties have not agreed upon a rate, and conventional interest, which is the rate usual at a given time and a given place; and which may be greater or less than legal interest. *Fowler v. Smith*, 2 Cal. 568.

20. To establish **usury**, the party must show that the rate agreed upon was greater than that which was customary, at the time and place of the contract. *Id.*

21. The legal rate of interest in California, under the Mexican law, was six per cent. per annum. Hence, where, on "a verdict for the full sum claimed, with interest and costs," judgment is rendered for a sum equal to the principal, with interest at ten per cent. per annum from the time the money was due, the judgment itself to draw like in-

terest until paid, it is error. The verdict does not authorize the judgment. The jury should have found the interest.

Macleota v. Packard, 14 Cal. 178.

22. Alcaldes in the departments of California, New Mexico, and Tebasco were empowered to perform the functions of **judges of first instance** in those districts where there were no judges of first instance; and the alcalde of San Francisco had the jurisdiction and powers of a judge of first instance previous to the appointment of such officer.

Mena v. Le Roy, 1 Cal. 216.

23. It seems that **Mexican justices of the peace** had authority, before the war, to make grants of lands in San Francisco.

Reynolds v. West, 1 Cal. 322.

24. The Mexican system knew nothing of the common law doctrine of **seala**. A power of attorney executed while those laws were in force, is therefore good without a seal.

Posten v. Rasette, 5 Cal. 467.

25. Where the plaintiff filed a bill in equity in 1852, to set aside a sale of land made in 1835, on the ground of fraud: *Held*, that his right to recover would be barred by ten years' **prescription** under the Mexican law, and the full period having run, he could not recover. *Dominguez v. Dominguez*, 7 Cal. 424.

MATTERS PERTAINING TO REAL ESTATE.

Generally.

26. The Mexican regulations of 1828 required the applicant for lands, whether an impresario, head of family, or private person, to set forth in his petition to the governor, "his name, country, profession, the number, description, religion, and other circumstances of the families or persons with whom he wished to colonize," and though these particulars constituted considerations with the authorities in whom the granting power was vested, they did not in any respect control the course of the title against the **operative words of transfer** in the grant. *Berreyesa v. Schultz*, 21 Cal. 513.

27. It seems that in the year 1833 or 1834 the **property of the missions** in California was **confiscated** by the Mexican government, with the exception of limited portions reserved for religious purposes; and that, in carrying into execution this law of confiscation, the officers of the Mexican government took possession of the lands and property of the Mission Dolores, except a small portion reserved. *Santillan v. Moses*, 1 Cal. 92.

28. Under the Mexican, Spanish, and common law, **donations** are of three classes, **pure**, **remuneratory**, and **conditional**. They are pure, when made without condition, as charities; remuneratory when required by no legal obligation, but are made from a regard for services rendered, as pen-

sions; conditional when accompanied with provisions intended to secure the purposes for which they were made, as grants of land for institutions of benevolence, for hospitals, schools, asylums, and the like.

Noe v. Card, 14 Cal. 576.

29. An inchoate title to lands is property which is protected by the treaty of Queretaro, and can not be affected or questioned by any authority except the government of the United States.

Reynolds v. West, 1 Cal. 322.

30. A parol partition of land may be made by co-owners under the Mexican law as well as by tenants in common under the common law.

Long v. Dollarhide, 24 Cal. 218.

31. In order to uphold a parol partition, under both the Spanish and common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed and followed up by a several possession by either the parties themselves or their grantees. Id.

32. A possessory action can not be maintained under Mexican law by a person who has acquired his title subsequent to the intrusion complained of.

Suñol v. Hepburn, 1 Cal. 254.

33. An ayuntamiento had no power to mortgage the lands of the pueblo, and a mortgage on such lands given by it was a nullity, and vested in the mortgagee no interest in the lands.

Branham v. San Jose, 24 Cal. 585.

Conveyance of.

34. A Mexican governor, in 1843, had authority to remove the restraint upon alienation contained in a condition annexed to a grant of land made by a previous governor, in 1834. Nieto v. Carpenter, 21 Cal. 455.

35. By the Spanish law, the vendor of land was under the implied obligation to make his sale and conveyance effective, and a title afterwards acquired by him inured to the benefit of the vendee.

Schmitt v. Giovanari, 43 Cal. 617.

36. The Spanish word "cedo" was the ordinary word used in Mexican conveyances to pass title to lands. Id.

37. By the Mexican law, before the acquisition of California by the United States, it was not necessary that an instrument conveying land should express a consideration in order to pass the title of the vendor. Id.

38. By the civil law every conveyance of land was required to be made before an escribano, or if there was none, then before the judge of the first instance.

Hayes v. Bona, 7 Cal. 153.

39. Though there is some doubt whether the civil law was in force in California, yet

it seems that by the custom of the country, conveyances were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer, and the price paid. Id.

40. As a general proposition it may be stated that under the Spanish law, a sale of real estate by parol would not be void *per se*, and that the distinction between parol contracts and specialties, known to the common law, does not exist under the civil law, or the Mexican system of jurisprudence heretofore in force here. Id.

41. Contracts for the sale of land were, under the Mexican law, and by the custom of California, required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain the names of the parties, the thing sold, the date of the transfer, and the price paid.

Stafford v. Lick, 10 Cal. 12.

42. All contracts made in this state, prior to the act of the twenty-second of April, 1850, must have their act and construction by the rules of the civil law.

Fowler v. Smith, 2 Cal. 568.

43. The warranty implied in a sale made by general terms, under this system, is equivalent to a covenant that the buyer shall quietly possess and enjoy, and nothing more. And to give a buyer a right of action upon this warranty, there must have taken place an actual judicial eviction, by the sentence of a competent tribunal, and this sentence carried into effect. Id.

44. Such purchaser, while he retains possession, can not resist the payment of the purchase money, however defective his title, and has no right to a rescission of his contract. Id.

45. Under Mexican law, the approbation and consent of the government was necessary to make a conveyance of land by an Indian to a white person valid; and such consent being wanting: *Hehl*, that a conveyance was void upon its face, and transferred no title, and that the party claiming under it was chargeable with knowledge of its invalidity.

Suñol v. Hepburn, 1 Cal. 254.

46. The plan of Iguala, and the Mexican constitutions of 1836 and 1843, and the decrees of 1812 and 1813, did not remove the restrictions on alienations of land by Indians. Id.

47. The Mexican law of 1844 and 1845 did not invalidate a deed because not executed in the presence of and witnessed by a notary public. Merle v. Mathews, 26 Cal. 455.

48. A deed executed in California while it was a part of Mexico was not void or invalid because no consideration or price paid

for the property described was expressed therein. *Id.*

49. The fact that a deed, under the Mexican law, does not recite a price or consideration, does not invalidate the deed. By that law, a deed of **gift to a stranger**, possession being delivered, was good, subject to certain qualifications. *Havens v. Dale*, 18 Cal. 359.

50. Where a deed of conveyance is **void upon its face**, as being in violation of law, the party claiming under it is chargeable with knowledge of the law, and of the invalidity of the deed; and this is the rule in Mexican as well as American law.

Suñol v. Hepburn, 1 Cal. 254.

51. A party can not, by the Mexican law, acquire **possession** beyond the **metes and bounds** of his actual occupancy, unless he claims to hold under what is termed a just title (*titulo justo*); and a deed void on its face is not a just title. *Id.*

52. An **agreement** for the conveyance of land, **resting solely in parol**, is void by the Mexican law. *Hoen v. Simmons*, 1 Cal. 119.

53. Under the Spanish law, contracts for the sale of real estate rest upon the same footing with those relating to personal estate, and may be by parol or otherwise, at the option of the parties.

Long v. Dollarhide, 24 Cal. 218.

54. The case of *Hoen v. Simmons*, 1 Cal. 119, deciding that a **verbal contract**, of itself alone, was insufficient, under Mexican law, to transfer the title to real estate, affirmed; but where there was a verbal contract of sale *in presenti*, and the title deeds were delivered by the vendor to the vendee, and permission given to the vendee to enter upon and take possession of the land, and the vendee did, accordingly, take possession and make valuable improvements on the premises: *Held*, that a **specific performance** of the verbal contract should be decreed.

Tohler v. Folsom, 1 Cal. 207.

MINES AND MINING LAWS.

55. Under the Mexican law, no interest in the minerals of **gold and silver** passed by a **grant from the government** of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil distinct from that of the minerals.

Moore v. Smaw, 17 Cal. 199.

Fremont v. Flower, *Id.*

56. The interest in the minerals was conveyed, through the operation of the mining ordinance, by **registry of discovery**, or by proceedings upon **denouncement** when a mine once discovered and registered had been abandoned or forfeited. *Id.*

57. The **history of the Spanish system** of permitting the mines of gold and silver to be worked by individuals, stated. *Id.*

58. At the date of the cession of California to the United States no minerals of gold or silver had been discovered in the grants under consideration in this case, and hence, as no proceedings could have been taken by individuals to acquire any interest in them from the government, they constituted, at that time, the property of the Mexican nation, and **passed, by the cession**, with all other property of Mexico within the limits of California, to the United States. *Id.*

59. Upon the **separation of Mexico from Spain**, the mines of gold and silver, which until that period were vested in the Spanish crown, passed to and vested in the Mexican nation. *Id.*

HUSBAND AND WIFE, PROPERTY OF, ETC.

60. By the Mexican law, **marriage** lawfully contracted in the face of the Catholic church and between members thereof can not be dissolved by the civil tribunals. But the union of man and wife without the sanction of the church is regarded a mere civil contract; and, as such, falls within the legitimate sphere of the ordinary jurisdiction of the court of the first instance.

Harman v. Harman, 1 Cal. 215.

61. By the Mexican laws, all property acquired during marriage was **common property**, and the wife could neither be bound as security for her husband, nor liable as joint contractor, except where it was shown that the contract was advantageous to the wife.

Hames v. Castro, 5 Cal. 109.

62. By the law of Mexico, in force in California before its cession to the United States, the **partnership relation** existed between the husband and wife in all property acquired by the spouses by their labor, and in the income of the individual property of either, and in the gains of the husband by the exercise of a profession or office, and also in the gains from the money of the spouses, although the capital was the separate property of one of them.

Fuller v. Ferguson, 26 Cal. 546.

63. By the Mexican law, the **husband alone could manage** or administer the property of the partnership, and he could sell or dispose of it as he deemed proper, provided he did so without intent to injure the wife. *Id.*

64. By Mexican law the husband was entitled to the **use, control, and disposition** of the common property during the coverture. Upon the death of the wife he was still entitled to the possession of such property, as **surviving partner** of the matrimonial union, and could sell or dispose of it in liquidation of community debts.

Ord v. De la Guerra, 18 Cal. 67.

65. By Mexican law, the wife, during the

continuance of the marriage, has a **revocable and feigned dominion** in, and possession of, one half the property jointly acquired by her and her husband (*gananciales*); but the husband is the real and veritable owner, and has the irrevocable dominion in all the *gananciales*, and may sell and dispose of them at pleasure.

Panaud v. Jones, 1 Cal. 488.

66. By the Spanish and Mexican law, to the wife is imparted during the marriage a fictitious and revocable dominion and possession of one half the property she acquires with her husband, which dominion and possession she can not assert during the marriage; but after his death she becomes the absolute owner of the one half which he leaves, in the manner prescribed by law between **conventional partners**.

Fuller v. Ferguson, 26 Cal. 546.

67. By the Spanish and Mexican law, if the husband, while the conjugal relation existed, obtained a grant of a lot to him in a pueblo from the alcalde, and used money belonging to the community, but acquired by the individual labor of the wife, to pay the municipal fees, the wife held his estate charged for one half this money, though its payment could not be enforced during the marriage, and it was competent for the husband during the marriage to render the wife an equivalent for her interest in this money by assigning her half the lot in satisfaction thereof, and the **assignment or transfer** vested in the wife a legal title to the part thus assigned. Id.

68. By the Spanish and Mexican law, the husband and wife were considered so far separate persons that the **contract of purchase and sale**, and any other onerous contract entered into between them, was valid, and the wife needed no authority or consent of the husband when dealing with him, other than that implied from the transaction itself. Id.

69. By the Mexican law in force in California before its acquisition by the United States, the husband could make a **donation** to the wife during marriage of a portion of the community or his separate property, and the donation was not void but only voidable; and if not revoked before the death of the donor, and the donee survived, the donation became irrevocable. Id.

70. Under the rule of the Mexican law, where the wife is the survivor of the husband, she is liable for one half of the **community debts**; but to fix this liability, it must be shown that a fruitless effort has been made to obtain payment through an administration of the community assets, or that there is no common property, and that the community is insolvent.

Hames v. Castro, 5 Cal. 109.

71. By the Mexican law in force in Cali-

fornia before its cession to the United States, property acquired by either husband or wife while living together, by **lucrative title** solely, constituted the property of the party making the acquisition.

Fuller v. Ferguson, 26 Cal. 546.

72. By the Mexican law, property acquired by the husband alone by onerous title, though the money paid as a **consideration** was **earned by the wife's individual labor**, became the separate property of the husband. Id.

73. Under the Spanish and Mexican law, property acquired by husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them, by onerous title, belonged to the community; whilst property acquired by either of them, by lucrative title solely, constituted the separate property of the party making the acquisition. The fruits and profits, and increase, of the separate property, also belonged to the community. By onerous title was meant that which was created by a **valuable consideration**, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges, to which the property was subject. Lucrative title was created by **donation, devise, or descent**.

Scott v. Ward, 13 Cal. 458.

WILLS AND DESCENTS.

74. By Spanish and Mexican law, wills are divided into **solemn or sealed, and open or nuncupative**. The former need not be written by, nor be subscribed by, the testator, but must be attested by the *escribano* of the place and seven witnesses, by subscribing their names on an envelope in which the will is inclosed, the testator saying to them, "This is my will; I desire you to write your names upon it;" in the latter, the testator declares his will, either *viva voce*, or in a writing, which he reads himself, or has the *escribano* read, if one is in attendance, or any one of the witnesses present, so that all the witnesses present may hear it. Such a will need not be signed by the testator.

Panaud v. Jones, 1 Cal. 488.

75. A will in writing, having been acknowledged by the testator to be his last will and testament before the alcalde, who possessed, in California, the powers and jurisdiction of an ordinary judge (*juez ordinario*), having been attested by the alcalde and two witnesses, and there having been no *escribano* in the place, and the will having been registered by the alcalde in his book of records: *Held*, that it was a **public writing** (*escritura publica*) as fully as it could have been made so in California, and required no further probating in order to authorize the executor to act under it; and *held, also*, that

the omission to reduce it to the form of a public writing would not have affected its validity; and *held, further*, that it was not necessary, in order to uphold acts of the executor, done in conformity with the provisions of the will, to show that he had taken out **letters testamentary**, the will itself being his authority and commission. *Id.*

76. Where an open will (*testamento abierto*) was admitted, on the face of the complaint, to have been "dictated" by the testator, and was reduced to writing, and signed by three subscribing witnesses, citizens (*vecinos*) of the place, one of whom was the *alcalde*, and it was recorded in the proper book of the *juzgado*: *Held*, that the will was valid, although the testator had **not signed it**, and although it was not made in the presence of an *escribano*. *Id.*

77. Where a testator, in his will, appointed two persons as executors, and gave to each of them all the power over his property which he himself possessed as fully as in law may be required, and empowered them to sell it as to them should seem proper, for the purpose of carrying into effect a provision in his will to pay his debts, and one of the executors, in good faith, and for a fair price, sold a portion of land for the purpose of raising money to pay the debts of the testator: *Held*, that the **transfer**, when attacked by the heirs of the testator, was valid, although not executed by the co-executor, when it appeared probable, from the testimony, that he advised and assented to the sale; *held, further*, that a **private sale** was good, and that it need not have been at auction; *held, further*, that a part of the purchase money having been paid down, the **heirs could not rescind** the contract of sale, without first refunding the amount paid. *Id.*

78. A father, during his life-time and after the death of his wife, may, although there have been children of the marriage, dispose of the **gananciales** for any honest purpose, when there is no intention to defraud the children, and may, by last will and testament, direct the sale of them for the payment of his debts. *Id.*

79. After the death of the wife, the husband may dispose of the *gananciales* without being obliged to reserve for the children of the marriage either the property in, or proceeds of, the *gananciales*. *Id.*

80. A. having married, and there being children of the marriage, and his wife having died, and there being common property acquired during the marriage (*gananciales*): *Held*, that the children, upon the death of the wife, did not acquire a vested estate in the **common property** (*gananciales*), and that the father had the absolute dominion in, and control over, and power to dispose of, such property during his life, and the

power by last will and testament to direct the sale of the same for the payment of debts, not only such as were contracted during the continuance of the marriage, but also such as were contracted by the husband after the dissolution of the marriage by the death of his wife. *Id.*

81. If the **heirs of a deceased wife** be the children of the marriage, they have the right of **succession**, on the death of the father, to the whole estate (*gananciales*) with the right in the father to dispose of one fifth; but by the estate in law is understood the residue, after all debts have been paid. *Id.*

82. Under the Mexican law, as enforced in California, such a proceeding as the **probate of an open will** was unknown. The will took effect as a **conveyance** upon the death of the testator. It was valid, if made in the presence of three witnesses; and, by the custom which prevailed in California, and obtained the force of positive law, two witnesses were sufficient.

Tevis v. Pitcher, 10 Cal. 465.

83. Proof of such **custom** in force in California previous to the formation of the state government is admissible. *Id.*

84. Under the Mexican law, the **heirs of Latillade succeeded immediately** to the estate, and became personally responsible for his debts; and Jose de la Guerra stood in the position of a voluntary agent, representing the heirs, and not the estate, and his payments were on behalf of the heirs and in discharge of their personal liability; and if any claim exist for these payments, it is against the heirs.

De la Guerra v. Packard, 17 Cal. 182.

85. Under the Mexican law, on the death of an intestate, the heirs succeeded immediately to the estate, and became **personally responsible for the debts of the deceased**; this rule applied equally whether the heirs were adults or minors, but no administration, in the common law sense, was needed or could be had at any time.

Coppinger v. Rice, 33 Cal. 408.

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MINERAL LANDS.
MINING CLAIMS.
MINERS.
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1. MINERAL LANDS.

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MINERAL LANDS.*Right to Occupy.*

1. The public mineral lands of this state are open to the appropriation of any one, and the one first occupying any portion of the same makes it his by the act of occupancy, and once his, it continues his until he manifests his intention to part with it in some manner known to the law. The occupant may part with his interest by selling it, or giving it to another, or by any other mode authorized by law, or he may abandon it.

Richardson v. McNulty, 24 Cal. 339.

2. How far the right of miners to go upon public mineral land, in possession of another, for the purpose of mining, must be modified to secure any rights of such possessor, reserved.

Burdge v. Smith, 14 Cal. 380.

3. Upon questions as to the occupancy of public mineral land, it seems that a transfer of the occupant's right of possession may as well be by simple agreement as by deed, the vendee taking possession.

Jackson v. F. R. W. Co., 14 Cal. 13.

4. Mere entry and possession give no right to the exclusive enjoyment of any given quantity of the public mineral lands of the state.

Smith v. Doe, 15 Cal. 100.

5. Where the title of the respective parties to public mineral lands is based on possession alone, the older possession, as between the two, gives the better right; and this, although the use to which the older possessor appropriated the land was for agricultural purposes, while the younger possession was for mining purposes.

Gibson v. Puchta, 33 Cal. 310.

6. The court assumes, for the purposes of a decision, that lands containing cinnabar or quicksilver are mineral lands, within the meaning of the act of congress passed July 1, 1862, granting lands to the Western Pacific railroad company of California to aid in the construction of a railroad.

McLaughlin v. Powell, 50 Cal. 64.

7. A party can not, under pretense of holding land in exclusive occupancy as a town lot, take up and inclose twelve acres of mineral land, in the mining district, as against persons who subsequently enter upon the land in good faith for the purpose of digging for gold therein, and who, in such operations, do no injury to the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business.

Martin v. Browner, 11 Cal. 12.

8. The legislature having expressly exempted mining claims from the operation of the revenue act, it can not be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them.

State v. Moore, 12 Cal. 56.

9. The right to mine for the precious metals can only be exercised upon public lands; and although it carries with it the incidents to the right, such as the use of wood and water, those incidents also must be of the public domain.

Tartar v. Spring Creek Co., 5 Cal. 395.

10. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another; but in that case his mining right will be subject to the prior right of deposit.

O'Keiffe v. Cunningham, 9 Cal. 589.

11. The right so to enter and mine carries with it the right to whatever is indispensable for the exercise of this mining privilege, as the use of the land, and such elements of the freehold or inheritance as water.

Clark v. Duval, 15 Cal. 85.

12. When a party enters upon mineral land for the purpose of mining he can not be presumed to be a trespasser, for if the land be not private property he has the right to enter upon it for that purpose; and, until it is shown that the title has passed from the

government the statutory presumption that it is public land applies.

Smith v. Doe, 15 Cal. 100.

13. As a general rule, the public mineral lands of the state are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining. But this rule has its limitations, to be fixed by the facts of each particular case. Certain **possessory rights**, and rights of property in the mining regions, though not founded on a valid legal title, will be protected against the miner as valuable permanent **improvements**, such as **houses, orchards, vineyards, growing crops**, etc. *Id.*

14. The state government has not only acquiesced in this universal appropriation of the public lands for all these purposes, but has studiously encouraged them in some instances and recognized them in all; and this court has held that the **state**, in her legislation on the subject, has established the policy of permitting all who wish to work the mines, with or without conditions.

Conger v. Weaver, 6 Cal. 548.

15. The government of the United States, in the face of the **notorious occupation** of the public lands of this state by her citizens, that upon those lands they have mined for gold, constructed canals, built saw-mills, cultivated farms, and practiced every mode of industry, has asserted no right of ownership to any of the mineral lands in this state. *Id.*

16. Yet this permission has not been derived from express legislation, but by general legislation, looking at the general state of things, from which a **license** is necessarily presumed to all who choose to avail themselves of it. *Id.*

17. This right, then, like digging gold, is a franchise, and the attending circumstances raise the presumption of a general grant from the sovereign of this privilege; and every one who wishes to attain it has license from the state to do so, provided that the prior rights of others are not infringed upon. *Id.*

18. Among the other pursuits thus encouraged, and which have been referred to in legislative acts and been made the subjects of revenue, is the **construction of ditches, canals and flumes**, for the purpose of conducting water for mining purposes. *Id.*

19. Evidence that a party is at work on a claim, and is mining, and is at work with tools commonly used by miners, is sufficient to justify a jury in finding that he is **mining for gold** without any proof that he has found any gold in the claim.

Hill v. Smith, 27 Cal. 476.

20. Where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, a miner has no right to work a

claim located above its head after the ditch is dug, in such manner as to mingle mud and sediment with the water, and injure its value to the ditch-owner for mining purposes, or to fill up the ditch and reservoirs with the same so as to lessen their capacity and increase the expense of cleaning them out. *Id.*

Rights of Occupants.

21. A party in possession of public mineral land is entitled to hold it as against all the world—the government excepted, if the land belong to it—subject only to the qualification that, upon land taken up for other than mining purposes, a right of entry for such purposes may attach.

Lentz v. Victor, 17 Cal. 271.

22. The occupant of mineral land may rely upon his **possession against a mere trespasser**, unless he uses the land for grazing or agricultural purposes.

Fitzgerald v. Urton, 5 Cal. 308.

23. **Mere occupants** of the mineral lands, who have entered upon the same for mining or other purposes, have no title or right under which they can maintain possession, as against the United States or its grantee.

Doran v. C. P. R. R. Co. 24 Cal. 245.

24. One who **incloses a tract** of public land in the mineral region, and plants the same with fruit trees, acquires a vested right which will be protected against one subsequently entering upon the same for mining purposes.

Wixon v. B. R. & A. Co., 24 Cal. 367.

25. Where the plaintiffs, who were miners, did not seek to enter or occupy, for mining purposes, the lands of the defendant, devoted to agriculture, but sought to restrain him from flowing water thereon for the purpose of **irrigation**, by which their adjacent mining claims were injured, the plaintiffs can not claim any authority, rights, or privileges in the premises under the act of April 25, 1855 (stats. 1855, p. 145). In such a case the plaintiff's rights depend upon the principles and rules of the common law, applicable to adjoining land-owners, where the one complains that he has sustained an injury by the acts of the other, done on his own land. In irrigating his land, the defendant is subject to the maxim, **sic utere tuo ut alienum non lædas**. *Id.*

25a. The defendant has the clear right to **irrigate**, as well as to cultivate and plant, his land, and an action can not be maintained against him for a reasonable exercise of his right, although the plaintiffs may suffer annoyance or injury thereby. He would be responsible to plaintiffs only for injuries caused by negligence or unskillfulness, or those willfully inflicted in the exercise of said right.

Gibson v. Puchta, 33 Cal. 310.

26. The United States—holding as they do, with reference to the public property in the minerals only, the position of a private proprietor, with the exception of exemption from state taxation, having no municipal sovereignty or right of eminent domain within the limits of the state—can not, in derogation of the rights of the local sovereign to govern the relations of the citizens of the state, and to prescribe the rules of property, and its mode of disposition, and its tenure—enter upon, or authorize an entry upon, private property for the purpose of extracting minerals. The United States, like any other proprietor, can only exercise their rights to the mineral in private property, in subordination to such rules and regulations as the local sovereign may prescribe. Until such rules and regulations are established, the landed proprietor may successfully resist, in the courts of the state, all attempts at invasion of his property, whether by the direct action of the United States, or by virtue of any pretended license under their authority.

Boggs v. Merced M. Co., 14 Cal. 279.

27. Any right defendant as a mining corporation, may have, as against Fremont, to the possession and use of the land for the purpose of extracting the gold, must be based upon the ground that the mineral does not pass with the soil as an incident to it, but belongs either to the United States, or the state of California, and that defendant has an effectual license to enter upon the premises and extract the same. Id.

28. The statement of the existence of a general license from the United States to work the mines which the public lands contain is inaccurate as applied to the action, or rather want of action, of the government. There is no license in the legal meaning of that term. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the general government only by act of congress. But congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. The supposed license from the general government consists in its simple forbearance. Id.

29. The provisions of the act of congress, approved July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," and the act amendatory thereof, approved July 9, 1870, and the "act to promote the development of the mineral resources of the United States," approved May 10, 1872, must be considered and construed together; and said acts merely confirm to the owners of mining claims and ditches and water rights on the public lands of the United States the same rights which

were accorded to them by the local customs, laws, and decisions of the courts prior to the passage of said acts.

Titcomb v. Kirk, 51 Cal. 288.

30. There is nothing in said acts which grants to the owners of ditches on the public lands any right not "recognized and acknowledged by the local customs, laws, and decisions of the courts." Id.

31. Said acts do not authorize a person engaged in the construction of a ditch for the conveyance of water to excavate it across the mining claim of another, which was located before the ditch was located. Id.

Title to.

32. In this state, claims to public mineral lands are recognized as titles, as legal estates of freehold, for all practical purposes, if we except some doctrine of abandonment not, perhaps, applicable to such estates.

Merritt v. Judd, 14 Cal. 59.

33. Defendant has no title to the land in controversy, that vested absolutely in Fremont by the final decree and approved survey, evidenced as they are by the patent under the signature of the president of the United States. Defendant does not claim under the pre-emption laws, and if he did the claim would be untenable, as mineral land is expressly exempted from pre-emption by the legislation of congress.

Boggs v. Merced M. Co., 14 Cal. 279.

34. If the forbearance of the government were entitled to any consideration as a legal objection to the assertion of the title of the government, it could only be so in those cases where it has been accompanied with such knowledge, on its part, of the working of the mines and the removal of the minerals, as to have induced investigation and action, had this been intended or desired. Such knowledge must be affirmatively shown by those who assert a license from forbearance. Id.

Grants of.

35. Mineral lands are not excepted from the operation of the grant of the sixteenth and thirty-sixth sections in each township, made to California for school purposes by the act of congress of March 3, 1853.

Higgins v. Houghton, 25 Cal. 252.

MINING CLAIMS.

Local Customs, Regulations, and Records.

36. The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners does not invalidate them. Courts will not inquire into the regularity of the modes in which these local legislatures or primary assemblies act. They must be the judges of their own proceedings. It is sufficient that the

miners agree, whether in public meeting or after due notice, upon their local laws, and that these are recognized as the **rules of the vicinage**, unless fraud be shown, or other like cause for rejecting the laws.

Gore v. McBrayer, 18 Cal. 582.

37. It is error for the court to instruct the jury that "the statute provides that general customs, usages, and regulations shall govern the decision of the action." The statute speaks only of **local customs**.

T. M. T. Co. v. Stranahan, 31 Cal. 387.

38. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the **general law of the land**, they can not be divested by any mere neighborhood custom or regulation.

Waring v. Crow, 11 Cal. 366.

39. If written laws exist in a mining district, and the proof renders it doubtful whether they are in force, both the mining laws and **parol proof** of the mining customs may be offered in evidence.

Culman v. Clements, 23 Cal. 245.

40. An **alteration**, made after their adoption, in one of several mining regulations reduced to writing by the officers of the meeting, does not change the legal effect of the other articles.

T. M. T. Co. v. Stranahan, 31 Cal. 387.

41. Where any local mining customs exist, controversies affecting a mining right must be solved and determined by the **customs and usages of the bar or diggings** embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten.

Morton v. Solambo C. M. Co., 26 Cal. 527.

42. **Actual possession** of a portion of a mining claim, according to the custom of miners, in a given locality on the Yuba river, extends by construction to the **limits of the claim**, held in accordance with such customs.

Hicks v. Bell, 3 Cal. 219.

43. Miners have the power to prescribe the rules governing the **acquisition and divestiture of titles** to this class of claims, and their extent, subject only to the general laws of the state.

English v. Johnson, 17 Cal. 107.

44. In the absence of any mining rule declaring that a **failure to record** a claim avoids the entry or claim, a party may take actual possession of mineral land, though in taking possession he do not observe the requirements as to registry and the like acts prescribed by the local laws. But if he takes more land than these rules allow this would not give him title to the excess against any one subsequently entering, who complies with the laws, and takes up such excess in accordance with them.

Id.

45. It appeared on the trial that the **district recorder**, in recording the notice of

one of the defendant's claims, omitted by mistake one of the lines, but in fact the lines were distinctly marked on the ground as required by the mining rules: *Held*, that the defendants were not bound by the **mistake** of the recorder, and that the actual location on the ground was sufficient to impart **notice to all comers**.

Myers v. Spooner, 55 Cal. 257.

46. If a mining custom allows a person to locate a lode or vein for himself and others, by placing thereon a **notice**, with his own name and the names of those whom he may choose to associate with him, appended thereto, designating the extent of his claim; and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location by the same become **tenants in common** with the locator and the others, and can not be divested of their interest by the locators afterwards tearing down the notice and posting up another omitting their names, unless this is done with their knowledge and consent.

Morton v. Solambo C. M. Co., 26 Cal. 527.

47. The mining rules of the district can not limit the **quantity of ground** or the number of claims a party may acquire by purchase.

Prosser v. Parks, 18 Cal. 47.

48. A local mining regulation or custom, adopted since the location of a claim, can not be given in evidence to limit the **extent of a claim** previously located.

T. M. T. Co. v. Stranahan, 31 Cal. 387.

49. Where there are no local customs or regulations in force in the district where a mining claim is located at the time of its location, **general customs** then in force are admissible in evidence upon the question of the reasonableness of its extent.

Id.

50. **Evidence of local usages** and customs in different counties in the mineral regions, varying from each other as to the size of locating a mining claim, is not admissible in evidence to show the reasonableness of its extent. A **general uniform custom** should be proved if one exists.

Id.

51. If the defendants in an action claim that when they took up the ground in dispute a local custom allowed them three hundred feet front to each man, and that they located to that extent, they are **estopped** from asserting that the plaintiff's location to the same amount, made before the adoption of the custom, was unreasonable in size.

Id.

52. If there is no evidence as to the general custom of the size of locating mining claims, instructions to the jury upon the **reasonableness of its size** depending on general custom are irrelevant.

Id.

53. Where the regulations of a mining locality require that every claim shall be worked two days in every ten: *Held*, that

the efforts of the owners of a claim to procure machinery for working the claim are, by fair intendment, to be considered as work done on the claim.

Packer v. Heaton, 9 Cal. 568.

54. So, also, is working on adjoining land in constructing a drain to enable the owners to work the claim. Id.

55. In an action of ejectment to recover possession of a mining claim, where the complaint alleges in general terms that the plaintiffs are the owners of the mining ground in controversy, they are entitled to show in evidence the rules and customs of the mining district in support of this alleged ownership without averring such rules and customs in the complaint.

Colman v. Clements, 23 Cal. 245.

56. In suit for mining claims, the court permitted defendants to introduce in evidence the mining rules of the district, though adopted after the rights of plaintiffs had attached: *Held*, that admitting plaintiffs' rights could not be affected by such rules, still, as defendants claimed under them, they were competent evidence to determine the nature and extent of defendants' claim, the effect of such rules upon pre-existing rights being sufficiently guarded by instructions of the court.

Roach v. Gray, 16 Cal. 383.

57. In this case: *Held*, that defendant could not offer in evidence an extract or single clause of a book containing the mining rules, but must offer the whole book, the book being in court, and in possession of defendant, and it being necessary to a fair understanding of any one part that the whole should be inspected.

English v. Johnson, 17 Cal. 107.

58. On the trial of an action to quiet the title to a mining claim, the plaintiffs' title depended upon maintaining their allegation, that by the custom prevailing among the miners of the district embracing their claims, the mode of locating claims therein was for the locators to measure off and designate by stakes on the ground their boundaries, to enter upon the occupation of the same, and to cause a record thereof to be made of such location, in the county recorder's office: *Held*, that the contents of a book kept in said recorder's office, consisting of the records of numbers of such locations—among which, and the first in the order of their registration, was the record of plaintiffs' claim—was properly admitted in evidence as tending to prove such allegation.

Pralus v. Pacific M. Co., 35 Cal. 30.

59. Where the original records of mining claims of a certain district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be re-recorded in a new book, such book may be admitted in evidence in the trial of an ejectment case for a mining claim, to show

that the rules of vicinage had been complied with.

McGarrity v. Byington, 12 Cal. 426.

60. Plaintiffs having offered in evidence the book, where mining claims are recorded according to mining rules, to show title in the original locators, then offered the entry in that book of the transfer of said claims from such locators to the lessor of plaintiffs as proof of the fact of transfer. The court below excluded this entry until proof aliunde of the transfer: *Held*, that this entry was inadmissible as proof of such transfer, there appearing no mining regulation which makes the entry by the recorder primary evidence of the fact of transfer.

Attwood v. Fricot, 17 Cal. 37.

61. Such book was admissible to show compliance with the rules of the mining district, and this particular entry admissible to show compliance with the miners' rule requiring transfers to be recorded. Id.

Abandonment and Forfeiture.

62. In an action of ejectment for a mining claim, in which the verdict and judgment were for the defendants, the evidence was conflicting, as to whether the plaintiffs' claim had been staked off and surrounded by a ditch, as required by the mining rules and regulations of the district, and also as to whether the claim had been abandoned; there being, on the latter point, evidence tending to abandonment, and the plaintiffs' own testimony that he had not intended to abandon: *Held*, upon the first point, that compliance with the mining rules, in the particulars specified, was essential to the validity of the claim; and upon the second, that evidence of the plaintiff as to his intentions, was not conclusive, but that the intention was to be determined from all the facts and circumstances of the case; and, the evidence being conflicting on both points, that the verdict should not be disturbed.

Myers v. Spooner, 55 Cal. 257.

63. Is purely a question of intention; an abandonment takes place when the ground is left by the locator without any intention of returning or making any future use of it, independent of any mining rule or regulation.

St. John v. Kidd, 26 Cal. 233.

64. Actual possession is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right. An entry upon such possession can not be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry; and such claim of right must exist before the entry to constitute good faith.

Phoenix M. Co. v. Lawrence, 55 Cal. 143.

65. *Held*, further, that the court properly ruled out the following question: "Do you

know what the **general belief** was with reference to those mines, as to whether they were abandoned or not?" *Id.*

66. Mere lapse of time does not constitute an abandonment, but it may be given in evidence for the purpose of ascertaining the intention of the parties.

Moon v. Rollins, 36 Cal. 333.

67. As to support the plea of abandonment it must appear from the evidence that there was a leaving of the claim, without any intention of returning or making any further use of it, so it is competent for the opposite party to prove, in rebuttal, any acts explanatory of the leaving which tend to show that it was not accompanied with an **intention not to return**.

Bell v. Bedrock T. & M. Co., 36 Cal. 214.

68. Where the plaintiff in ejectment for a mining claim, on cross-examination, admitted that he had not worked the claim for several years, but had during that time followed mining in Mexico: *Held*, that the **testimony** established abandonment, and the verdict for plaintiff was against the evidence.

Seymour v. Wood, 53 Cal. 333.

69. Evidence of the abandonment of a mining claim by a party suing to recover the same is admissible, without a **special plea** thereof, under a denial of title in the plaintiff, pleaded by defendant.

Bell v. Bedrock T. & M. Co., 36 Cal. 214.

70. To an action for the possession of a mining claim, the defendant pleaded in defense, first, a denial of the plaintiffs' title; and, second, a forfeiture of the same by the plaintiffs, under the mining rules and regulations of the district embracing the claim. At the trial, the defendant introduced testimony tending to prove that about two years before suit brought, the plaintiffs, or their grantors, who prior thereto had possessed and worked said claim, removed therefrom all tools and implements of mining, and ever since had ceased in any manner to work upon or occupy the same. The plaintiffs, in rebuttal, offered to prove that about nine months before suit brought, one W., on behalf of the defendant, offered to purchase of them said claim, and that they refused to sell. The court rejected the offered testimony, upon the defendant's objection thereto on the grounds of irrelevancy, and that no authority had been shown in W. to act in the premises on behalf of the defendant: *Held*, first, that under the defendant's denial of plaintiffs' title, evidence of abandonment of said claim by plaintiffs was admissible, without **special plea** thereof; second, that as said evidence introduced by defendants tended to prove such abandonment, it was equally relevant under both of said defenses; and, third, that as said testimony offered by the plaintiffs tended to disprove said abandonment, the court erred in rejecting the same. *Id.*

71. A right to hold and work a mining claim, when acquired, may be lost by a failure or neglect to **comply with the rules** and regulations of the miners relative to the acquisition and tenure of claims, in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer.

St. John v. Kidd, 26 Cal. 263.

72. The term forfeiture, as used in our mining customs and codes, means the loss of a right, previously acquired, to mine a particular piece of ground, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated. *Id.*

73. In order to the enforcement of the forfeiture of the interest in the claim, some appropriate action by suit must be taken to liquidate the demand, and sell the property, or there must at least be clear and **unequivocal proof** of abandonment.

Waring v. Crow, 11 Cal. 366.

74. The failure of a party to comply with a mining rule or regulation can not work a forfeiture of his title thereto, unless the **rule itself so provides**.

Bell v. Bedrock T. & M. Co., 36 Cal. 214.

75. In charging the jury upon the question of such forfeiture, the court should narrow its charge to such rules or regulations as expressly provide that a **non-compliance** with their provisions shall be cause of forfeiture. *Id.*

76. If the **local mining laws** of a district provide that, on a failure to work and notice a claim as required by the mining laws, the claim shall be considered as abandoned, a **failure to comply** with such laws is an abandonment of the claim, and it is open to location as vacant ground.

Strang v. Ryan, 46 Cal. 33.

77. If several, as tenants in common, locate a mining claim on the public lands, and by a failure to comply with the local mining laws, forfeit the same, it may be **relocated** by a part of the first locators, along with others who were strangers to the first location; and the tenants in common whose names are left out in the notice of relocation cease to have any interest in the mine. *Id.*

78. If the mining laws require a **renewal of notice of location** at stated periods, and a claim has been lost by reason of a failure to make such renewals, and one of the joint locators afterwards renews the location, stating that it is a renewal, and not a new location, the renewal will inure to the benefit of all the locators. *Id.*

Location and Notice.

79. A mining claim on the public domain

may be held either by **actual occupancy**, and the exercise of control over it by distinctly indicating the boundaries by monuments and marks, or by occupancy in accordance with the local mining customs.

Hess v. Winder, 30 Cal. 349.

80. One party may locate ground in the mineral districts for fluming purposes, and another party, at the same or a different time, may locate the same ground for mining purposes; the **two locations, being for different purposes, will not conflict.**

O'Keefe v. Cunningham, 9 Cal. 589.

81. In the absence of mining regulations, the fact that a party has located a claim bounded by another, **raises no implication** that the last-located claim corresponds in size, or in the direction of its lines, with the former.

Live Yankee Co. v. Oregon Co., 7 Cal. 40.

82. Although the mining ground may be located in the absence of local regulations, yet the extent of such location is not without limit. The **quantity taken must be reasonable**; and whether it be so or not will be determined in such cases by the general usages and customs prevailing upon the subject. If an unreasonable quantity be included within the boundaries, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied.

Table Mt. T. Co. v. Stranahan, 20 Cal. 198.

83. Upon the question of reasonableness of the extent of a mining location, a **general custom**, whether existing anterior to the location or not, may be given in evidence; but a local rule stands upon a different footing, and can not be introduced to affect the validity of a claim acquired previous to its establishment. Id.

84. English v. Johnson, 17 Cal. 107, that the quantity of ground a miner can claim by location or prior appropriation for mining purposes may be **limited by the mining rules** of the district, affirmed.

Prosser v. Parks, 18 Cal. 47.

85. The allegation of possession is too broad to defeat the rights of a person who has, in **good faith**, located upon public mineral land for the purpose of mining.

Smith v. Doe, 15 Cal. 100.

86. Where the location of a mining claim is made both by posting notices and by designating fixed objects, such as trees, shafts, and ditches on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground, **witnesses** are not confined in their testimony to a statement of the **contents of the notices**, but may also state whether the location made included the ground in dispute.

Kelly v. Taylor, 23 Cal. 11.

87. The inclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietors no higher rights; nor is it necessary, as notice, to those who have received actual notice of the intended line of the canal.

Conger v. Weaver, 6 Cal. 548.

88. If a company locates a mining claim of a certain width, extending through a mountain from base to base, and afterwards another company succeeds to their possession, whatever it was, and puts up a notice stating that its claim comprises the claim held by the old company, * * * and comprises the channel then existing, with its dips and angles, through the mountain, the latter company is **not restricted by this notice to one paying channel within the claim.**

Table Mt. T. Co. v. Stranahan, 31 Cal. 387.

Boundaries.

89. One seeking to hold a mining claim by virtue of prior possession alone, without any reference to local mining customs, must **mark out his boundaries** by such distinct physical marks or monuments as will indicate to any person what his exterior boundaries are.

Hess v. Winder, 30 Cal. 349.

90. In an action to recover damages for a **trespass** upon the plaintiffs' mining claims, where the defendants own adjoining claims lying west of the plaintiffs' ground, and both parties agree as to the north line of plaintiffs' claims, and admit that their east and west lines are parallel, but disagree as to their location, and W. & Co. own claims adjoining and east of plaintiffs, and H. & Co. own claims adjoining and east of W. & Co., **evidence of the location of the west line of H. & Co. is not pertinent, unless the east and west lines of W. & Co. are parallel, and the east line of W. & Co. is coincident with the west line of H. & Co.**

Stokes v. Monroe, 36 Cal. 383.

91. The **posting of a notice** upon a tree at each end of a mining claim is not a sufficient compliance with section 2324 of the revised statutes of the United States, which requires the location to be "distinctly marked on the ground so that its boundaries can be readily traced."

Holland v. M. A. G. Q. M. Co., 53 Cal. 149.

92. The **placing of a monument** in the center of a mining claim upon a mineral vein, and posting a notice thereon stating that the "undersigned claim seven hundred and fifty feet easterly and seven hundred and fifty feet westerly therefrom, together with three hundred feet on each side of the vein, with all its dips, spurs, and angles," giving the name of the lode and district, is not a sufficient compliance with the act of congress of May 10, 1872, which requires locators of mining claims to distinctly mark their locations on

the ground, so that the boundaries can be readily traced.

Gelcich v. Moriarty, 53 Cal. 217.

Possession of.

93. Mining claims are held by possession, but that possession is regulated and defined by **usage and local and conventional rules**; and the "actual possession" which is applied to agricultural land, and which is understood to be a *possessio pedis*, can not be required in case of a mining claim, in order to give a right of action for the invasion of it.

Attwood v. Fricot, 17 Cal. 37.

94. When sufficient possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation are not done in accordance with any local mining rule.

Table Mt. Co. v. Stranahan, 20 Cal. 198.

95. The exclusion, therefore, of evidence tending to prove a possession of this character, is error.

Id.

96. Where it appeared that the boundary line between the plaintiff's and defendant's mining claims had been in dispute for several years, the *locus in quo* being embraced between the adverse lines claimed by the parties respectively, the court refused the defendant's request to give the jury the following instruction, to wit: "Where two mining companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim." *Held*, that the instruction correctly declared the law, and, in view of the fact that plaintiff's said instruction had been given, the court erred in refusing it.

Maine Boys v. Boston Co., 37 Cal. 40.

97. Where a claim is distinctly defined by **physical marks**, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on or of a part, and though the party does not enter in accordance with mining rules, or under a paper title. The rule which applies to agricultural lands, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. *English v. Johnson*, 17 Cal. 107.

98. Fences are not requisite around mining claims. The physical marks upon and around the claim are sufficient to notify every one of the possession and claim of the possessor; and by common understanding, the going upon a claim to work it is an appropriation of the entire claim, especially if that claim can be appropriated to that extent by location by one man.

Id.

99. Where plaintiff claims, under purchase and location, a small tract of mineral land, with demarked limits, of which he is in possession, and there is no proof on the trial that the extent of his claim is opposed to the local rules, the presumption is that his possession is rightful, and not wrongful.

Id.

100. In such case the plaintiff need not show, in the first instance, that he was in possession in accordance with the local laws; but may, as a vendee under a deed may as to other land, make a *prima facie* case, upon possession; and this is enough until the defendant shows that the possession is wrongful because in violation of rules which justify him in going upon the premises and working them.

Id.

101. The nature of the possession requisite, when applied to different kinds of property, as **agricultural lands, town lots** covered with water, large districts where there is no timber, etc., suggested.

Id.

102. No acts are required as evidence of the possession of a mining claim, other than those usually exercised by the owners of such claims. A miner is not expected to **reside on his claim**, nor build on it, nor cultivate it, nor inclose it. He may be in possession by himself, or by his agents or servants.

Id.

103. **Going on the lead to work it**, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it, as, for example, starting a **tunnel** a considerable distance off, to run into the claim, would be a possession of the claim within the meaning of the rule.

Id.

104. Work done outside of a mining claim, with intent to work the claim, to be considered by intentment as **work done on the claim**, must have direct relation and be in reasonable proximity to it.

McGarrity v. Byington, 12 Cal. 426.

105. The possession of one claiming under a **parol sale**, or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure, or anything equivalent thereto.

Patterson v. Keystone M. Co., 23 Cal. 575.

106. The provision contained in the first section of the act of April 13, 1860 (stats. 1860, p. 175), that "conveyances of mining claims may be evidenced by bills of sale or

instruments in writing under seal," is mandatory, and it was intended that the method of conveying such property therein prescribed should exclude transfers by verbal sale, even though accompanied by a delivery of possession. *Felger v. Coward*, 35 Cal. 650.

107. C. agreed in writing to convey to F. an undivided interest in a mining claim, upon the fulfillment of certain specified conditions to be thereafter performed by F., and let F. into possession. Thereafter, on the failure of C. to convey as stipulated, F., who was at the time out of possession, brought ejectment to recover the same, the complaint being in the usual form: *Held*, that ejectment would not lie, but that the appropriate remedy of F. was by action for specific performance, and, as incidental thereto, a delivery of the possession. *Id.*

108. Persons claiming and in the possession of mining claims upon the public lands of the United States, are, as between themselves, and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation of the land containing the mine.

Hughes v. Devlin, 23 Cal. 501.

109. In suit for mining claims, the court charged the jury, in effect, that possession taken of a mining claim, without reference to mining rules, was sufficient, as against one entering by no better title, to maintain the action; and further, that this possession need not be evidenced by actual inclosure, but "if the ground was included within distinct, visible, and notorious boundaries, and if plaintiffs were working a portion of the ground within those boundaries," this was enough, against one entering without title: *Held*, that the instruction was right; that though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still, a possession not so taken is good against one taking possession in the same way; and that the actual prior possession of the first occupant would be better than the subsequent possession of the last.

English v. Johnson, 17 Cal. 107.

110. In this case the court instructed the jury, first, that if they found that plaintiffs located their claim as now claimed, before the location of defendants' claim, then they should find for plaintiffs; and, second, if they found that defendants never located any claim adjoining plaintiffs' claim, then they should find for plaintiffs: *Held*, that the instructions are wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it, until a prior and paramount right was shown in plaintiffs; that it was not

essential to defendants' possession to show that they had ever formally located their claim in accordance with any mining regulations, or that they had or claimed any other mining ground.

Pennsylvania Co. v. Owens, 15 Cal. 135.

112. The possession of a mining claim by a company composed of several persons, is the possession of each one of its members of his undivided share.

Patterson v. Keystone M. Co., 30 Cal. 360.

112. One who enters upon a part of a mining claim under a deed, does not by the deed alone acquire a constructive possession to the entire claim unless the deed contains definite and certain boundaries which can be located, marked out, and made known from the deed alone.

Hess v. Winder, 30 Cal. 349.

113. So, if a party enters upon a mining claim *bona fide*, under color of title, as under a deed or lease, the possession of part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this, though the paper did not convey the title. A third person could not invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger with which he had no connection.

Attwood v. Fricot, 17 Cal. 37.

114. The condition of the possessor in such instances is no worse than that of the occupant of other real estate, in which case the principle above stated applies. But this principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc., but applies where possession is taken independently of such rules. *Id.*

115. A mining claim must be in some way defined as to limits before the possession of, or working upon part, gives possession to any more than the part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim. *Id.*

116. As to the extent of a miner's possession, where he enters under a written claim or color of title, his possession, except as against the true owner or prior occupant, is good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim.

English v. Johnson, 17 Cal. 107.

117. One who claims a tract of mining ground for mining purposes on the public domain, but is actually occupying and working only one portion of it, can not recover damages for an entry by a stranger upon the tract beyond his actual occupancy, unless his boundaries were plainly indicated by marks or monuments, or there was some

local mining custom allowing his possession to extend to the ground upon which the entry was made.

Hess v. Winder, 30 Cal. 349.

118. The withdrawal of a member from a participation in the affairs of a **mining company**, and another taking his place and representing his undivided interest, is a change of possession of that undivided interest.

Patterson v. Keystone M. Co., 30 Cal. 360.

119. Evidence that a **portion of a mining claim** is not valuable for mining purposes is not admissible, on general principles, to prove that the owner of the claim has no right to hold to such portion.

Correa v. Frietas, 42 Cal. 339.

120. The **character** of the possession necessary to work mining claims will vary with the **nature of the mines**, the modes adopted in working them, and perhaps, with the character of the country. Id.

121. The owner and possessor of a mining claim on public land has a right to prevent any **subsequent comer** from erecting or constructing any superstructure, cut, or ditch on his claim, unless the right to construct the same is given by some mining custom or regulation. Id.

122. If parties are allowed by mining regulations to include within their claim land outside of that which they expect to work, it will be presumed, in the absence of proof to the contrary, that it is for the **convenience of working** the claims, and that its possession is necessary. Id.

Sale and Conveyance of.

123. A bill of sale, not under seal, is insufficient to convey a mining claim.

McCarron v. O'Connell, 7 Cal. 152.

124. A bill of sale for a mining claim, **not under seal**, and without warranty, which only purports to convey to the vendee the right, title, and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. Such a bill only passes an equity, which is subject to the legal title or any superior equity.

Clark v. McElvy, 11 Cal. 155.

125. In such a case, the purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of **caveat emptor** applies to all such cases. Id.

126. Instruments conveying mining claims need not be under seal.

Draper v. Douglass, 23 Cal. 347.

127. Where a mining claim is conveyed by a written bill of sale, the bill of sale is the **best evidence** of the transfer, and parol evidence of the conveyance is inadmissible.

Crary v. Campbell, 24 Cal. 634.

128. Mining claims may be conveyed by bills of sale or instruments in writing not under seal; and such conveyances have the same force and effect as *prima facie* evidence of sale as if made by deed under seal.

St. John v. Kidd, 26 Cal. 263.

129. No precise form of words is necessary to work a conveyance in a bill of sale for a mining claim. If it be clear from the language of the instrument that the maker intended to pass thereby the title to the property, the law will, if possible, so construe the words used as to effectuate that intent. Meyers v. Farquharson, 46 Cal. 191.

130. The owner of a mining claim may give away the same by a written bill of sale, and such bill of sale is not to be rejected as evidence because it was a gift. Id.

131. The entry of the sale of a mining claim made by the recorder of a mining district, in a book kept for the record and transfer of mining claims, and authorized by the mining customs and laws in force in the district where the claim is situated, is admissible in evidence to prove the sale of the claim, unless objected to. Such entry is at least secondary evidence of the sale. Id.

132. The right to a mining claim upon the public lands rests upon possession only, and a sale by **parol** by one in possession, accompanied by a transfer of possession, transfers the title.

Gatewood v. McLaughlin, 23 Cal. 178.

133. It is not necessary to prove the transfer of title of a mining claim by a written conveyance, but a **parol transfer with delivery of possession** is sufficient.

Antoine Co. v. Ridge Co., 23 Cal. 219.

134. A **bona fide parol sale** of a mining claim, accompanied by a delivery of possession, is valid as against a subsequent sale of the same grantor, made by deed in writing duly acknowledged.

Patterson v. Keystone M. Co., 23 Cal. 575.

But see Melton v. Lambro, 51 Cal. 258.

135. The rule allowing mining claims to be transferred by a verbal sale and delivery of possession only applies to cases where the grantor is in **actual possession** and can deliver possession to the grantee; and does not extend to cases where at the time of the sale the claim is in the adverse possession of third parties. In such cases, there must be a written conveyance to pass the title.

Copper Hill Co. v. Spencer, 25 Cal. 18.

136. The question discussed whether a verbal sale of a mining claim will pass the title, or whether, since the passage of the act of the thirteenth of April, 1860, such sale must be in writing.

Patterson v. Keystone M. Co., 30 Cal. 360.

137. A **verbal power** is sufficient to authorize an agent to sign the name of the grantor to a bill of sale of a mining claim,

where the grantor has first agreed in person with the grantee upon the terms of sale. *Id.*

138. The act of April 13, 1860, relative to the conveyance of mining claims, applied to gold claims only until the amendment of 1863, striking out the second section, after which it applied to all mining claims. *Id.*

139. A verbal sale of a mining claim, even if accompanied with a delivery of possession, **does not pass the legal title.**

Goller v. Fett, 30 Cal. 481.

140. A gold mine is real estate, and an interest therein, other than an estate at will or for a term not exceeding one year, can be transferred only by an **instrument in writing.** A verbal sale is not good.

Melton v. Lambard, 51 Cal. 258.

141. The owner of an **undivided interest** in a mine is entitled to the **possession of the whole mine**, as against one who has not title to any portion of the mine. *Id.*

142. Where K. acquired his interest in a mining claim by purchase, evidenced by deed or bill of sale, he was bound, for the purpose of showing title in himself, to produce the deed or bill of sale, or prove its loss, for the purpose of laying the foundation for the introduction of **secondary evidence** as to its contents. *King v. Randlett*, 33 Cal. 318.

143. Where, by the usages and customs existing in the territory of Utah (now state of Nevada), interests in mining claims situated therein which had been acquired by location, in accordance with the local customs and usages which then and there prevailed, could be sold and conveyed by delivery of possession, without deed or other instrument in writing; and where the ancestor from whom the plaintiff took by descent certain **undivided interests** in such a mine, in his life-time, in common with the other owners, so sold and conveyed said interests to a corporation formed under the laws of the state of California, by an association consisting of said ancestor and the other owners of said mine, which sale was in trust for the members of said association and their legal representatives, which conveyance was duly accepted by said corporation: *Held*, that thereby said corporation acquired the title of said ancestor to said mine, and that said trust was enforceable by plaintiffs against said corporation.

Blodgett v. Potosi M. Co., 34 Cal. 227.

144. Where individuals convey lands, the minerals of gold and silver pass, unless **expressly reserved.**

Moore v. Smaw, 17 Cal. 190.

Fremont v. Flower, *Id.*

145. The minerals of gold and silver in this case, which passed by the cession, were not held by the United States in trust for the future state, and the ownership of such

minerals did not vest in California upon her admission into the union. Such ownership is not an incident of sovereignty; and the United States holds the minerals of gold and silver just as they hold any other public property which they acquired from Mexico. *Id.*

146. The purchaser at a judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a **receiver** appointed to take charge of the proceeds during the period allowed by statute for redemption. *Hill v. Taylor*, 22 Cal. 191.

Title and Evidence of Title.

147. Under existing legislation, the owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated until his title is divested by the exercise of the higher right of his superior proprietor. His right to protect the property, for the time being, is as full and perfect as if he were the tenant for years, or for life, of his superior proprietor. As his **lease** is of the mine, he is entitled to all the remedies for its protection that he could claim if he were the owner, against all the world except the true owner.

Merced M. Co. v. Fremont, 7 Cal. 317.

148. Parties taking possession of a quartz lead, under an agreement made with another party, can not retain **possession** and refuse compliance with their agreement made in consideration of such possession and right to the lead. *Hitchens v. Nougues*, 11 Cal. 29.

149. And where such parties conveyed to H. one third interest in the lead, by deed purporting to convey in fee simple absolute, and **subsequently acquired** other title: *Held*, that such subsequent acquisition of title inured to H.'s benefit. *Id.*

150. The purchaser of a mining claim can only acquire, by such purchase, such right or title as his vendor had at the time of sale. *Waring v. Crow*, 11 Cal. 366.

151. The whole course of legislation and judicial decisions in this state, since its organization, has recognized a **qualified ownership** of the mines in private individuals.

State v. Moore, 12 Cal. 56.

152. There is no force in the objection that the **value of a mining claim**, which depends upon the amount of the precious metals which it contains, must necessarily be left to conjecture. *Id.*

153. A bill of sale of a mining claim is sufficiently proved when the handwriting of the **subscribing witness**, who is absent from the state, and the execution by the vendor, is proven. And this, though the subscribing witness was in the state after suit instituted, and near the time of trial,

and plaintiff used no efforts to get the testimony of the witness before he left the state.

Jackson v. F. R. W. Co., 14 Cal. 18.

154. A writing is not necessary to vest or divest the title on taking up a mining claim. The right of the miner comes from the mere appropriation of the claim made in accordance with the mining rules and customs of the vicinage. The title is in the government, and the right to mine is by its permission to the appropriator.

Gore v. McBrayer, 18 Cal. 582.

155. The usual mode of taking up mining claims is to put upon the claim a **written notice** that the party has located it; and this taking up and giving notice may be done by a party personally, or by any one for him, or with his assent or approval; and whenever the appropriation is made by an agent having authority from a principal to make it, the act is complete, and the title vests in the principal, and the agent by his mere act can not subsequently divest it. *Id.*

156. So, where G., McB., and others verbally agreed to prospect for quartz, and to be equally interested in claims taken up, and McB. discovered a lead or claim and located it by putting up a written notice with G.'s name and others on it, appropriating the lead: *Held*, that G.'s right attached by these proceedings, and could not be divested by the mere act of McB. in taking down the notice and putting up other notices with other names. *Id.*

157. After the notice was put up, G. became a **tenant in common** of the mine, and not a partner, and could bring an action to vindicate his title against McB. or any one who excluded him or denied his right. *Id.*

158. In actions to recover possession of mining claims located on the public lands, the doctrine that the plaintiff, if he recovers at all, must recover on the **strength of his own title**, has no application, for neither party has any legal title.

Richardson v. McNulty, 24 Cal. 339.

159. A bill of sale of a mining claim executed by three grantors is admissible in evidence, if the execution of only two of the grantors is proven. If the execution of the third grantor is not proven, the failure to make this proof should be taken advantage of by asking the court to instruct the jury to disregard it so far as it purports to convey the interest of the person whose **signature is not proven**.

St. Johns v. Kidd, 26 Cal. 263.

160. Plaintiffs here, three in number, claiming by purchase and location, defendant offered to show that one of the plaintiffs had admitted, years ago, that he had more than five claims: *Held*, that the evidence was properly ruled out, its **relevancy** not being shown. *English v. Johnson*, 17 Cal. 107.

161. Where K. admitted he acquired his interest in certain company mining claims by purchase, which admission was not withdrawn, evidence that K. had acted as member of the company, that the company had recognized him as a member and the owner of said interest, and that he had paid assessments to the company thereon, was irrelevant and incompetent to prove title to said interest in K. Had K. claimed title as an original member of the company, then such proof would have been relevant and competent as tending to prove that he was a member of the company and had an interest in the claims by virtue of the company's location. Since the passage of the act of April 13, 1860, entitled "an act to provide for the conveyance of mining claims," a deed duly acknowledged, or bill of sale accompanied by delivery of possession, is necessary to pass the title of a mining claim to a purchaser. Prior to said act, a **verbal sale**, accompanied by a **delivery** of possession, was sufficient.

King v. Randlett, 33 Cal. 318.

Injuries to, and Remedy.

162. The **removal of gold** from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which **injunctions** are now universally granted.

Merced M. Co. v. Fremont, 7 Cal. 317.

163. Where the plaintiff sued for an injury to his mining claim, by the **breaking of defendant's canal**, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil, and no negligence in fact being shown other than that which the law would presume from the breaking of the ditch: *Held*, that the rights of the parties were acquired at the dates of their respective **locations**, and that the rule of "**coming to a nuisance**" may be applied.

Tenney v. Miners' D. Co., 7 Cal. 335.

164. A writ of **injunction** will lie, to restrain **trespass**, in entering upon a mining claim and removing auriferous quartz from it where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law. Moreover, it would be impossible to estimate, with any approach to accuracy, the damage done; and hence the greater necessity of preventing what can not be adequately compensated.

Merced M. Co. v. Fremont, 17 Cal. 317.

165. In this case the supreme court refused to interfere with the **discretion** of the court below in denying an injunction sought by a settler upon public mineral lands to protect his improvements, a dwelling-house, milk house, barn, garden, dam, etc., against miners who were working the bed of a ra-

vine a short distance in front of the house. See facts. *Slade v. Sullivan*, 17 Cal. 102.

166. Plaintiffs are owners of mining claims located in the bed of a creek, and defendants own claims situated on a hill in the vicinity. The refuse matter washed from defendants' claims is deposited on plaintiffs' claims to such an extent as to render the working of them impracticable. Plaintiffs' claims were first located and are valuable only for the gold they contain: *Held*, that plaintiffs are entitled to damages for the injuries done their claims by such deposits, and to an injunction against the same in future; that the enjoyment of their claims lies in the use necessary to obtain the gold, and that to interrupt this use is to take away the opportunity to enjoy and defeat the object for which they were located and taken possession of. The rule *qui prior est in tempore potior est in jure* applies in such cases.

Logan v. Driscoll, 19 Cal. 623.

167. The position that, so long as the use made by defendants of their claims is not in itself unlawful, plaintiffs can not complain of its effect upon them, is untenable, because no use is lawful which precludes plaintiffs from the enjoyments of their rights. *Id.*

168. The working of mines is something more than the ordinary use of real estate by one in possession, and requires the use of more than ordinary remedies to protect the rights of the purchaser at a judicial sale. It may probably be restrained as waste under section 235 of the practice act, but the appointment of a receiver is the more appropriate remedy, as it permits the continued working of the claims.

Hill v. Taylor, 22 Cal. 191.

MINERS.

Rights of Miners.

169. The act of 1850, respecting the mines, the practice act of 1851, section 621, relative to proof in actions respecting mining claims, the act of 1852, relative to possessory actions, commented on, and the conclusion reached, that, so far as they touch the question of a license from the state to mine, they refer to public lands alone.

Boggs v. Merced M. Co., 14 Cal. 279.

170. Where the question is confined to public lands, there is no necessity to resort to any construction to determine the right which the law confers. The legislature has passed an act which gives permission to all persons to work the mines upon public lands, notwithstanding they may be in the possession and enjoyment of another for agricultural purposes.

Stokas v. Barrett, 5 Cal. 36.

171. The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights which have an equal

equity on account of an equal recognition from the sovereign power.

Irwin v. Phillips, 5 Cal. 140.

172. A party mining upon a ravine which runs into another ravine is not clothed, by virtue of his right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in, at any point he may select, upon the tail-race of another constructed upon the other ravine.

Gregory v. Harris, 43 Cal. 38.

173. Although it appears that the plaintiffs had the better title to the ground claimed by them, yet if the testimony establishes that the defendants had the prior right to mine, and that they could not mine without the dam, the plaintiffs can not recover.

Stone v. Bumpus, 40 Cal. 428.

174. An instruction to the effect, that if at the time plaintiffs took up and worked the ground in dispute, defendants or their grantors stood by and permitted plaintiffs to work and develop the same without objection or opposition, were matters, if true, to be taken into consideration in determining the conflicting claims of the parties to the premises, is erroneous. *Id.*

175. It is not the province of a court to question the judgment of the owner of a mining claim as to the manner in which he shall work the claim, so that the working does not interfere with prior rights acquired by others. *Stone v. Bumpus*, 46 Cal. 218.

176. The owner of a mining claim, comprising the bed of a canyon, may erect dams across the canyon for the purpose of enabling him to work the same, even if thereby mining claims on the banks of the canyon, belonging to others, are flooded, provided the claim in the bed of the canyon is the oldest location, and in such case the injury sustained by the owner of the bank claim is *damnum absque injuria*. *Id.*

177. In such case, a declaration of the owner of the canyon claim, before building the dam, that he will put in a dam that will flood the claim on the bank of the canyon, is consistent with the utility or necessity of the dam in working the canyon. *Id.*

178. The act of 1870, providing for the condemnation of the right of way over or through a mining claim for ditches, tunnels, flumes, etc., necessary for the convenient working of another mining claim, is merely cumulative, and does not have the effect of excluding a party from the enforcement in court of the right to construct such tunnels, ditches, flumes, etc., when that right exists independent of the statute, as by local customs. *Bliss v. Kingdom*, 46 Cal. 651.

179. If by the local customs, the owner of one mining claim has a right to construct a tunnel through an adjoining claim, in order to enable him to work his own claim, a

court of equity may enjoin any interference with that right. *Id.*

180. The right to be protected in the possession of the public lands in this state is founded alone on the doctrine of presumption; for a license to occupy, from the owner, will be presumed.

Conger v. Weaver, 6 Cal. 548.

181. As, from the nature of these works, time is necessary to complete them, the license would be valueless, if the right did not commence until their completion; and it must be presumed that, in granting the license, the state did not intend that it should be turned into so vain a thing, but designed it to be effectual, for the object in view; and it consequently follows that the same rule must be applied here to protect this right as any other. *Id.*

182. The fact that the parties in possession of a gold mine are foreigners, and without license, affords no apology for trespassers. The state alone can enforce the law prohibiting foreigners from working in the mines without a license.

Mitchell v. Hagood, 6 Cal. 148.

183. Miners have a right to enter upon public mineral land, in the occupancy of others for agricultural purposes, and to use the land and water for the extraction of gold, the use being reasonable, necessary to the business of mining, and with just regard to the rights of the agriculturist. And this, whether the land is inclosed or taken up under the possessory act.

Clark v. Duval, 15 Cal. 85.

184. A person who settles for agricultural purposes upon any of the mining lands of this state, settles upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals there may be found in the lands so occupied by the settler, in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant.

McClintock v. Bryden, 5 Cal. 97.

185. Where it appeared that plaintiff had an inclosed garden and fruit orchard, together with his residence and outbuildings, also a dam situated a short distance above the inclosure, and across a ravine extending from above through his inclosure, with a small ditch leading therefrom to his garden and house, whereby he collected and conveyed, for culinary use and for irrigation, pure water, claimed by plaintiff to be from a natural spring, arising in or near the bed of said ravine, above said dam, all of which were being used and enjoyed by plaintiff, for their several appropriate uses, and so continuously had been for over five years; and when defendants (having mining claims situated on the hillside above plaintiff's premises), by means of foreign water procured from ditches, washed the debris of their mine

down into said ravine, at a point above said dam, and thereby filled up and rendered useless to plaintiff said dam and ditch, and by flooding with water and mud materially injured plaintiff's garden, fruit trees, and buildings, which injury, however, was not done maliciously or unnecessarily, but in the reasonable conduct of their said mining; and where said mining by defendants, and their right to mine in said claims and vicinity dated back only three years; and where the premises of both plaintiff and defendants were part of the public lands of the United States: *Held*, that the court below erred in rendering judgment for defendants in an action by plaintiff against them to recover said damage, and to enjoin, as working an irreparable injury to plaintiff, the continuance of said injurious acts.

Leveroni v. Miller, 34 Cal. 231.

186. In such case, the right of the defendants to mine in, and to use therefor the ravine, above the plaintiff's premises, must be exercised in such manner as not to damage the prior right of the plaintiff to inhabit and cultivate his premises, and to the use of his dam, as appurtenant thereto. *Id.*

187. In permitting persons to go upon public lands occupied by others, for the purpose of mining, the legislature has legalized what would otherwise have been a trespass, and the act can not be extended by implication to a class of cases not specially provided for.

Fitzgerald v. Urton, 5 Cal. 308.

Burdge v. Underwood, 6 Id. 45.

Weimer v. Lowery, 11 Id. 104.

188. The occupation of a lot for the purpose of hotel keeping is not inconsistent with the policy of the state with regard to mining claims. *Id.*

189. The wants of mining communities demand some facilities for the business of mining, and persons settled in good faith upon lots in the mining towns, and carrying on business, should be reasonably protected. *Id.*

190. The act of 1855 seems to proceed upon the idea of an absolute and unconditional right in the miner to enter upon the possessions of another for mining purposes, and the intention of the act was to limit this supposed right, and not to give a right of entry in cases where no such right previously existed. *Gillan v. Hutchinson*, 16 Cal. 153.

191. Miners have no such absolute and unconditional right. The true rule is laid down in *Smith v. Doe*, 15 Cal. 100. *Id.*

192. Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing, first, that the land is public land; second, that it contains mines or minerals; third, that he enters for the bona fide purpose of mining. And such justification must be affirmatively pleaded

in the answer, with all the requisite averments to show a right under the statute, or by law, to enter.

Leutz v. Victor, 17 Cal. 271.

193. Miners have no right to enter upon **private land**, and subject it to such uses as may be necessary to extract the precious metals which it contains.

Henshaw v. Clark, 14 Cal. 460.

194. A miner has no right to dig or work within the inclosure surrounding a dwelling-house, corral, and other improvements of another. Burdge v. Underwood, 6 Cal. 45.

195. The policy of this state, as indicated by her legislation, in conferring the privilege to work the mines, equally confers the right to divert the streams from their natural channels.

Irwin v. Phillips, 5 Cal. 140.

196. A prior locator of a mining claim, on the bank of a stream, has the right to the use of the bed of the stream for the purpose of fluming or working his claim; and any subsequent erection, dam, or embankment, which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent on such obstructions.

Sims v. Smith, 7 Cal. 148.

197. In constructing canals, under the license of the state, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right.

Conger v. Weaver, 6 Cal. 548.

198. Where the owners of a ditch had commenced their ditch and run their line before the location and appropriation of a lot of land by the plaintiffs, who sued them for trespass thereon: *Held*, that a slight divergence in the construction of the canal from the original line, after the plaintiffs' location and appropriation, both lines running equally through the plaintiffs' claim, was no trespass in constructing the ditch on the new line; and, if the plaintiffs suffered no actual injury by the change, it was *damnum absque injuria*. Id.

199. The pay-dirt and tailings of a miner, which are the productions of his labor, are his property.

Jones v. Jackson, 9 Cal. 237.

200. When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose; provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly

manifested by outward acts. Mere posting notice is not sufficient. He must claim the place of deposit as such or as a mining claim. Id.

201. To suffer the tailings to flow where they list, without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary. Id.

202. If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass. Id.

203. Where tailings are allowed to flow upon the ground of another, he is entitled to them. Id.

204. The first locator of a quartz lode is not confined simply to the solid quartz actually embodied in the bedrock, but is entitled to the loose quartz rock and decomposed material which were once a part of the lode, and are now detached, so far as the general formation of the ledge can be traced.

Brown v. '49 and '56 M. Co., 15 Cal. 152.

205. The right of the quartz miner comes from his appropriation; and whenever his claim is defined, there is no reason, in the nature of things, why the appropriation may not as well take effect upon quartz in a decomposed state as any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator. Id.

206. The only question of fact in this case being, whether the quartz rock, parted or not from its original connection, was a portion of the same quartz lode or claim taken up by defendant, it was not important whether the rock was upon or beneath the surface, or what its condition, provided it were a part of such lode or claim. Id.

207. In cases of this kind, the custom of miners is entitled to great, if not controlling, weight. Id.

208. Under certain circumstances, proof of the custom in other districts may be proper—at least, this court is not satisfied to the contrary. But, in this case, the admission of such testimony, if error, was immaterial, as the case was tried by the court, and the judgment placed on independent ground, upon which it can stand. Id.

209. The right in a mining claim vests by the taking in accordance with local rules.

McGarrity v. Byington, 12 Cal. 426.

210. In the absence of any custom or local regulation, the right of property, once attached in a mining claim, does not depend upon mere diligence in working such claim.

The failure to comply with any one mining regulation is not a **forfeiture** of title. It would be enough to hold the forfeiture as the result of a non-compliance with such of them as make a non-compliance a cause of forfeiture. *Id.*

211. The true interpretation of the **mining usage** in the county of Nevada is that work to the value of one hundred dollars, or twenty days of faithful labor performed on a claim, or on any one of a set of adjoining and contiguous claims, owned by the same party, is sufficient to hold the same for one year.

Bradley v. Lee, 38 Cal. 362.

212. Where defendants owned and possessed a **hydraulic claim** on Dutch ravine, into which their **flume** emptied, and plaintiff, being the owner of a claim below, dug a ditch, commencing on defendant's claim but below their flume, for the purpose of appropriating the water discharged therefrom, and thereupon defendants extended their flume further down on their own claim, but so as to prevent such appropriation by plaintiff: *Held*, that defendants had a right to such extension, though there might be a question as to whether it served any useful purpose or not, and that it could not be abated by plaintiff as a **nuisance**.

Correa v. Frietas, 42 Cal. 341.

213. In an action for possession of a mining claim, where plaintiff relied upon a location under certain **written rules** adopted by the miners of the district some five years before, which did not require the posting of notices upon the claim at the time of location; and defendant offered to prove that there was a **custom** in the district requiring the posting of such notices; and the court excluded the evidence on the ground that the written rules superseded any custom: *Held*, that the exclusion of such evidence was error. *Harvey v. Ryan*, 42 Cal. 627.

214. Section 621 of the practice act makes no distinction between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law; and a custom reasonable in itself, and generally observed, will prevail as against a written mining law fallen into disuse. *Id.*

215. The rules adopted by the miners of a district acquire validity, not from their mere enactment, but from the **customary obedience** and acquiescence of the miners following the enactment. *Id.*

216. As the "**mining law**" of a district must not only be established, but in force, it is void whenever it falls into disuse or is generally disregarded; and the question whether it is in force at a given time is one of fact for the jury. *Id.*

217. Mining claims on the public lands must be held and worked in accordance with

the **local mining laws** adopted and in force in the mining district where the same are located. *Strang v. Ryan*, 46 Cal. 33.

218. Those owning the major portion of a mining claim have the power to decide what may be necessary and proper for carrying on the business of mining, and to **control the working of the claim**, in case all the parties in interest can not agree, provided that the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned.

Dougherty v. Creary, 30 Cal. 290.

219. Each member of a **mining partnership** has a **lien** upon the partnership property for the debts due the creditors of the concern, and for moneys advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist.

Duryea v. Burt, 28 Cal. 569.

Liabilities of.

220. Where the miner, who desires to dig up crops growing on land held under the possessory act, offers to give the proper bond required by the act of 1855, and the owner of the crops refuses to receive it, the miner acquires by such offer a right to enter and mine on the land, and can not be treated as a trespasser. The miner is liable, however, for the **damage to the growing crops**, caused by his act, and if the owner of the crops should demand of the miner payment of the damage caused to the crop, and the miner should refuse to pay, a court of equity would restrain him from further working.

Rupley v. Welch, 23 Cal. 452.

221. The fact that a miner, working a claim above the head of a ditch, conducts his mining operations in such a manner as to cause the least possible injury to the ditch and water flowing in the same, does not excuse his responsibility for injuries caused by working the same. It matters not how cautiously or carefully the miner works, for if the ditch owner is in fact injured, the miner is none the less liable.

Hill v. Smith, 27 Cal. 476.

222. Where the owner of a mining claim contracts, verbally, with J., for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J.'s contract: *Held*, that his claim is not subject or liable to J.'s contract. *Jenkins v. Redding*, 8 Cal. 598.

223. The possession of J. being that of his employer, was not notice to the purchaser. *Id.*

224. The interest of a miner may be **sold on execution**. *McKeon v. Bisbee*, 9 Cal. 137.

225. If a party who is engaged in mining

for coal causes water, sand and clay, in a flowing mass, to descend upon the land of another so as to destroy its value for cultivation, and such descent is the direct result of the act of such party, and not the mere result of the law of gravitation, the person whose land is thus injured may recover damages, and enjoin the future commission of said acts.

Robinson v. Black D. C. Co., 50 Cal. 460.

MINING STOCK.

226. Plaintiff and others owned and worked a mining claim from 1855 to 1858, when they formed themselves into a corporation, with twenty-one shares of stock at one hundred dollars each; and from that time the claim was held as corporate property. The corporation levied assessments on the shares of stock, of which plaintiff owned one, and plaintiff failing to pay, sold his share at public auction. He now sues the corporation for an undivided one twenty-first of the mining claim: *Held*, that plaintiff has mistaken his remedy; that if the corporation had no power to forfeit his stock, and hence it was improperly sold, he may maintain an action for its recovery, but not for a specific interest in the claim, not being in a position to question the title of the corporation, particularly as the property is a mining claim and could only be held by occupation and possession.

Smith v. Maine Boys' T. Co., 18 Cal. 111.

227. A finding of fact that a mine owned by a corporation is valueless does not necessarily show that the stock of the corporation is valueless. Gifford v. Carvill, 29 Cal. 589.

228. The right of action against a stockholder of a mining corporation, on account of his individual responsibility for its debts and liabilities, as prescribed by the sixteenth section of the act concerning mining corporations, accrues at the same time as against the corporation, and is not contingent on a recovery against the corporation. Davidson v. Rankin, 34 Cal. 503.

229. Sale of mining stocks by bailee, and right of bailor to demand proceeds of. Atkins v. Gamble, 42 Cal. 86.

230. The question whether a sale of mining stock made in the board of brokers is not a sale at public auction, such as a pledgee is authorized to make upon default being made by the pledgor, not decided. Child v. Hugg, 41 Cal. 519.

231. The statute of 1865-6 in relation to levying assessments against the owners of interests in making claims for the purpose of working the same, applies only to copartners in the claim, and has no reference to those who are mere owners and shareholders, without the partnership relation.

Brundage v. Adams, 41 Cal. 619.

232. To warrant such assessment, if the partnership relation does not exist, the joint owner must be notified that thenceforward he will be deemed a copartner for the purpose of working the claim, and the service of the notice changes the relation of the parties, and creates a mining partnership. *Id.*

234. The pledgee of mining stocks, upon a redemption of the pledge, is not obliged to return to the pledgor the identical certificates pledged, but may return certificates corresponding to those received.

Thompson v. Toland, 48 Cal. 99.

235. If the owner of mining stocks allows his broker, who purchases for him, to hold the certificates in such a manner that they will pass by delivery on the indorsement of the broker, with nothing on the face of the certificate to indicate that the real owner has any interest in the stock, a purchaser in good faith from the broker, without notice of the rights of the real owner, acquires a good title to the same, even if the broker, by a contract with his principal, had no right to sell or hypothecate the stocks without the consent of his principal. *Id.*

236. In this state, mining stocks properly indorsed pass by delivery; and if the true owner places them in the hands of another, on some secret trust between them, without anything on the face of the certificates to show his ownership, he, and not an innocent purchaser or pledgee, must bear the loss. *Id.*

237. The addition of the word "trustee" in a certificate of stock to the name of the person to whom it is issued, does not show that such person has not the full right to deal with it as his own, nor give the person dealing with him notice that any other person has any interest in the same. *Id.*

238. Certificates of stock in a corporation are not negotiable securities, in a commercial sense, but are mere evidences of the holder's title to a given share in the property and franchises of the corporation.

Sherwood v. Meadow V. Co., 50 Cal. 412.

239. If a corporation issues to an owner of shares of stock a certificate transferable on the books of the company by indorsement and surrender of the certificate, and he indorses the same, and then loses it, and it comes into the hands of a bona fide purchaser for value, such purchaser acquires no right to the stock. *Id.*

240. If the owners of a mining claim agree to incorporate, and to take stock in the corporation in proportion to the interest of each in the mine, and before the corporation has been created, one transfers to a third person shares of stock to be issued as soon as the corporation is in existence, and gives him a certificate to that effect, the corporation

is not bound by the transfer or certificate, and is not obliged to issue the stock to such third person.

Hawkins v. Mansfield M. Co., 52 Cal. 513.

241. If W., being the owner of certain shares of the stock of a corporation, causes them to be transferred on the books of the company to M., to whom a certificate is issued in due form, and if M. thereupon indorses the certificate in blank, and delivers it to W., from whom, while so indorsed in blank, and while M. still stands on the books of the company as the registered owner, the certificate is subsequently stolen by M., who puts it on the market, and it is purchased in the usual course of business, in good faith and without notice, by a third person—the purchaser will acquire a valid title to the stock, as against W.

Winter v. Belmont M. Co., 50 Cal. 428.

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MISTAKE.

1. If money be paid in mistake of law, and not of fact, the court can not relieve.

Smith v. McDougal, 2 Cal. 586.

2. Plaintiff is not entitled to relief on the ground of mistake, which was of law, and not of fact. Gross v. Parrott, 16 Cal. 143.

3. Parties may be relieved from a mistake of law as well as of fact.

Remington v. Higgins, 54 Cal. 620.

4. A court of equity will not relieve a party from a contract entered into by mistake, where the mistake is one purely of

law, unattended with misrepresentation, undue influence, misplaced confidence, or other special circumstances of similar character.

Kenyon v. Welty, 20 Cal. 637.

5. Thus, a contract entered into by parties under a mutual supposition that the law affecting the subject of the contract was in accordance with a previous decision of the supreme court upon a similar state of facts, will not be set aside because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the subject. *Id.*

6. In the absence of fraud or mistake, a party can not escape the consequences of an arrangement voluntarily made by him, because of a misunderstanding of its legal effect. *Parsons v. Fairbanks*, 22 Cal. 343.

7. If the language of a deed is the language intended to be used by the grantor, his mistake as to the legal effect of the language used will not afford him any ground to relief in equity. *Burt v. Wilson*, 28 Cal. 632.

8. A court of equity will relieve against mistake, as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show the mistake.

Wagenblast v. Washburn, 12 Cal. 208.

9. Where the mistake appears upon the face of the instrument itself, courts will correct the mistake without evidence aliunde. *Id.*

10. The form in which relief will be given, when a mistake in a material particular is established in a written agreement, depends upon the circumstances of the particular case. Courts of equity have a wide discretion in such matters, the object being to give parties the same beneficial result which would have flowed from the agreement had the mistake never existed.

Lestrade v. Barth, 19 Cal. 660.

11. As in this case, relief from the consequences of the mistake in the description of the premises sold by Bennett to defendant's grantors is sought in equity; evidence of Bennett's declarations, and conduct in fencing the lot, in locating his own building, and of his agreement as to a partition wall between himself and such grantors, was admissible to show the mistake. *Id.*

12. Where the correction of a mistake in a written instrument is sought in equity, the evidence as to the mistake must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt. *Id.*

13. When in a criminal case a mistake or omission has occurred in a bill of exceptions settled by the judge, he may allow a resettlement, provided it be asked before the transcript on appeal is sent to the supreme court, and the mistake or omission is supported by documentary evidence, or is not

denied by the adverse party. But where the existence of the alleged mistake or omission rests in the mere recollection of the judge or of the counsel in the case, and is not admitted by the parties, resettlement should be denied. *People v. Romero*, 18 Cal. 89.

14. A judgment will not be set aside on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note.

Zeil v. Dukes, 12 Cal. 479.

15. A declaration of location, under the possessory act of this state, described the tract of land as being in township 21; and also gave the names of the land claims adjoining it on its different sides. The tract was in township 22: *Held*, that this mistake did not vitiate the declaration, and that it was admissible in evidence.

Hicks v. Whiteside, 23 Cal. 404.

16. Where property has been assessed to an unknown owner and sold for the tax, and a deed executed to the purchaser, the fact that the agent of the owner of the lot paid the tax on the wrong lot by mistake is not such a mistake as a court of equity will relieve against. *Moss v. Mayo*, 23 Cal. 421.

17. Where there is an evident mistake in the use of a word in a section of a statute, and it is apparent what was the word intended, it will be read as though the intended word was inserted.

Ex parte Hedley, 31 Cal. 108.

18. The complaint alleged that the defendant contracted to a certain effect with the plaintiff and others. The defendant pleaded that the written contract signed by him did not represent the understanding of the parties, and that he signed it under a mistake, induced by misrepresentations as to its contents by one of the parties, at whose request he signed it. The court found that all the allegations of the complaint were true: *Held*, first, the evidence being conflicting, that the finding was conclusive upon the question as to whether there was a verbal understanding different from the written agreement; and, second, that the finding negatived the defense of mistake pleaded in the answer, and sufficiently disposed of that issue.

Williams v. Hill, 54 Cal. 390.

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34.

APPEAL, 174, 278,
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ARBITRATION, 16, 26-
28.

ATTACHMENT, 81.

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BILLS AND NOTES,
254, 266.

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CONTINUANCE, 46,
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DEFAULT, 89, 102, 107, 110.	FORECLOSURE, 86.
DEMAND, 18.	FRAUD, 5.
EJECTMENT, 240.	GUARDIAN AND WARD, 58.
EQUITY, 10, 44, 62, 73, 78, 83, 84, 108, 139.	JUDGMENT, 52, 53, 189, 197, 212, 238,
EVIDENCE, 165-167, 190.	MEXICAN GRANT, 343, 344, 348-351.
EXECUTION, 227.	MORTGAGE, 81.
	PLEADING, 1300.

MOBS

1. A claim for damages for injuries to property, caused by a mob or riot (in the city and county of San Francisco) is not to be presented, in the first instance, to the board of supervisors for allowance, as in the case of other claims, but a judgment must first be had, and thereupon the board must order it to be paid, unless they shall determine to appeal.

Bank of Cal. v. Shaber, 55 Cal. 322.

2. The attorney and counselor of the city and county of San Francisco, while he holds his office by a tenure independent of the board, can not act independently or against the directions of the board; and *held*, accordingly, where the board had determined by ordinance not to appeal from a judgment against the city and county for damages, caused by a mob or riot, and had ordered the payment of the same, that an appeal taken by the attorney and counselor was without authority, and did not stay the enforcement of the order of the board. *Id.*

3. *Held, further*, that the order of the board, directing the payment of the judgment, operated as an estoppel upon the city and county, as against an assignee for value, who purchased the claim, relying upon the action of the board. *Id.*

4. And *held, further*, that upon the refusal of the county treasurer to pay the claim, *mandamus* was the proper remedy. *Id.*

5. The act of the legislature compelling a county to pay for property destroyed by a mob created a new right, and provided a new remedy therefor complete in itself.

Clear Lake W. Co. v. Lake Co., 45 Cal. 90.

6. It is not necessary that a claim against a county for damages for property destroyed by a mob should be presented to the board of supervisors for allowance before bringing an action to recover judgment on it. *Id.*

7. Persons whose goods are destroyed by a mob, in a riot in a city, are not entitled to recover from the city the value of the goods destroyed, unless such persons, if they had knowledge of the impending danger, use reasonable diligence to notify the mayor or

sheriff of the threatened riot and the apprehended danger to their property; nor are they entitled to recover if they instigate or participate in the riot.

Wing Chung v. Los Angeles, 47 Cal. 531.

EVIDENCE, 612.

MODIFICATION.

APPEAL, 860.

MONEY.

1. By the laws of the United States there are three kinds of money, to wit, gold, silver, and treasury notes, each of which is made a legal tender in payment of debts.

Carpentier v. Atherton, 25 Cal. 564.

2. A court can not say judicially that one kind of money, made a legal tender, is of greater or less value than another; nor can evidence be received that a dollar of one kind is of greater or less value than another. *Id.*

3. Courts can not discriminate between one kind of money and another in cases where neither of the parties contracting nor the laws have made any such discrimination.

Higgins v. B. R. & A. Co., 27 Cal. 153.

4. Gold dust is not cash within the meaning of a contract calling for the payment of cash.

Gunter v. Sanchez, 1 Cal. 45.

5. A promise to pay money generally can be satisfied by a payment in any kind of currency that becomes lawful money and a legal tender during the interval through which the relation of debtor and creditor shall be extended.

Higgins v. B. R. & A. Co., 27 Cal. 153.

6. Money at interest is to be taxed in the county in which the creditor resides.

People v. Whartenby, 38 Cal. 461.

7. The proceeds of a policy of insurance (effected by the trustees) for a loss happening to the property during the continuance of the trust estate, and not expended for the purposes of the trust, will, on the determination of the trust estate, be regarded in equity as real property, and will belong to the owner of the reversion.

Hawes v. Lathrop, 38 Cal. 493.

MONEY HAD AND RECEIVED.

1. Money paid by plaintiffs to the treasurer of the city and county of San Fran-

cisco to purchase stamps under the act of 1857, as amended by the act of 1858, to put on bills of lading for the transportation of gold or silver by steamer from that city to New York, is money voluntarily paid and can not be recovered back. As the act of 1857, as amended, required stamps to be deposited with the treasurer for sale, and as he had no authority to compel plaintiffs to purchase them, the fact that the owners and agents of the steamers refuse to issue bills of lading without the stamps does not show any coercion on the part of the treasurer. The conduct of third parties can not be resorted to for the purpose of fastening a liability upon him. Unless he personally does some act which the law condemns, he can not be charged, no matter how arbitrarily or improperly others have acted.

Brunagum v. Tillinghast, 18 Cal. 265.

2. Money voluntarily paid upon a claim of right, with full knowledge of all the facts, can not be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes of itself no ground for relief. There must be in addition some **compulsion** or **coercion** attending its assertion, which controls the conduct of the party making the payment. *Id.*

3. Generally, to constitute such compulsion or coercion as to render the payment involuntary, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. *Id.*

4. The fact that a party pays money under protest does not change the character of the transaction, or enable him to recover it back, unless the payment was under duress or coercion, or where undue advantage was taken of his situation. *Id.*

5. The object of a protest in such cases is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. But where no such compulsion exists, or no advantage is taken, there is no cause for its interposition. If the payment is in truth voluntary, no language used on the occasion can change its character. *Id.*

6. The proposition that "moneys voluntarily paid upon a claim of right, with full knowledge of the facts, can not be recovered back," has exceptions. *Id.*

7. Owners or agents of steamers running between San Francisco and New York who purchased stamps from the defendant, as treasurer of the city and county of San Francisco, to be placed on the passage tickets

issued, can not recover back the money paid for such stamps on the ground that the act of 1857, as amended by the act of 1858, stood on the statute book, and declared that such tickets should not be admitted in evidence in any court or be available in law or equity unless stamped as required, and hence that the tickets could not be sold to passengers without the stamps. The influence exerted by these provisions of the statute does not constitute that kind of compulsion or coercion which the law recognizes as sufficient to render the payment in a legal sense involuntary. There was no compulsion or coercion on the part of the defendant. The stamps are by the law deposited with him to be sold to applicants.

Garrison v. Tillinghast, 18 Cal. 404.

8. As to the point that the payment here was **voluntary** and therefore can not be recovered back, see facts and opinion.

Douglass v. Mayor Placerville, 18 Cal. 643.

9. Contracts for carrying freight form no exception to the general rule of law, that where money is paid by one party in consideration of an act to be done by another, and the act is not done, the money so paid may be recovered back. *Reina v. Cross*, 6 Cal. 29.

10. If freight is paid in advance on a charter party, and the voyage is not accomplished by reason of the loss of the vessel at sea, the freight advanced may be recovered back. *Id.*

11. Where a sheriff deposits, in his own name, with his banker, money received from a sale by him under judicial process, its identity is lost, and it can not be followed as a **specific fund** by the parties entitled to the proceeds of the sale into the hands of a third person who has drawn it from the banker upon the sheriff's order.

Carlton v. Conroy, 21 Cal. 170.

12. **Advanced freight** can be recovered back by the charterer, in case of the loss of the ship or non-performance of the voyage, whether by the fault of the master or not.

Lawson v. Worms, 6 Cal. 365.

13. Where the complaint charges that A., being indebted to plaintiff in a sum of money, it was agreed between A., plaintiff, and defendant, that A. should pay the same to defendant, who should pay the same to plaintiff on the request of plaintiff; that thereafter A. paid to defendant said sum in the gold coin of the United States, and for the use and benefit of plaintiff; that defendant refused to pay the same to plaintiff upon said request duly made; an action to recover said sum in said coin is an action for money had and received, and therein the defendant is not charged, nor, upon said facts, chargeable as a bailee.

Wendt v. Ross, 33 Cal. 650.

14. Where a party makes a purchase from an **innocent agent**, who afterwards

parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: *Held*, that no right of legal complaint will lie against the agent.

Engles v. Healty, 5 Cal. 135.

15. F., while employed as boat captain by the defendant, a corporation, subscribed for its stock to the amount of two thousand dollars, and shortly after advanced to the company eight hundred and twenty dollars upon a verbal condition that if he should be retained in his position as captain the money should be applied on his stock subscription; but otherwise should be considered a loan, and repaid. F. was soon after discharged from the employment, and then assigned his demand to plaintiff: *Held*, that plaintiff was entitled to recover of defendant the amount advanced as money had and received.

Allen v. Citizens' S. N. Co., 22 Cal. 28.

16. M. sued L. and attached his property; R. and J. as securities signed an undertaking on behalf of L. to procure a release of the attached property; R. signed at the request of S.; S. deposited with R. a sum of money to secure him against any loss or damage which he might sustain by reason of his signing the undertaking: *Held*, that the relation of principal and surety did not exist between S. and R., and that if a suit was brought on the undertaking, R. could not retain out of the money deposited by S. any costs and expenses incurred in defending the action. In such case, if S. and J. tender to M. the amount of his judgment against L., and he refuses it, their liability to him ceases, and S. may recover his money back.

Solomon v. Reese, 34 Cal. 28.

17. Where a purchaser at a sale under a decree in a foreclosure suit, directing the sale of the premises—which decree was void, because the grantee of the mortgagor was not made party—brought suit against the mortgagees to recover back the money paid them on his bid: *Held*, that the action does not lie, the purchaser being aware, at the time of his bid, that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud.

Boggs v. Hargrave, 16 Cal. 559.

18. The purchaser in such case makes a mistake of law as to the effect of the decree when the grantee of the mortgagor is not made party to the foreclosure suit. From such mistake no relief can be granted in an action at law.

Id.

19. A judgment unreversed and not suspended may be enforced, but when reversed it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back.

Raun v. Reynolds, 18 Cal. 275.

20. H., as assignee of a judgment and mortgage, and sheriff's certificate of sale

thereunder of a water-ditch, sued defendant, in the judgment for rents and profits between the sale and the expiration of the time for redemption, and had judgment for eight thousand one hundred and fifty dollars. Defendant appealed. The supreme court affirmed the judgment and the money was collected under it. Before this affirmance the supreme court had reversed the judgment of which H. was assignee, and set aside the sale of the ditch on appeal in that case; but this reversal had not been made when H. recovered judgment in the court below for rents and profits: *Held*, that defendant can recover back from H. the eight thousand one hundred and fifty dollars received on his judgment; that the supreme court, on the appeal in the suit of H. for rents and profits, passed on the record as it stood when the court below rendered judgment, and hence did not decide on the effects of the reversal of the original judgment assigned to H.; that this matter of reversal was not before the court, and as defendant could not set it up in the court below, the reversal not then having been made, he is guilty of no laches; *held, further*, that as the equity of defendant to be restored to whatever he lost by the original judgment arose after the reversal, it is really a new cause of action; and even if this reversal could have been interposed in the suit for rents and profits, by way of plea or motion in the supreme court, a point not decided, still the failure to interpose it does not deprive defendant of the benefit of this new cause of action to regain what he had lost by the erroneous judgment.

Raun v. Reynolds, 18 Cal. 275.

21. In an action for the purchase money of land conveyed by the deed without covenants, want of title in the vendor is no defense, unless the vendee has been evicted.

Fowler v. Smith, 2 Cal. 39.

22. The sale of the city's property in this case being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money.

McCracken v. San Francisco, 16 Cal. 591.

23. The title of the city was unaffected by the sale, and the deeds made in pursuance thereof. The parties claiming possession from the plaintiff are simply trespassers, who can, at any time, be ejected from the premises by action on behalf of the city. *Id.*

24. The cases where possession must be surrendered before action for the purchase money can be brought are those where a contract has been made, and possession has been taken thereunder, and the vendee seeks to rescind the contract on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of

some fraudulent representations inducing its execution. In these cases the **vendee** must first offer to restore whatever he has received, before he can call upon the vendor to refund the purchase money. Where the contract is void there is nothing to **rescind**; no rights are acquired, and there are, in consequence, no rights to restore. *Id.*

25. If a purchaser of property from a **municipal corporation** acquires neither title nor possession from the corporation by the attempted sale, but the sale is void, he is not required to convey or transfer either the property or the possession to the corporation before the commencement of an action to recover back the purchase money.

Herzo v. San Francisco, 33 Cal. 134.

26. Where defendant sold a lot to plaintiff, by deed of bargain and sale, for six thousand dollars, and plaintiff, supposing himself to be the owner thereof, paid taxes thereon, and afterwards discovered that his grantor had previously conveyed the lot; and the court finds, as a fact, that defendant knew of his prior conveyance, and that the money was fraudulently obtained; the procurement by defendant of a full title to the lot, and a tender of conveyance of the same to plaintiff, will not bar the plaintiff's recovery of the purchase money and interest. It is immaterial whether a party, thus **misrepresenting a material fact**, knew it to be false, or did not know whether it was true or false.

Alvarez v. Brannan, 7 Cal. 503.

27. A purchaser in possession can not reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed. *Salmon v. Hoffman*, 2 Cal. 138.

28. Action to recover certain real estate as the **homestead** of plaintiffs. Complaint avers that plaintiff K. alone executed to C. his note, and a mortgage on the property in question to secure its payment. C. foreclosed, making K. and wife, and also several persons holding subsequent mortgages, parties. K. and wife made default, but the other defendants answered, asking for a sale of the property and a decree settling priorities, etc. The court ordered a sale of the property, and that, in case of insufficiency of the proceeds to satisfy all the mortgages, they be paid in a certain order, C.'s mortgage being last: *Held*, that plaintiffs can not recover without showing that these subsequent mortgages were invalid and insufficient to pass the title, because the complaint avers the sale to have been made under them as well as under the mortgage to C.

Klink v. Cohen, 15 Cal. 201.

29. An action will not lie on the mere recital in a mortgage of the existence of the debt. *Schafer v. B. R. & A. Co.*, 4 Cal. 295.

PLEADING, 1301-1305.

MONTH.

1. Whenever the word "month" is used in the constitution and laws of this state, without any qualification, a calendar, and not a lunar month, is intended.

Gross v. Fowler, 21 Cal. 392.

Sprague v. Norway, 31 Id. 173.

S. & L. Soc. v. Thompson, 32 Id. 347.

2. The month contemplated by the statute of this state is a calendar, and not a lunar month.

S. & L. Society v. Thompson, 32 Cal. 347.

MONUMENT.

BOUNDARY, 6, 22, 23. | DEED, 50.

MORTGAGE.

1. WHAT CONSTITUTES.
16. CONSTRUCTION AND EFFECT.
90. DESCRIPTION OF LAND.
96. MORTGAGOR'S RIGHTS AND LIABILITIES.
101. MORTGAGEE'S RIGHTS AND LIABILITIES.
115. MORTGAGEE IN POSSESSION.
133. MORTGAGE BY DEED AND DEFEASANCE.
146. DEED, WHEN CONSIDERED A MORTGAGE.
175. DELIVERY OF MORTGAGE.
177. RENTS AND PROFITS.
190. MORTGAGE SECURING SEVERAL NOTES.
201. NEW NOTES.
203. NEW MORTGAGE.
207. UNRECORDED MORTGAGE.
219. MORTGAGE OF MARRIED WOMAN.
228. MORTGAGE ON PUBLIC LANDS.
231. TAXATION OF.
234. ASSIGNMENT.
246. PAYMENT AND SATISFACTION.
252. MORTGAGE LIEN.
262. MISCELLANEOUS DECISIONS.

WHAT CONSTITUTES.

1. A mortgage is merely a security for the payment of money.

Godefroy v. Caldwell, 2 Cal. 489.

2. No particular words are necessary to create a mortgage. The words "we mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, are clearly sufficient.

De Leon v. Higuera, 15 Cal. 483.

3. No particular form of words is necessary to constitute a mortgage; and where

two instruments taken together described the property and the amount of indebtedness, and conveyed the premises as security for the indebtedness: *Held*, to be a sufficient mortgage.

Woodworth v. Guzman, 1 Cal. 203.

4. The existence of a debt, an obligation to pay money, is essential to the existence of a mortgage. *Henley v. Hotaling*, 41 Cal. 22.

5. Where plaintiff leased a lot to B. for ten years, at a monthly rent, payable monthly; at the end of the term, B. to have two thirds of the appraised value of the house, to be by him erected, and the lease also contained this clause: "And it is further agreed, etc., that the brick house now being built, etc., shall always be and remain, as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated." *Held*, that it was a mortgage, and that it might be foreclosed on the non-payment of the first or any month's rent. *Barroillet v. Battelle*, 7 Cal. 450.

6. A provision in the agreement, for the application of the proceeds of the property, after deducting the expenses of its charge, to the payment of monthly interest, and any excess, upon the principal sum, is a very strong circumstance to show the existence of the debt, and when taken in connection with the other circumstance above stated, is conclusive that the debt was not extinguished by the conveyance, and that the transaction was intended as a mortgage.

Hickox v. Lowe, 10 Cal. 197.

7. It is not necessary, to constitute a mortgage, that it should appear upon the face of the papers that there was any personal obligation on the part of the mortgagor to pay the amount of the principal and interest. Such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. *Id.*

8. If a mortgage under seal expressly declares and recites an indebtedness, this is sufficient evidence of the indebtedness in a foreclosure suit. No law requires any note, bond, or the like, in addition to such mortgage. *Whitney v. Buckman*, 13 Cal. 536.

9. In mortgages there exist the right to foreclose, after condition broken, and the right of redemption from forfeiture. These two rights are mutual and reciprocal. When one can not be enforced the existence of the other is denied; and when either is wanting the instrument, whatever its resemblance in other respects, is not a mortgage.

Koch v. Briggs, 14 Cal. 256.

10. The assignment of a lease for years, absolute on its face, but made in consideration of a loan of money, with a defeasance back to reassign upon the payment of the

loan and interest, constitutes a mortgage of the leasehold.

Polhemus v. Trainer, 30 Cal. 685.

11. An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity or a specific lien on the property so intended to be mortgaged. *Duggett v. Rankin*, 31 Cal. 321.

12. An agreement not so executed or sealed as to make it a mortgage, signed by both parties, which provides that the purchase money of land shall be secured by the property if not sold, or by the purchase money if sold, is an incumbrance on the land as against the party executing and strangers with actual knowledge, which may be removed by a sale and substituted security on the purchase money.

Racouillat v. Sansevain, 32 Cal. 376.

13. An agreement in writing, which by its terms makes a sum of money due from one to the other chargeable as a lien upon land, but which is neither under seal, nor so executed or acknowledged as to make it a mortgage within the act concerning conveyances, will be regarded as an executory agreement for a mortgage and enforced in equity as a specific lien upon the land, as against the person executing and strangers having actual notice. *Id.*

14. The plaintiff agreed with the defendant, H., to sell him a tract of land, part of the purchase money to be paid in cash, and the balance to be secured by a mortgage on the land; and at the request of H. the deed was made to his wife, and the notes and mortgage for the unpaid purchase money executed by her: *Held*, not deciding but that the plaintiff may have waived his lien as vendor, that, as the parties had agreed for a mortgage, the transaction should be treated as an equitable mortgage to secure the unpaid portion of the purchase money and interest. *Remington v. Higgins*, 54 Cal. 620.

15. A mortgage lien upon real estate can be created only by an instrument in writing, executed with the formalities required in case of a grant of real property.

Porter v. Muller, 53 Cal. 677.

CONSTRUCTION AND EFFECT OF.

16. In the absence of a mutuality of obligation, it must appear by apt and express words in the instrument that it was the intention of the parties that the transaction should amount to a mortgage.

Low v. Henry, 9 Cal. 538.

17. G., to secure the payment of his three promissory notes, made severally to C., F., and S., executed an instrument whereby he conveyed to C. certain real estate upon the

condition that if he, G., should pay the notes according to their tenor, the conveyance should be void; but providing that if default should be made in the payment, then it should be lawful for C., after notice, to enter upon and sell the premises and apply the proceeds to the payment, which sale should be a bar both in law and equity against G. and his representatives: *Held*, that this instrument was a mortgage with an ordinary power of sale, and not a trust deed, and that its character as a mortgage was in no respects changed because the mortgagee was a trustee for himself and other parties.

Cornierais v. Genella, 22 Cal. 116.

18. A conveyance of real estate, conditioned to be void on the payment of a given sum of money on a given day, otherwise to be and remain in full force and virtue, is a mortgage, and not a conditional sale.

Ferguson v. Miller, 4 Cal. 97.

19. No title passes to the grantee by a deed absolute in form, and without any defeasance, if the purpose of the deed was to secure a debt; and in this respect conveyances absolute on their face stand on the same footing as conveyances with a defeasance. *Jackson v. Lodge*, 36 Cal. 28.

20. A mortgage does not convey the legal title for any purpose, either before or after condition broken.

Mack v. Wetzlar, 39 Cal. 247.

21. A mortgage is a mere security for the payment of money, and passes no estate in land. *Id.*

22. A lien held under a mortgage will pass by a simple assignment of the debt, but will not pass by a conveyance of the land alone. *Id.*

23. The opinion of the court in *Dutton v. Warschauer*, 21 Cal. 609, in relation to mortgages, accepted and approved. *Id.*

24. It is definitely settled in this state that a mortgage does not convey the title to the mortgaged premises, but only creates a lien thereon for the security of the mortgage debt.

Carpentier v. Brenham, 40 Cal. 221.

Harp v. Calahan, 46 Id. 222.

25. O'R. conveyed certain premises to C., as security against liability on a bail bond. The deed was duly recorded, but there was no evidence in writing of the purpose for which it was executed. O'R. or his tenant continued in the possession of the premises. The bail was exonerated, and C. reconveyed the premises to O'R.; but before the last conveyance was recorded, O'C. attached the property for a debt due him by C.: *Held*, that the property was not liable for C.'s debt to O'C., and injunction lies to restrain the execution of O'C.'s judgment.

O'Rourke v. O'Connor, 39 Cal. 442.

26. Where, from an instrument transferring shares of stock as security for a note, and from other circumstances, the transaction is clearly a loan, a clause of foreclosure on non-payment, or a provision that the mortgagee may take the property for the debt, does not make the instrument any the less a mortgage.

Smith v. '49 & '56 M. Co., 14 Cal. 242.

27. Where the mortgage is conditioned to pay a note "according to the tenor and conditions thereof," and the note is recited as a "certain promissory note for the payment of the sum of three thousand five hundred dollars, on the sixth day of June, 1858, at said Pine Grove, with interest at the rate of two per cent. per month, from date till paid," the statute is complied with as to "setting out the sum to be secured, the rate of interest to be paid, and when payable."

Ede v. Johnson, 15 Cal. 53.

28. A provision in an agreement for a reconveyance, upon the payment of the precise amount of the consideration, and a stipulated monthly interest thereon, is a circumstance favoring the conclusion that the debt subsisted. *Hickox v. Lowe*, 10 Cal. 197.

29. The allegation in the answer, that unless the money was returned the property should remain in the plaintiff, does not change the nature of contract. This is the usual form of a mortgage.

Lee v. Evans, 8 Cal. 424.

30. If a mortgage at the beginning, the instrument always remains a mortgage. *Id.*

31. At common law, a mortgage was regarded as a conveyance of a conditional estate, which became absolute upon breach of its conditions. It gave to the mortgagee, except as otherwise provided by stipulations inserted in the instrument, a right to immediate possession. Upon it he could enter peaceably, or support ejectment.

Fogarty v. Sawyer, 17 Cal. 589.

32. At common law, a mortgage was regarded as a conveyance of a conditional estate, and upon breach of its condition, the estate became absolute; but courts of equity, to relieve from the hardship of this rule, gave to the mortgagor a right to redeem, upon payment within a reasonable time, of the debt secured.

Goodenow v. Ewer, 16 Cal. 461.

33. The doctrine respecting mortgages which prevails in this state is that a mortgage is a mere security, operating upon the property as a lien or incumbrance only, and is not a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken.

Dutton v. Warschauer, 21 Cal. 609.

34. The settled doctrine of equity now is that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal and the land the inci-

dent; that the mortgage constitutes simply a lien or incumbrance; and that the **equity of redemption** is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage.

McMillan v. Richards, 9 Cal. 365.

35. This equitable doctrine has been adopted in this state, and asserted, directly or indirectly, in repeated instances by this court. Id.

36. This doctrine was established, not merely from a consideration of the provisions of the statute of 1851, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind, and as embodying the principles recognized generally in the courts of other states.

Dutton v. Warschauer, 21 Cal. 609.

37. The provisions of the statute, however, led the court to go beyond the decisions in other states adopting the **equitable doctrine** as to mortgages, and to carry that doctrine to its legitimate and logical result by regarding the mortgage as a security under all circumstances, both at law and in equity. Id.

38. The character of the mortgage, as a mere security, is not changed by default in the payment of the debt secured, and payment after default operates as an extinguishment of the lien equally as payment at the maturity of the debt.

Id.; McMillan v. Richards, 9 Cal. 365.

39. A mortgage is a mere security, and does not vest in the mortgagee any estate in the land, either before or after condition broken. **Payment after default** operates to discharge the lien equally with payment at the maturity of the debt.

Johnson v. Sherman, 15 Cal. 287.

40. In this state, a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for the debt, and default in the payment does not change its character.

Nagle v. Macy, 9 Cal. 426.

41. In this state, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken, but is regarded as a mere security, operating upon the property as a lien or incumbrance only.

Goodenow v. Ewer, 16 Cal. 461.

42. Section 260 of the practice act of 1851 which provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms," etc., applies to all mortgages, as well those executed before as after its passage. Grattan v. Wiggins, 23 Cal. 16.

43. A mortgage executed prior to the pas-

sage of the two hundred and sixtieth section of the practice act in 1851, was not a conveyance of a **conditional estate** to become absolute on a breach of condition as at common law. Skinner v. Buck, 29 Cal. 253.

44. A mortgage, under our statute, is not a conveyance of lands, nor does the mortgagee take any estate in the land mortgaged. He has a **lien** upon it simply for the security of his demand, which can only be enforced by a judgment for the sale of the property mortgaged, and a sale in pursuance of the judgment. Bludworth v. Lake, 33 Cal. 255.

45. A mortgage is a **mere incident to the debt** which it secures, and follows the transfer of the note with the full effect of a regular assignment. Ord v. McKee, 5 Cal. 515.

46. Under our system, a mortgage is a mere incident to the debt secured by it, and as the consideration for indorsing a note can be gone into at any time, there can be no reason for adopting a more stringent rule as to the assignment of the mortgage securing it.

Bennett v. Solomon, 6 Cal. 134.

47. A mortgage is a mere security for a debt, and can not pass without a **transfer of the debt**.

Peters v. Jamestown B. Co., 5 Cal. 334.

48. The debt and mortgage are **inseparable**. The latter must follow the former. As distinct from the debt, the mortgage has no determinate value, and is not a subject of transfer.

Nagle v. Macy, 9 Cal. 426.

49. Where a mortgage is given to secure a debt, it is not of the essence of the deed whether the debt be evidenced by one form of contract or another. All that a court of equity desires to know in such cases is, what is the **debt** really intended to be secured; and whether it be called a note or bond is immaterial, so that the debt itself be identified as that for which the mortgage is given.

Blankman v. Vallejo, 15 Cal. 638.

50. The original character of mortgages has undergone a change. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They **pass no estate** in the lands, but are mere securities; and default in the payment of the money secured does not change their character. Id.

51. The clause, in such instruments, "I hereby sell, transfer, and set over, * * * all my right, title, and interest, to the said * * * stock, provided I fail to pay * * * the above sum * * * on the day the same becomes due and payable," does not make it a conditional sale, there being no money given, or agreed to be given, for the stock, and no agreement to take it at any price, at the time of contract. Smith v. '49 & '56 M. Co., 14 Cal. 242.

52. In mortgages the form of the contract is one of conveyance; while, in truth, the contract is only one of security, and equity gives effect to the intention of the parties. *Koch v. Briggs*, 14 Cal. 256.

53. This takes from the instrument its common law character, and restricts it to the purposes of security. It does not, in terms, change the estates at law of the mortgagor and mortgagee; but, by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine upon a consideration of which this section was evidently drawn.

McMillan v. Richards, 9 Cal. 365.

54. The character of a mortgage, as security, is in no way affected by the fact that judgment for the debt has been obtained.

Nagle v. Macy, 9 Cal. 426.

55. A mortgage is a mere security for a debt, and does not pass the fee, nor give a right of entry. Hence, if land mortgaged is sold, the vendee of the mortgagor can not be ousted from possession by a purchaser under the decree of foreclosure and sale, unless such vendee was made a party to the foreclosure suit. *Hatley v. Maier*, 13 Cal. 13.

56. The words "whatever its terms" in this section were intended to control the terms of grant, bargain, and sale generally employed in mortgages, and do not relate to stipulations for possession or sale.

Fogarty v. Sawyer, 17 Cal. 589.

57. The two hundred and sixtieth section of our practice act changes this character of the instrument, and takes from the mortgagee all right to the possession, either before or after condition broken, and makes the mortgage a mere lien; but this section does not prevent the owner from making an independent contract for the possession, or from authorizing a sale of the premises, the mortgagee consenting thereto, to pay the debt. *Id.*

58. A mortgage of real estate does not, in this state, confer the right to the possession of the mortgaged property, except as the result of a foreclosure and sale.

Kidd v. Teeple, 22 Cal. 255.

59. When possession is taken by the mortgagee, after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the debt secured; and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt.

Dutton v. Warschauer, 21 Cal. 609.

60. The interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. *Id.*

61. The temporary possessory right thus acquired by the mortgagee may be transferred, and the transferee will be substituted to his position, and be subjected to the same liabilities. This, however, will not be effected by a deed which does not purport to convey any possessory rights of the grantor, or his interest generally, but only such interest as he could convey as mortgagee, or by virtue of an express power from the mortgagor. *Id.*

62. If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of debtor and creditor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession.

Nagle v. Macy, 9 Cal. 426.

63. By an instrument in writing, a ditch company "granted, bargained, and sold" a water ditch, "and also the entire proceeds derived from said ditch, from the sale of water, and also the proceeds from the sales of water" from another ditch called the Virginia ditch; and in the same connection the grantees were authorized "to collect, demand, and receive the rents, issues, and profits, and the entire proceeds" of said ditches, or sufficient thereof to meet the payments thereafter mentioned. Then followed the usual proviso in a mortgage, that if the several installments of a certain debt, due the grantees, were duly paid, the conveyance should be void; and a further clause, that in default of payment the grantees might sell the "premises before described with all the appurtenances" in the manner prescribed by law: *Held*, that the instrument was, as to all the property mentioned in it, simply a mortgage, and that nothing in the provisions respecting the profits and proceeds of sales of water authorized the mortgagees to take possession of either ditch before a foreclosure and sale.

Kidd v. Teeple, 22 Cal. 255.

64. A mortgagee of stock does not get an absolute title to the stock by the mere default of payment of the mortgage debt.

Smith v. '49 and '56 M. Co., 14 Cal. 242.

65. Where a mortgage contains a power of sale, the mortgagee has his election either to foreclose in chancery and obtain a judicial sale, or to sell under the power.

Cormerais v. Genella, 22 Cal. 116.

66. A mortgagor in this state may invest the mortgagee with a power to sell the premises upon default in the payment of the debt secured; and when the sale is conducted in accordance with the conditions of the power, and is fairly made, a good title will pass to the purchaser upon its consummation by a conveyance. *Fogarty v. Sawyer*, 17 Cal. 589.

67. A clause in a mortgage authorizing the mortgagee to sell the premises on default of payment, and out of the proceeds to satisfy

the mortgage, and render the surplus to the mortgagor, his heirs or assigns, includes the power to **execute a conveyance** to the purchaser. *Id.*

68. A power of sale contained in a mortgage is a merely **cumulative remedy**, and does not affect the right to foreclose in chancery. *Cormerais v. Genella*, 22 Cal. 116.

69. A mortgagee after condition broken, whether in or out of possession, can not convey the legal title, and his deed, as mortgagee alone, without a transfer of the debt, passes nothing. *Dutton v. Warschauer*, 21 Cal. 609.

70. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial sale. *Koch v. Briggs*, 14 Cal. 256.

71. A mortgage in fee is, for the purposes of the statute which provides that if any person shall convey any real estate by conveyance, purporting to convey the same in fee simple, an estate subsequently acquired by the grantor shall pass to the grantee, a conveyance in fee. *Vallejo Land Ass. v. Viera*, 43 Cal. 572.

72. A stipulation in a mortgage that in case of default in the payment of the interest upon the note, secured by the mortgage, on or before the fifth day of any month, to the agent of the mortgagee, the agent should take charge of the mortgaged premises, collect the rents, deduct interest, and pay the excess to the mortgagor, does not conflict with a previous stipulation in the same mortgage that, in default of payment of interest for a period of sixty days, the mortgagee might at his option consider the principal sum due and foreclose. *Stevens v. De Cardona*, 53 Cal. 487.

73. Although by a provision of the mortgage it was covenanted that in case the mortgagor did not keep the property fully insured, or did not pay all **taxes and assessments**, the mortgagee might pay the same and have his lien therefor with interest, yet the agent named in the second of the stipulations was not authorized to pay such taxes, or assessments, or premium insurance, or make other like expenditures out of the rents received, and thereby, perhaps, reduce the amount received as rents below the interest to be paid on the note and mortgage, and set running the sixty days mentioned in the first of the stipulations. *Id.*

74. If A. mortgages his mining claim to B. to secure a debt which he owes to C., and which is already due, and a clause is in-

serted in the mortgage that B. is to pay the debt as fast as it comes out of the claim, after deducting three dollars a day for each day's work, for living, and there is no stipulation to extend the credit on A.'s debt to C., the clause does not amount to an agreement that the debt shall be paid only out of the proceeds as they come out of the claim, after deducting three dollars per day, and the mortgage may be foreclosed by C. at any time. *Sharpe v. Arnott*, 51 Cal. 159.

75. C. executes a bond and mortgage to D. and P. for money loaned, payable in three years with interest. On the same day C. executes a lease of the mortgaged premises to D. and P., partners, for three years, the lease referring to the bond and mortgage, and providing that D. and P. shall take immediate possession, which C. covenants shall be quiet and peaceable. D. and P. stipulate that if they have such possession, the interest on the bond and mortgage shall not be collected. D. becomes sole owner of the bond and mortgage and assigns them, under seal, to plaintiff: *Held*, that in a foreclosure suit plaintiff is entitled to interest on the bond and mortgage from the time of notice to defendants of the assignment, if not from the assignment itself, the term of the lease having expired before such notice, the whole interest of C. having passed to third persons, and the lease not recorded, defendants being C., P. and purchasers under foreclosure of subsequent mortgages; that D. and P. could not, by continuing to occupy the premises after the term, so renew the lease in law as to prevent plaintiff from enforcing the contract according to its terms. *Perre v. Castro*, 14 Cal. 519.

76. In connection with such promise by defendants to the Elders to pay to plaintiff the amount of the Pangburn note as part of the purchase price of the land bought by them of said Elders, they further agreed with the Elders that the mortgage given by Pangburn to plaintiff upon said land to secure the payment of said note should remain a lien thereon as security for defendants' said promise, plaintiff might as the **party beneficially interested**, enforce such agreement as a lien upon said land. In such a case the right of action is not upon the Pangburn mortgage, but upon said promises; but as the averments of plaintiff's complaint setting up said promises are both denied by defendants in their answer, and as the cause was submitted without proof offered or received upon them, judgment was properly rendered for defendants. *Wormouth v. Hatch*, 33 Cal. 121.

77. A covenant of the mortgagor inserted in the mortgage, to "pay and discharge all legal mortgages and incumbrances of whatever nature and description" on the premises mortgaged, does not put a purchaser from the mortgagor upon inquiry as to any mortgages or incumbrances not on record. A pur-

chaser from covenantor can not be charged with **constructive notice** of a recorded mortgage not under seal.

Racouillat v. Rene, 32 Cal. 450.

78. If the mortgageor covenants in the mortgage that he will pay and discharge, whenever the same becomes due, all legal mortgages and incumbrances of whatever nature and description upon the mortgaged property of a previous date, the covenant will make the mortgageor personally liable for a sum due and secured by an executory contract for a mortgage not under seal or recorded, if the mortgageor had actual notice of it, and the mortgage will become security for the performance of this covenant.

Racouillat v. Sansevain, 32 Cal. 376.

79. A mortgage on real estate made by an agent for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority, and the failure to execute in the name of the principal resulted from accident or mistake, and will be enforced against the principal and subsequent lien creditors, and also against subsequent purchasers with notice.

Love v. S. N. L. W. & M. Co., 32 Cal. 639.

80. Such mortgage does not require reformation, but is ripe for enforcement according to the methods peculiar to courts of equity.

Id.

81. It is of no equitable moment whether the mistake in the execution of such mortgage was one of law or one of fact.

Id.

82. A mortgage purporting to be the mortgage of a corporation, but signed by its trustees individually, and not by the corporation by its trustees, is not the legal mortgage of the corporation.

Id.

83. Though such mortgage does not bind the corporation as a legal mortgage, yet it does not follow that it may not be enforced in equity.

Id.

84. Where real property is owned by the husband as his separate property, or by the husband and wife as their common property, a conveyance or mortgage thereof by the husband alone is valid.

Bernal v. Gleim, 33 Cal. 668.

85. A note and mortgage given in good faith for a greater sum than is due by the mortgageor to the mortgagee to secure both a present indebtedness and future advances to be made by the mortgagee, is not fraudulent in law as to the creditors of the mortgageor, because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances.

Tully v. Harloe, 35 Cal. 302.

86. A mortgage given in good faith, for the purpose of securing future advances expected to be made is a good and valid se-

curity. Such mortgage need not express its object upon its face, although it is better it should.

Id.

87. A mortgage knowingly given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgageor.

Id.

88. The execution of a new note and mortgage, by the husband alone, in place of a prior one given on the homestead before the declaration of homestead was filed, does not continue the old mortgage in life, as to the homestead interest, beyond the time when it would otherwise be barred by the statute of limitations.

Barber v. Babel, 36 Cal. 11.

89. Where P. contracts with B. to sell him his hotel, and, to effect the sale, executes to C. a conveyance thereof upon C. advancing to P. part of the purchase money, and C. gives B. a contract for a deed when the money he has advanced is repaid, and B. gives P. security for the balance, as between the parties, the sale and conveyance will be deemed, in equity, a mortgage to secure the payment by B. to C. of the sum advanced; and in such case a complaint, to set aside the contract for fraudulent representations of B. must aver an offer to refund C. his money.

Purdy v. Bullard, 41 Cal. 444.

DESCRIPTION OF LAND IN.

90. Mere indefiniteness of description in a mortgage is no objection to its enforcement as it is written, whatever the effect of the sale under such a description. The mortgageor can not complain.

Tryon v. Sutton, 13 Cal. 490.

91. Where the description was that "certain tract or parcel of land situated in said county of Napa, consisting of a pre-emption claim of one hundred and sixty acres, and commonly known as the 'Soda springs,' and embracing the said springs, and the improvements thereunto belonging, and being about five miles from Napa city, in a northerly direction, together with all and singular the tenements," etc.: Held, to be, *prima facie*, sufficient.

Whitney v. Buckman, 13 Cal. 536.

92. That property mortgaged is so indefinitely described as not to pass title by sale on foreclosure is no objection to the enforcement of the mortgage against the mortgageor.

Id.

93. A mortgage describing the land as "the rancho of her property, in the place known by the names of 'Laguna de los Palos Colorados,' or 'Santa Clara,' in Contra Costa county," and stating the land to be the half league the mortgageor acquired from the grant to her first husband, Juan Bernal, which grant is before the United States land

commission for confirmation, is not void for **uncertainty** in description.

De Leon v. Higuera, 15 Cal. 483.

94. Where a mortgage describes the property as the "interest in the quartz mill and lode formerly owned by John H. Hancock, said interest being one half of the mill and lode," **extrinsic evidence** is admissible to identify the property.

Hancock v. Watson, 18 Cal. 137.

95. If a mortgage on a **mining claim** describes it generally by name, and then gives the monuments and cardinal points by which it is bounded on three sides, without naming the boundary on the fourth side, and there is an averment in the complaint stating the fourth boundary, and the complaint also gives the general name and the other three boundaries as contained in the mortgage, without naming the cardinal points, and the mortgage is not set out in *hac verba* in the complaint, it is admissible in evidence in an action to foreclose it, as against a subsequent mortgagee who denies that the mortgagor mortgaged the land described in the complaint.

Began v. O'Reily, 32 Cal. 11.

MORTGAGOR, RIGHTS AND LIABILITIES OF.

96. Where an absolute conveyance is given as security, the mortgagor retains the right of **redemption** only, the legal title being in the mortgagee, and the rights of mortgagor and mortgagee are so far mutual, that when the debt is barred, the right to redeem is also barred. Espinosa v. Gregory, 40 Cal. 58.

Hughes v. Davis, *Id.* 117.

97. The right of the mortgagor to redeem is not affected by the fact that he may have had no title to the mortgaged property, nor can the mortgagee refuse the **redemption money**, if tendered, because the mortgagor had no title to mortgage.

Lorenzana v. Camarillo, 45 Cal. 125.

98. If a mortgagor mortgages public land upon which he is residing, and afterwards obtains a patent to the same from the United States, and then sells, the **title** acquired by the patent **inures** to the benefit of the mortgagee, and the mortgage may be enforced against the subsequent purchaser.

Christy v. Dana, 42 Cal. 175.

99. As against the **subsequent incumbrancers** or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the **time of payment**, or in any manner to increase the burdens of the mortgaged premises.

Wood v. Goodfellow, 43 Cal. 185.

Commenting on Lord v. Morris, 18 Cal. 482; McCarty v. White, 21 *Id.* 495; Lent v. Morrill, 25 *Id.* 500; Low v. Allen, 26 *Id.* 141; Barber v. Babel, 36 *Id.* 11; Lent v. Shear, 26 *Id.* 361; Sichel v. Carrillo, 42 *Id.* 493.

100. Where the property is conveyed to another by deed absolute in form, but under agreement that it shall be only a security by way of mortgage, and the grantee subsequently sells the property as his own, the grantor may, if he so elects, affirm the sale, and sue for the **overplus after the payment** of the mortgage debt.

Wilber v. Sanderson, 43 Cal. 406.

MORTGAGEE, RIGHTS OF.

101. Equity will keep the **legal title** and the mortgagee's interest, although held by the same person, separate, whenever necessary for the full protection of such person's just rights.

Carpentier v. Brenham, 40 Cal. 221.

102. A mortgagee may enforce his mortgage as against the land, notwithstanding the **personal liability** of the mortgagor for the debt may be barred by a discharge in **insolvency**.

Christy v. Dana, 42 Cal. 175.

103. Section 131 of the probate act, which provides that when the **estate is insolvent** a creditor can only recover interest at the rate of ten per cent. after the letters of administration issue, can not be invoked by a purchaser of the mortgaged property who buys from the mortgagor after the mortgage is given, and who is made a party in an action to enforce the mortgage. Said section is intended only for the benefit of the estate, and if the complaint waives a **judgment for a deficiency**, the estate has no interest in the matter. *Id.*

104. If the mortgagor sells the land after he gives the mortgage, and then dies, the mortgagee may enforce his mortgage as against the **subsequent purchaser** without presenting his claim to the administrator, for allowance. *Id.*

105. A **junior mortgagee** possesses the right to extinguish the senior incumbrance; and, by whatever mode he may elect to exercise this right, it operates as a satisfaction of the claim of the **prior mortgagee**, and a release from his lien.

Carpentier v. Brenham, 40 Cal. 221.

106. No decree in a proceeding to which he was not made a party can deprive a mortgagee of the right to relief, by showing that an apparent prior **incumbrance is fraudulent**, or not supported by any consideration. *Id.*

107. Whenever a subsequent mortgagee files a **bill to redeem** the former mortgage, or to redeem the former and to foreclose his own, he may allege and show that the claim of the prior mortgagee has been exaggerated, or any other kindred fact which will increase the fund. *Id.*

108. Although a subsequent mortgagee may bring his action against the mortgagor without making the prior incumbrancer a

party, no decree in the suit can affect the prior incumbrancer, whose rights are paramount. Id.

109. When the mortgagor has parted with his title to the property and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor.

Wood v. Goodfellow, 43 Cal. 185.

110. A subsequent mortgagee has no estate in the land itself nor any lien upon the land, except subject to the prior lien; that is, he has a right to be paid out of the excess; which is, in effect, a right to redeem, and incidentally, if made a party to a foreclosure suit, a right to defend by pleading the statute of limitations, or the invalidity, in whole or in part, of the plaintiff's claim, or that it is paid.

Carpentier v. Brenham, 40 Cal. 221.

111. A mortgage was executed by the husband upon certain real property situated in the city and county of San Francisco, being the community property of the husband and wife, who were thereafter divorced from the bonds of matrimony, and one half the community property was awarded to the wife by decree of said divorce. Thereafter the mortgage was duly foreclosed, and thereunder the mortgaged property sold to R.; from which sale a redemption was made by S., by the procurement of the husband and one C., the husband having for that purpose fraudulently confessed a judgment in favor of S., without being indebted to him, and C. furnished the money with which said redemption was made. Subsequently, the wife procured a redemption to be made from S., through F., to whom, for that purpose, she made an assignment of her judgment for costs and alimony, rendered in the divorce suit, which had been rendered in another county, but without docketing said judgment in the city and county of San Francisco. Subsequently, one Cochran, as the secret agent of the husband and C., and who had full knowledge of the foregoing facts, and to whom C., had furnished money to purchase another mortgage debt upon said property which had been contracted by the husband after the granting of said decree of divorce, redeemed from F. Said first and third redemptions were procured by the husband and C., to be made for the fraudulent purpose of divesting the wife of her interest in said property, of which fact, and the particular means of its intended accomplishment, the wife was ignorant during said periods: Held, first, that in equity the redemption by S. was a redemption by the husband, and extinguished the lien of said mortgage; second, that the redemption by F. was nugatory, because of the failure to docket said judgment in the city and

county of San Francisco; third, that although Cochran was a legal redemptioner, he having become the legal holder of a mortgage which was a valid incumbrance upon the husband's moiety interest in said property, yet his redemption was likewise nugatory as to the wife, because of the said extinguishment of said first mortgage lien thereon, of which he had notice; and, fourth, that as the result of said transaction, the title of the wife to her one half of said property remained in her, freed of the lien of said first mortgage, subject only to a contribution to be made by her as a tenant in common of said property with the husband, after said decree of divorce, for one half the expense of said redemption made by S.

Perkins v. Center, 35 Cal. 713.

112. In such case, after the foreclosure of the mortgage to H., and the sale of the property thereunder to R., and whilst it was subject to redemption, the wife, by her quitclaim deed, conveyed all her interest in it to S., for an inadequate consideration, and immediately thereafter S. conveyed it to C., who furnished the money which was paid to the wife: Held, that at the date of her deed the wife had sufficient notice of the prior transactions to put her upon inquiry, and is not entitled to rescind the contract of sale. Id.

113. If a person is about to make a loan and take a mortgage upon land as security, and employs an agent, an attorney, to make the negotiation, a declaration made by a tenant in possession of the land to the agent that another person owns an interest in the land is sufficient to put the mortgagee on inquiry, and if due diligence is not exercised in making such inquiry, the mortgage, even if the paper title appears to be in the mortgagor, is subject to the rights of such other person in the land.

Bauer v. Pierson, 46 Cal. 293.

114. If the husband and wife own a tract of land, a part of which is claimed as a homestead, and both execute a mortgage on the whole tract to secure a debt, and the husband afterwards executes a mortgage upon the part not covered by the homestead to secure his debt, and the first mortgagee forecloses, making the other mortgagees parties, the second mortgagees can not insist that the homestead be sold, but the decree should direct the part not covered by the homestead to be first sold, and if the proceeds satisfy the first mortgage, that the homestead be reserved from sale. The second mortgagees must rely on the surplus, if any, arising from the sale of the part not covered by the mortgage.

McLaughlin v. Hart, 46 Cal. 638.

MORTGAGEE IN POSSESSION.

115. Mortgagee in possession is not entitled to make any charge, by way of com-

pensation, for his trouble in managing the property, and collecting and receiving the rents. *Benham v. Rowe*, 2 Cal. 387.

116. Where a mortgagee takes possession of the mortgaged premises, his care and trouble are bestowed for the furtherance and protection of his own interests. He is not a mere naked trustee, nor is his capacity that of an agent. While in possession, he is **quasi the owner**. He takes the charge upon himself voluntarily, and has no right to compensation from the mortgagor. *Id.*

117. It is the **duty of a mortgagee** in possession to exercise the same care and supervision over the property, as a prudent man would over his own. *Id.*

118. If such mortgagee act in bad faith towards the owners, or is guilty of gross **negligence**, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Id.*

119. If the mortgagee took immediate and actual possession of the property in the absence of any contract concurrent or subsequent to the mortgage, conferring any greater authority than that contained in the mortgage, he can not claim by virtue of such possession, because the **covenants** of the mortgage show that he was not entitled to such possession.

Meyer v. Gorham, 5 Cal. 322.

120. Possession by the mortgagee can not abridge, enlarge, or otherwise affect his interest, nor convert that which was previously a security into a **seisin of the freehold**.

Nagle v. Macy, 9 Cal. 426.

121. In this state a mortgagee of a term in possession is not liable as assignee upon the covenants of the lease.

Johnson v. Sherman, 15 Cal. 287.

122. Nor does possession under the mortgage affect the nature of the mortgagee's interest; it does not change the **relation of debtor and creditor**, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. *Id.*

123. Possession taken by the consent of the owner, or by contract with him, may confer **rights as against third parties**, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. *Id.*

124. After a sale of mortgaged premises on execution against the mortgagor, and a delivery of the sheriff's deed to the purchaser, the mortgagee can acquire no **right of entry** by a permission from the mortgagor who has remained in possession.

Kidd v. Teepie, 22 Cal. 255.

125. The entry of the mortgagee of real estate into the possession of the mortgaged premises by **consent** of the mortgagor does not invest him with any other or greater

rights than he would have had without such entry. *Robinson v. Russell*, 24 Cal. 467.

126. An action can be maintained by the mortgagee of real estate to recover damages for wrongful and **fraudulent injuries** done to the mortgaged property, by which security of the mortgage has been impaired. *Id.*

127. The entry of the mortgagee into the possession of the mortgaged premises can not, as between him and the mortgagor, **extend the time** allowed by the statute for the enforcement of the mortgage.

Cunningham v. Hawkins, 24 Cal. 403.

128. If the owner of a mortgage on an undivided interest in land is also the owner of another **undivided interest** in the same tract of land, his entry into possession of the whole tract does not constitute him a mortgagee in possession.

Davenport v. Turpin, 41 Cal. 100.

129. If the owner of real estate mortgages the same to secure his debt, and the mortgagee forecloses, and after a decree of sale is entered, the mortgagor and mortgagee make an **agreement** in writing, by which it is provided that an order of sale shall not issue for a period named, and that the mortgagee may enter into possession of the premises, and collect the rents, and apply them to the satisfaction of the decree, the agreement amounts to an **assignment of the rents** to the mortgagee during the period named, unless the decree is sooner satisfied, and during said period, a court of equity will not permit the mortgagor to assert his legal title, or to disturb the mortgagee in his possession.

Frink v. Le Roy, 49 Cal. 314.

130. Even if in such case the period named in the agreement has expired, a court of equity will not, on account of that fact alone, while the debt remains unpaid, permit the mortgagor or his grantee to turn the mortgagee out of possession. *Id.*

131. A mortgagee has no power to authorize another party to enter upon the mortgaged property and remove **fixtures** therefrom, and the rights of the mortgagor are not affected by such authority given by the mortgagee. *Hill v. Gwin*, 51 Cal. 47.

132. If fixtures attached to mortgaged property are severed from the realty, and taken away, they are freed from the lien of the mortgage, and the mortgagor may recover damages; and the facts that the **severance** takes place by the consent and concurrence of the mortgagee, and that he afterwards enforces his mortgage, and at the sale obtains a sheriff's deed, do not defeat the action of the mortgagee for damages. *Id.*

MORTGAGE BY DEED AND DEFEASANCE.

133. A deed and defeasance, to constitute a mortgage, must be between the **same parties**. *Low v. Henry*, 9 Cal. 538.

134. A conveyance and an attendant agreement for a reconveyance, upon the payment of the amount of the consideration and interest, do not of themselves, in the absence of other circumstances, create a mortgage, but only a **defeasible purchase**, which should be narrowly watched lest it may be made the means of converting what was, in fact, intended for security into an absolute purchase. Slight circumstances will determine the transaction to be one of mortgage, when that can be done without violence to the understanding of the parties.

Hickox v. Lowe, 10 Cal. 197.

135. Whether a conveyance, absolute in form, executed in consideration of a precedent debt on the part of the grantor to the grantee, and an agreement executed at the same time by the grantee to reconvey the premises to the grantor, upon payment of the consideration, with interest and expenses, taken together constitute a mortgage or a **conditional sale**, depends upon the fact whether the debt was discharged by the conveyance or subsisted afterwards.

Id.

136. The only difficulty which arises, where there is an absolute conveyance, with an attendant agreement to reconvey, is to ascertain the fact whether the debt subsists or has been extinguished; and where there is doubt on this point, courts of equity lean in favor of the **right of redemption**, and construe instruments as constituting a mortgage rather than a conditional sale.

Id.

137. Where land is mortgaged by an absolute deed, with a defeasance back, an absolute conveyance of the premises by the mortgagee to a third person amounts to an **assignment** of the mortgage, the grantee being substituted to the rights of the mortgagee.

Halsey v. Martin, 22 Cal. 645.

138. When a deed absolute on its face is given of a tract of land, and at the same time the grantee makes to the grantor a defeasance, agreeing to sell the grantor the land, if he pays a sum fixed by a certain time, the test by which to determine whether the transaction is a mortgage or a **defeasible sale** is the fact whether or not, notwithstanding the conveyance, there is a subsisting, continuing debt from the grantor to the grantee.

Farmer v. Grose, 42 Cal. 169.

139. If the consideration for the conveyance was an **antedecedent debt**, and the property is to be reconveyed on the payment of the debt, and nothing more appears, *prima facie* the transaction constitutes a mortgage.

Id.

140. In like manner, if there is no antecedent debt, but a **loan** of money to be repaid, with interest, it is a mortgage.

Id.

141. Where there is a deed absolute on its face, and a defeasance back, **parol evi-**

dence is admissible to show whether the transaction constitutes a mortgage.

Id.

142. Where property is mortgaged by an unrecorded deed, absolute upon its face, accompanied by a **separate defeasance**, possession and actual occupation by the mortgagor is notice of his title to a purchaser from the mortgagee.

Daubenspeck v. Platt, 22 Cal. 330.

143. An **absolute** deed, although shown by parol evidence to have been intended as a mortgage, conveys the legal title.

Hughes v. Davis, 40 Cal. 117.

Espinosa v. Gregory, 40 Id. 58.

144. Where Page conveyed land to Vilhac on December 12, 1864, by deed absolute on its face, in consideration of Vilhac's satisfying a mortgage for two thousand five hundred and twenty-two dollars, which he held against Page upon the property, and paying off a previous mortgage for five thousand two hundred and fifty-five dollars, held by a third party on the same property, and at the same time Vilhac gave Page a contract, agreeing to sell back the whole or any part of the property, on payment of eight thousand three hundred and seventy-seven dollars, or a proportional part thereof, on or before November 1, 1865, at which time the agreement was to "cease to be in force and become entirely null and void," and it appeared that the eight thousand three hundred and seventy-seven dollars to be paid represented moneys actually paid and to be paid by Vilhac, on the property, and no part of it to be made up of interest to accrue during the interim, and that the attorney who drew the papers was directed by the parties to draw a full deed and not a mortgage, but to give Page a privilege of buying back the whole or any part, if he was able to do so by November 1, 1865, and that both parties so understood the arrangement: *Held*, that the transaction was one of sale and not of mortgage, and that after November 1, 1865, without anything having been done, Page had no right or equity in the property.

Page v. Vilhac, 42 Cal. 75.

145. If, at the time of the execution of a deed, the grantee executes and delivers to the grantor a writing, stating that he has received the deed as **security** for money to be paid to him in consideration of his thereafter procuring witnesses to testify to a certain state of facts, it is not a defeasance, and the transaction does not constitute a mortgage.

Patterson v. Donner, 48 Cal. 369.

DEED, WHEN A MORTGAGE.

146. If a deed of land, absolute on its face, is executed and delivered in consideration of a **precedent debt** due from the grantor to the grantee, and there is at the time a **verbal understanding** between the parties that the grantor shall be entitled to

a reconveyance upon the payment of the debt, then the conveyance is a mortgage.

Lodge v. Turman, 24 Cal. 385.

147. G. executed to B. a deed absolute on its face, but intended as a security for money. B. subsequently executed an instrument whereby he agreed to reconvey to G. upon payment by G. at a specified day of a certain sum of money due from G. to B., and, by consent of G., went into possession. Afterwards there was an accounting, and B. purchased of G. his interest in the land, and paid therefor its full value, the money due being a part of the purchase money; and thereupon G. surrendered up to B. the said last-named instrument to be canceled, upon an understanding between the parties that such surrender and cancellation should and would vest the absolute title to the lands in B., and B. continued in possession in pursuance of his purchase. Afterwards G. brought suit against B., claiming that said surrender and cancellation of said instrument did not vest the title in B.; that said conveyance was still only a mortgage; that the indebtedness had been paid by the rents and profits; and asking that B. be adjudged to convey to G.: *Held*, that under such circumstances a court of equity would not compel conveyance. *Green v. Butler*, 26 Cal. 595.

148. A deed which appears upon its face to have been an absolute conveyance may be shown by parol evidence to have been intended as a mortgage.

Gray v. Hamilton, 33 Cal. 686.

149. If a deed, absolute on its face, is given for a loan of money, and intended as a mortgage, and a defeasance is at the same time and as a part of the transaction given by the grantee to the grantor, it is doubtful whether parol evidence is needed to show the deed a mortgage. *Id.*

150. If a deed absolute on its face is given, and at the same time a defeasance is executed, parol evidence is admissible to show them parts of the same transaction. *Id.*

151. A clear case ought to be made to justify a jury or a court in finding upon parol testimony that a deed absolute on its face is a mortgage. *Hopper v. Jones*, 29 Cal. 18.

152. A deed conveying land in present for a money consideration, and a covenant by the grantee to perform certain acts, and to be void if the grantee fails to perform these acts (the grantor to remain in possession until performance), is not a mortgage, nor are the conditions in such deed conditions precedent. *Hihn v. Peck*, 30 Cal. 280.

153. Although an absolute deed, accompanied by a covenant to reconvey upon the repayment of the purchase money, or even a larger sum, may amount to a conditional sale, yet if such contract be made upon the negotiation of a loan, and such was the in-

tention of the parties, the court will construe it as a mortgage.

Sears v. Dixon, 33 Cal. 326.

154. If a deed, absolute on its face, is given as security for an indebtedness, a court of equity will declare it to be a mortgage, and allow the grantor to redeem by payment of the indebtedness, both as against the original grantee and parties who purchase from him with knowledge.

Kuhn v. Rumpp, 46 Cal. 299.

155. A deed or an assignment of an interest in land, absolute on its face, may be shown by parol testimony to have been intended as a security for the payment of a debt.

Raynor v. Lyons, 37 Cal. 452.

Vance v. Lincoln, 38 Id. 586.

156. In California parol evidence is admissible at law, as well as in equity, to show that a deed, absolute on its face, was given as security for money, and is, in fact, a mortgage.

Jackson v. Lodge, 36 Cal. 28.

Vance v. Lincoln, 38 Cal. 586.

157. When an attempt is made to convert a deed, absolute in form, into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage; otherwise, the intention appearing on the face of the deed will prevail.

Henley v. Hotaling, 41 Cal. 22.

158. Parties may buy land in satisfaction of a debt, or for a consideration paid, and contract to reconvey upon the payment of a sum certain, without any intention that the transaction should create a mortgage. *Id.*

159. A covenant to reconvey does not necessarily convert an absolute deed into a mortgage. It may be one among other facts showing that the parties intended the deed to operate as a mortgage. *Id.*

160. To convert an absolute deed into a mortgage, something more must be shown than the reservation of the right to repurchase. *Id.*

161. Where Morris and Angle owned a lot of sheep, and Morris executed a bill of sale of his half to Angle, who was in possession, in consideration of the surrender to him of his own note, previously given to Angle, and the giving to him of Angle's note for the balance; and Angle at the same time agreed in writing to sell back to Morris at a future time, on payment of the money represented by the notes: *Held*, that the transaction constituted an absolute sale, and not a mortgage. *Morris v. Angle*, 45 Cal. 236.

162. Whether a deed absolute in form is a mortgage is a question of intention to be determined from all the facts and circumstances of the transaction, taken in connection with the conduct of the parties after the execution of the deed.

Montgomery v. Spect, 55 Cal. 352.

163. In an action of ejectment, the defendant set up the defense that a deed from him, under which the plaintiff claimed, was in reality a mortgage; and the court having found to that effect, the judgment was that the plaintiff, upon the payment of a debt within a specified time, should convey to the defendant, and that if the defendant, within the time specified, failed to pay the debt, the affirmative relief demanded by him should be denied, and his bill asking for the same be dismissed, and upon appeal the judgment was affirmed. *Id.*

164. In such cases, in order that the deed be held a mortgage, the central fact to be found is the existence of an indebtedness at the time of the transaction (forming the consideration of the deed) and a continuation of the relation of debtor and creditor. If this is found, the inference is that the deed was not made to transfer the title, but to secure the debt. *Id.*

165. A deed of land from A. to F. reciting the consideration at one hundred dollars, and a contract not under seal, not acknowledged nor recorded, from F. agreeing to reconvey the land to A. upon payment within a given time of eight thousand six hundred dollars, with interest at a specified rate, deducting the rents and profits of the land during the period limited for payment, were delivered between the parties at the same time: *Held*, that the deed is not a mortgage, in the absence of proof, that the consideration for it was a debt pre-existing, or created at the time, and still subsisting between the parties; that the provisions in the contract of reconveyance, relative to the payment of interest, and the rents and profits, do not necessarily imply the existence of a debt, which is essential to a mortgage.

People v. Irwin, 14 Cal. 428.

166. If it were shown *alunde* that the consideration of the deed was a pre-existing debt, these provisions would be strong evidence of the continued existence of the debt, and that the deed was intended as a mortgage. *Id.*

167. If, from such proof, in connection with the instrument itself, it was clearly a mortgage, then it would be so held, although the parties had inserted in the contract to reconvey an express declaration that it should be treated only as a contract to reconvey, and not as a mortgage. *Id.*

168. This case differs from *Hickox v. Lowe*, 10 Cal. 197, because there the consideration of the deed was a precedent debt, the defeasance was under seal, and both instruments were executed and delivered at the same time, and acknowledged and recorded together. *Id.*

169. On *mandamus* by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such

certificate is not merged in a deed made to the assignee by the execution debtor after the sale, can not be tried. The right to the deed is the only matter in controversy. *Id.*

170. A deed of land from A. to F., reciting the consideration at one hundred dollars, and a contract from F. not under seal, not acknowledged nor recorded, agreeing to reconvey the land to A. upon payment within a given time of eight thousand six hundred dollars, with interest at a specified rate, deducting the rents and profits of the land during the period limited for payment, were delivered between the parties at the same time. This contract contained a provision that it should be treated only as a contract to convey, and not as an acknowledgment that the deed was intended as a mortgage. The real consideration of this deed was a pre-existing indebtedness of eight thousand six hundred dollars due from A. to F.: *Held*, that this deed is not in effect a mortgage; that the question is one of intention, to be gathered from the whole transaction; that, although the consideration of the deed was an antecedent debt, yet the legal inference is that the debt was discharged upon the execution of the deed, and the provision, in the contract to reconvey, as to not treating the deed as a mortgage, confirms this inference, and it was competent for the parties to insert such a provision. This contract in itself is in legal effect an agreement to sell, and the provision as to not treating the deed as a mortgage must be regarded as one of the conditions upon which the contract was executed, and does not take away or interfere with its efficacy as a contract, but simply repels any presumption from outside facts giving it an operation different from the intention of the parties. *Ford v. Irwin*, 18 Cal. 117.

172. V. gave F. a deed of bargain and sale, absolute on its face; at the same time, and as a part of the same transaction, F. gave V. a written instrument to the effect that the deed had been taken as security for a note which he held against V., and that F. would indorse upon the note all moneys received by him from sales of the land, and that when the note was all paid, F. would deed back to V. all the land then unsold: *Held*, that this was not a mortgage merely, but a trust for the benefit of F., and that the legal title was in F. while the trust continued. *Vance v. Lincoln*, 38 Cal. 586.

173. Under a plea of the general issue in ejectment, a deed absolute in form can not be attacked on the ground that it was in fact intended to be a mortgage.

Davenport v. Turpin, 43 Cal. 597.

174. A trust deed of real estate, taken by a person who loans money to the owner, defeasible on payment of the debt, is something more than a mortgage. It conveys the legal title and an interest in the land.

Fuquay v. Stickney, 41 Cal. 583.

DELIVERY OF MORTGAGE.

175. A testator bequeathed to his niece, A. W. (a minor), the proceeds of certain lands, but provided that the said proceeds might be used to pay a debt of his brother, H. W. (father of A. W.), and that in such case H. W. should give a mortgage upon his farm to secure the repayment of the money. An executor and guardian of A. W. was appointed by the will, who was authorized to appoint a successor, and who, after having qualified, resigned his trust, and appointed H. W. as executor and guardian; and H. W. thenceforth acted as such, but without qualifying or receiving letters. H. W. having come into the possession of the bequest to A. W., and appropriated the same to his own use, executed to her, to secure its repayment, a note and a mortgage upon his farm, and caused the latter to be recorded; but the note and (except for the purpose of being recorded) the mortgage were never out of his possession, and were never delivered to A. W. or to any person for her, otherwise than as above stated; and H. W., acting as guardian, afterward entered satisfaction of the mortgage on record; but the same was, in fact, not paid. Afterward H. W. borrowed money of the plaintiff's, assignor, and executed another mortgage on his farm to secure it. In an action to foreclose the latter mortgage, in which A. W. was made a party defendant: *Held* (by the department), that H. W. never became executor or guardian of A. W.; but that, having received her money, he became her trustee, and that, having spent it, his mortgage to her was valid; and, being for her benefit, that the fact of its being set up in her answer, by her guardian *ad litem*, and relied upon and proved in the case, was sufficient evidence of its **delivery and acceptance**, and that the satisfaction entered by H. W. was void; and *held, further* (by the court in bank), that the mortgage was given in compliance with the terms of the will, and that a voluntary acceptance by the infant was unnecessary, since the law compelled her acceptance; that she took under the will, and was bound by its terms.

Aldrich v. Willis, 55 Cal. 81.

176. Mortgage—note—delivery.

Renken v. Bellmer, 55 Cal. 466.

RENTS AND PROFITS.

177. After a decree foreclosing a mortgage, the **mortgagor in possession** is not, until a sale is made under the decree, accountable either for rents or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste.

Whitney v. Allen, 21 Cal. 233.

178. The **sale of the equity of redemption** of mortgaged premises, and **assignment of the rents** thereof until foreclosure and

sale to a creditor, can not operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by foreclosure.

Dewey v. Latson, 6 Cal. 609.

179. The collection of the rents and profits by the creditor purchasing can be no more a **fraud upon the mortgagee** than would be their application by the mortgagor to the payment of his debts. *Id.*

180. The mortgagor having the right to sell the rents and profits, or to apply them to the payment of his debts, except as against a **creditor who is hindered, defrauded, or delayed** thereby, the mortgagee can not complain, as he is not such a creditor. *Id.*

181. A mortgagee of land in possession must **account** for rents and profits; and after payment of the debt for which the mortgage was given, he becomes, by operation of law, **trustee of the surplus** for the mortgagor. *Pierce v. Robinson*, 13 Cal. 116.

182. A mortgagee in possession is accountable for the **actual receipts** of the net rents and profits, after deducting necessary expenses of managing the property.

Hidden v. Jordan, 28 Cal. 301.

183. **Taxes paid**, and necessary repairs made by the mortgagee in possession, are included in necessary expenses. *Id.*

184. New and permanent **improvements** in fences, made by a mortgagee in possession, are not necessary expenses for which he can recover, unless the fences were necessary for the protection of the crops. But if the value of the rents and profits are enhanced by the fences made, the mortgagee can not be charged with such enhanced value, unless an allowance is also made for the value of such fence. *Id.*

185. A mortgagee in possession is not bound to work the land himself, if he can **rent it for its full value**. *Id.*

186. If permanent improvements, made by a mortgagee in possession, do not cost him anything, he is not entitled to anything for their construction, in an **accounting** with the mortgagor concerning rents and profits. *Hidden v. Jordan*, 32 Cal. 397.

187. If, in an accounting concerning the rents and profits of land, between the mortgagor and mortgagee in possession, the testimony shows that the mortgagee paid expenses as he went along and had a **balance** in his hands at the end of the year, he should be charged with such balance. *Id.*

188. A mortgagee in possession can not charge the mortgagor, in an accounting concerning rents and profits, with the cost of constructing new and permanent improvements, unless there are special circumstances requiring their construction. *Id.*

189. A mortgage given by the lessee upon the **leasehold interest** does not give the

mortgagee any right to the rents coming from the tenants of the mortgagor.

Polhemus v. Trainer, 30 Cal. 685.

MORTGAGE SECURING SEVERAL NOTES.

190. A mortgage being merely the incident to the note secured by it, it follows that where **two notes** are secured by a single mortgage, the indorsement and delivery of one of the notes carries with it a **pro rata portion of the security**.

Phelan v. Olney, 6 Cal. 478.

191. A purchaser of a **second note**, taking therewith an **assignment of the mortgage**, takes with notice of the equity of the holder of the first note, as he was informed of its existence by the mortgage itself. Id.

192. When the holder of the second note and assignee of the mortgage entered a discharge of the mortgage, and took a **new security**, the discharge was valid as to him, and divested his lien under the mortgage, though void as to the holder of the first note. Id.

193. Where a mortgage was executed to secure three notes, two of them drawing interest at five and the third at six per cent. per month, and the notes were described in the mortgage, which was recorded, by their dates, amounts, time of payment, and names of maker and payees, but without further description of the interest than as follows: "And if the payment of the amount of the said notes shall be made at maturity, then these presents shall become void, and the estate hereby granted shall cease and utterly determine; but if default shall be made in the payment of the said sum of money, or the interest, or any part thereof, at the times hereinbefore specified for the payment thereof," then the mortgagee is empowered to sell, etc., and "out of the money arising from such sale, to retain the principal and interest which shall then be due on the said notes." *Held*, that the mortgage is good against subsequent purchasers from the mortgagor, for the principal and the conventional interest stipulated in the notes; that, as the mortgage showed that the notes drew interest, and inferentially conventional interest, by providing for the payment of interest at the maturity of the notes, the property was held for the principal and that interest; and as the names of the payees, the dates, etc., were given, the subsequent purchaser or incumbrancer was bound to inquire into the facts and ascertain them.

Ricketson v. Richardson, 19 Cal. 330.

194. In describing the indebtedness in a mortgage literal exactness is not necessary if the description be correct so far as it goes, and if enough be said to direct the attention of parties subsequently dealing with the property to sources of correct and full in-

formation, provided these persons be not deceived or subject to be misled by the language used. Id.

195. Because a mortgage, given to secure the payment of several notes falling due at different times, provides for payment at times, or in modes, different from the notes, is no objection to suit on the notes at maturity. The mortgage is not a part of the contract of indebtedness.

Robinson v. Smith, 14 Cal. 95.

196. The fact that the purchaser of the note saw the mortgage and note was no notice to him of any valid defense to the note. Id.

197. Where, in a mortgage to secure the purchase money of land, for which notes were given falling due at different times, the condition was, "provided, that previous to the dates of said payments, it shall have been decided by competent authority that the title to said land is fully vested in the party of the second part, and the party of the first part is given full and peaceable possession," the holder of one of the notes transferred before maturity may sue on it at maturity, although the title to the land has not been settled, and peaceable possession not given. Id.

198. Where several notes have been given which are secured by one mortgage, and the notes are assigned to different persons, the assignor has a right, by agreement with the assignees, to fix the rights of the purchasers of the several notes to the mortgage security. Grattan v. Wiggins, 23 Cal. 16.

199. Where in such case the assignee of one note having the first right to the benefit of the mortgage security forecloses when the debt falls due, and obtains a decree under which all the mortgaged property is sold, such foreclosure and sale operate as an **extinguishment of the mortgage**. Id.

200. The holders of the other notes secured by the mortgage have a right to **redeem** from the sale made under such foreclosure, but when not made parties to the action must assert this right to redeem within four years or it is barred by the statute of limitations. Id.

NEW NOTES.

201. Where a new note, on the same terms, between the same parties, for the same sum, and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note.

Spring v. Hill, 6 Cal. 17.

202. If a note secured by mortgage is afterwards so far changed as to lose its identity, the mortgage can not be enforced as against subsequent incumbrancers.

Poett v. Stearns, 31 Cal. 78.

NEW MORTGAGE.

203. Where a new mortgage is executed in lieu of an old mortgage, for the same debt, the execution of the new and satisfaction of the old mortgage, may be regarded as simultaneous acts. *Dillon v. Byrne*, 5 Cal. 455.

204. Where a mortgage is a mere security for the purchase money of the property, the debt is not lost by the acceptance of a new mortgage, intended to supply the old one and secure the same debt. *Id.*

205. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one, to whom the other had meanwhile sold, the new mortgage being for a less sum, by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud, to induce a court of equity to interfere, and give the mortgage priority over intervening liens.

Dingman v. Randall, 13 Cal. 512.

206. R., an unmarried man, executed two mortgages upon a lot of land. Subsequently he marries, and then executes a new mortgage to persons who pay off the first mortgages upon their being released. The release of the old, and the execution of the new mortgage, were on the same day. The wife did not sign the new mortgage: *Held*, that in equity the transaction is an assignment of the first mortgages in consideration of the money advanced by the second mortgagees; not the creation of a new incumbrance, but changing the form of the old.

Swift v. Kraemer, 13 Cal. 526.

UNRECORDED MORTGAGE.

207. A prior unrecorded mortgage has priority of lien over a subsequent recorded mortgage where the second mortgagee had notice of the existence of the first incumbrance; and this was so, as well before as since the enactment of the statute by which the common law was adopted in California.

Woodworth v. Guzman, 1 Cal. 203.

208. A mortgage made anterior to the passage of the act concerning conveyances, was not recorded in accordance with the provisions of the forty-first section of the said act: *Held*, that it lost its priority against a subsequent purchaser without notice.

Call v. Hastings, 3 Cal. 179.

209. An unrecorded mortgage has priority over a mechanic's lien, which attached subsequently to the execution of the mortgage.

Rose v. Munnies, 4 Cal. 173.

210. A mortgagee of the defendant in execution, who has failed to record his mortgage until after the sale, has no lien or intervening rights as against the purchaser; he can redeem under the statute; if he fails to do so a court of equity will not interpose.

Smith v. Randall, 6 Cal. 47.

211. A party holding under an assignment of a recorded lease, containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate.

Barroilhet v. Battelle, 7 Cal. 450.

212. A subsequent purchaser of property mortgaged, with actual notice of the mortgage, can not object to defects in the registry thereof.

De Leon v. Higuera, 15 Cal. 483.

213. A judgment creditor who buys at sheriff's sale the land of the judgment debtor, and receives a sheriff's deed without knowledge of a prior unrecorded mortgage given by the judgment debtor on the land, must show that his sheriff's deed was first recorded before he can claim to be a purchaser in good faith and for a valuable consideration.

Thomas v. Vanlieu, 23 Cal. 616.

214. When the mortgage is recorded, so as to give constructive notice to a subsequent purchaser, there is no need of proof of actual notice in an action to enforce the mortgage.

Christy v. Dana, 42 Cal. 175.

215. The words "conveyance of real property," as used in section 1213 and 1214 of the civil code, include mortgages.

O. F. Savings Bank v. Banton, 46 Cal. 604.

216. A mortgage of real property is void, as against a subsequent mortgage of the same property which is first recorded and is taken in good faith and for a valuable consideration, and without actual notice of the preceding mortgage. *Id.*

217. The above rule is not affected by section 2937 of the civil code, which prescribes that the mortgagee is allowed one day for every twenty miles between his residence and the recorder's office, and that during such time the mortgage has the same effect as if recorded. *Id.*

218. The subject-matter of recording mortgages comes more properly under the article in the civil code prescribing rules for "mortgages of real property" than under the article prescribing rules for "mortgages in general," and if there is a conflict between the two articles in relation to recording mortgages, the former must prevail. *Id.*

MORTGAGE OF MARRIED WOMAN.

219. The wife can not mortgage her separate real estate, unless her husband unites in the conveyance in the mode prescribed by our statutes, at least as to property acquired after the passage of the statutes; and these statutes, when operating in future, are constitutional. *Harrison v. Brown*, 16 Cal. 287.

220. The act of February 14, 1855, makes an exception in case the husband be not, and for one year next preceding the execution of

the conveyance of the wife has not been, *bona fide*, residing in this state. Id.

221. But the fact that the husband abandons his wife, or suffers her to act as a *feme sole*, and take care of herself, does not give her a right to mortgage either his or her separate property, whatever may be the effect of such acts of the husband in rendering her personally liable for her contracts. Id.

222. Where a bond is given in the usual form, expressing the personal obligation of the husband alone, and, in connection with it, a mortgage in the usual form executed by the husband and wife, purporting to cover the separate estate of the wife as well as the interest of the husband in the premises mortgaged, the transaction will, upon its face, create the presumption that the wife is a mere surety for the husband's debt. Spear v. Ward, 20 Cal. 659.

223. The presumption of the suretyship of the wife may be repelled by proof *alunde*, showing that the debt secured was created for her benefit or that of her estate; and on like grounds, the presumption will be destroyed by a recital in the mortgage of a fact inconsistent with the theory that the wife contracted as a surety. Id.

224. The wife being empowered to execute a mortgage, is *prima facie* bound by the clause stating the consideration of its execution. Such clause, subject to certain qualifications, is open to explanation and may be varied by *parol proof*; but in the absence of such explanation or proof, the clause is deemed to express the true consideration. Id.

225. W. executed a bond to S., conditioned for the payment by him of six thousand dollars in one year with interest; and at the same time, as security for its payment, W. and wife executed a mortgage upon the separate property of the wife, which mortgage recited as the consideration of its execution the receipt of six thousand dollars by the mortgagors, "and each of them." In an action by S. to foreclose the mortgage, the wife defended upon the ground that she was a mere surety for her husband, and that the liability of her property had been discharged by an extension of the time of payment given by S. to her husband. By the pleadings, the extension of time was admitted, and the question of suretyship put in issue, and the cause was submitted without the introduction of other proof than the bond and mortgage: *Held*, that the property of the wife was bound by the mortgage—that she was not a surety for her husband, the recital as to the consideration meeting and countervailing the effect which would otherwise have arisen from the form of the transaction. Id.

226. The execution and acknowledgment

by the wife of a mortgage under compulsion and undue influence of the husband does not render the mortgage void, but only voidable; and if the mortgage is given to secure an antecedent debt, and the mortgagee has no notice of such compulsion and undue influence, the mortgage can not be avoided on that ground.

Conn. L. Ins. Co. v. McCormick, 45 Cal. 580.

227. If the wife executes a mortgage under the compulsion or undue influence of her husband, she can not avoid the mortgage because of this compulsion or undue influence, when the mortgagee has no notice of it, unless, at the time of the acknowledgment of the mortgage she also acted under the fear, compulsion, or undue influence of her husband. Id.

MORTGAGE ON PUBLIC LAND.

228. A mortgage on public land, or the improvements thereon, is not void because it does not follow the provisions of the chattel mortgage act. That act gives a new remedy, but does not take away the old.

Hadley v. Maier, 13 Cal. 13.

229. The mortgagor having mortgaged the land as his own property is estopped, as are his privies in estate, from saying it is public land. Id.

230. If one who is in possession of public lands mortgages the same in fee, and afterwards acquires title to the same under the federal homestead act, he is estopped from denying the lien of the mortgage, and can not set up a title afterwards voluntarily acquired to defeat it. Section 33 of the act concerning conveyances applies to mortgages as well as absolute conveyances.

Kirkaldie v. Larrabee, 31 Cal. 455.

See LAND.

TAXATION OF.

231. A mortgage is not personal property within the revenue act of 1856, nor liable, as such, to taxation.

Falkner v. Hunt, 16 Cal. 167.

232. Land mortgaged may be taxed without reference to the mortgage, and if the mortgage be to secure a debt, the debt may be taxed; if to secure a loan of money, the money may be taxed; but the act does not intend to tax the mortgage, as such, and also to tax the money loaned and secured by the mortgage, or the solvent debt it represents. Id.

233. *Prima facie*, a mortgage is no more taxable than a deed or any other muniment of title or mere security, and the money which it secures can not be taxed without a more particular description than the general designation, "personal property." Id.

See TAXATION.

ASSIGNMENT OF.

234. The Uncle Sam mining company execute a mortgage upon their mining claims to R., a director of the company. The mortgage was in fact in trust to secure F. et al., who had, as sureties of R., signed with him a joint and several note to D. for money loaned by him to R. The money was for the company. R. assigns this mortgage to F. to secure him against his liability on the note, delivering the mortgage, at the same time, to F., who retained it a few minutes and returned it to R. to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing: *Held*, that after the assignment, R. had no interest in the mortgage which a judgment creditor could not reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F. et al. as sureties was a sufficient consideration for the assignment, and that such assignment is not a mortgage of a mortgage. Hall v. Redding, 13 Cal. 214.

235. A deed from a mortgagee to a third party for the conveyance of mortgaged premises, does not operate as an assignment of the mortgage.

Peters v. Jamestown B. Co., 5 Cal. 334.

236. On a settlement between D. and P., it was agreed, verbally, that D. was the owner of the mortgage debt: *Held*, that this is a sufficient transfer, P. not objecting, being party to the suit, and D. having, in fact, advanced the money loaned. The decree will protect all parties.

Perre v. Castro, 14 Cal. 519.

237. Suit on note and mortgage executed by defendants to Sloss & Co., and assigned to plaintiff after maturity. Defendant, McD., avers in his answer that the consideration for the note and mortgage was received by his co-defendants, and that he executed the same for their accommodation; that the assignment to plaintiff was a fraud on him, McD., and that the consideration of the assignment was paid in whole or in part with money advanced by his co-defendants for that purpose; that he also deposited with Sloss & Co., as additional security, certain notes or "scrip" issued by the "Camp Far West water and mining company," and that prior to the assignment to plaintiff, Sloss & Co. converted these notes to their use, and refuse to account for them: *Held*, that if the averment as to the consideration for the assignment be true, the amount advanced by McD.'s co-defendants should be credited on the note and mortgage, and the recovery be limited to the sum actually paid by plaintiff; that if the co-defendants paid the whole the debt was discharged and plaintiff can not recover; *held, further*, that the equities of

the parties might be different, if, as between the defendants, McD. were liable for any portion of the indebtedness; *he'd, further*, that as to the notes or "scrip" held by Sloss & Co. as additional security, the rights of McD. are the same as they would be in an action prosecuted by Sloss & Co., and that plaintiff, being chargeable with notice of the equities between McD. and Sloss & Co., must credit his note and mortgage with the value of this "scrip."

Higgins v. McDonald, 17 Cal. 289.

238. Cases cited as to whether and when payment of money due on a mortgage operates as a discharge or as an assignment of the mortgage.

Guy v. Du Uprey, 16 Cal. 195.

239. The assignee of such mortgage does not succeed to all the rights held by the mortgagee by virtue of his having been the owner of the premises, and of his having conveyed them without obtaining the stipulated consideration, but he only acquires such rights as the mortgage carries with it.

Camden v. Vail, 24 Cal. 392.

240. A mortgage is a mere incident of the debt it was intended to secure, and passes by an assignment of the debt, and is discharged by a payment of the debt, and is barred by the statute of limitations when the debt is barred.

Willis v. Farley, 24 Cal. 490.

241. The assignment of an indebtedness transfers, likewise, the security by which its payment is protected.

Hurt v. Wilson, 38 Cal. 263.

242. Prior to the mortgage to A. W., H. W. had mortgaged his farm to one H., and this mortgage, by agreement with the plaintiff's assignor, was paid out of the moneys loaned by him, and it was claimed by him that the transaction constituted an equitable assignment of the H. mortgage, and that he was entitled to be subrogated to the rights of H.: but *held*, that, as he did not sue as assignee of H., but only to foreclose his own mortgage, the question could not be considered, and that any finding upon the subject was outside of the issues.

Aldrich v. Willis, 55 Cal. 81.

243. The Yreka water company execute to B. and others a mortgage on its property, to secure, in part, debts severally due from the company to the different mortgagees, and in part a debt due from the company to K., not named in the mortgage. A new company is afterwards incorporated to take the place of the Yreka water company, and an arrangement is made between the mortgagees and the companies, that when nine tenths in amount of the debts secured by the mortgage shall be surrendered, on a fixed basis, in exchange for stock in the new company, the mortgage shall be canceled and the property be owned by the new company, free of

the incumbrance; some of the mortgagees, B. among the number, receive stock to the amount of their debts, and conditionally assign their demands; but the mortgage is not canceled or assigned, nor do any of the mortgagees receive anything on account of the debt due to K: *Held*, that neither B. nor any of the mortgagees have by these acts made themselves liable to K. for any portion of his debt. *Bibend v. Krautz*, 20 Cal. 110.

244. Where it was agreed between the mortgagor and mortgagee that the land and its proceeds were to be held, not only as security for the debt due the latter, but for debts due third persons, laborers on the land for instance: *Held*, that such agreement was an appropriation of said surplus for the benefit of said third persons, not revocable when they have acted on the faith of it, and the mortgagee is a trustee of the same for said third persons.

Pierce v. Robinson, 13 Cal. 116.

245. Such an agreement operates as an equitable assignment of the surplus so soon as any exists, which does not pass to the administrator of the mortgagee as general assets for the benefit of creditors at large, but is subject, in his hands, to the same trust which attached to it before the decease of the intestate. *Id.*

PAYMENT AND SATISFACTION OF.

246. A mortgage unsatisfied upon the record is a subject of sale to all innocent parties.

Peters v. Jamestown B. Co., 5 Cal. 334.

247. The purchaser of a mortgage can not be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction duly entered of record. *Id.*

248. The entering a discharge of a mortgage, by the mortgagee, does not of itself discharge the debt, but only the security.

Sherwood v. Dunbar, 6 Cal. 53.

249. The assumption of the payment of the mortgage by the defendants did not extend it over the whole land, nor does it amount to an understanding to pay it as part of the purchase money, so as to give the vendors a lien on the whole land.

Abell v. Coons, 7 Cal. 105.

250. Where property is mortgaged to secure two notes falling due at different periods, and the mortgage is foreclosed by suit upon the note first falling due, and then, after the period for redemption has passed, but before the sheriff has executed his deed to the purchaser, this first note, or rather the judgment thereon, is paid: *Held*, that the payment of this note effected the redemption of the property, and left it subject to the mortgage to secure the second note.

Hocker v. Reas, 18 Cal. 650.

251. *Held, further*, that the lien of the mortgage for the second note could not be displaced by a sale under prior incumbrances, mechanics' liens, in proceedings to which the holder of the second note was not a party.

Id.

MORTGAGE LIEN.

252. If a mortgage is recorded, its lien is not affected by sales of the mortgaged property made by the mortgagor pending proceedings to foreclose it.

Breon v. Strelitz, 48 Cal. 645.

253. An assignment of a certificate of purchase of land, issued by the state, by way of security for a debt due by the assignor to the assignee, operates as an equitable mortgage on the interest in the land which the assignor acquired by virtue of the certificate, and if the assignee pays money due the state on the certificate, in order to prevent a forfeiture of the assignor's title, the money so paid becomes a portion of the mortgage debt, and the court will enforce an equitable lien for the whole sum.

Hill v. Eldred, 49 Cal. 398.

254. A tender of the amount due on a debt which is secured by mortgage, made after the debt falls due, does not release the lien of the mortgage.

Himmelmarm v. Fitzpatrick, 50 Cal. 650.

255. The court intimates that, under section 1504 of the civil code, a tender of the amount due on a mortgage will stop the running of interest, but does not decide the point. *Id.*

256. If a mortgage is given on two pieces of land, and the mortgagee enforces it against and sells only one piece, he thereby waives the lien of the mortgage on the other piece; and if the land sold fails to bring the amount due and costs, and a judgment is docketed for the deficiency, the mortgagor can not complain.

Mascarel v. Raffour, 51 Cal. 242.

257. Although a mortgage given by the wife on community property creates no lien, yet the mortgage is not void in the extreme sense; and if the husband afterwards dies and the wife inherits the property, the mortgage becomes a lien on the interest thus inherited by the wife, subject to the payment of the debts of the estate.

Parry v. Kelley, 52 Cal. 334.

258. A chattel mortgage upon a growing crop, as against an attaching creditor, continues to be a lien upon the crop, in the possession of the mortgagor, after severance and removal from the land.

Rider v. Edgar, 54 Cal. 127.

259. On the twenty-second day of June, 1857, T. H. O. Walton sold a half interest in a ditch to G. W. Walton, who, in part payment, agreed, from the proceeds of said interest, to pay five thousand dollars upon two

promissory notes, executed by the grantor and one Hall to Parsons. February 12, 1858, G. W. Walton sold and conveyed this interest in the ditch to G. V. Fairbanks for ten thousand five hundred dollars, of which two thousand seven hundred dollars was paid at the time, but not applied on the notes held by Parsons, and a mortgage given upon the half interest for the balance. Afterwards, G. V. Fairbanks sold to Jonathan Fairbanks, and soon after G. W. Walton gave to Parsons a written acknowledgment that he had bought the interest in the ditch, upon condition to pay five thousand dollars of its proceeds upon the Walton and Hall notes, and that all moneys due to him upon his note to Fairbanks were due and payable to Parsons until the five thousand dollars should be paid. After receiving this acknowledgment Parsons transferred the Walton and Hall notes to Jonathan Fairbanks, by indorsement, and took from the latter his note for five thousand dollars, secured by a new mortgage on the ditch: *Held*, that any interest which Parsons acquired by the acknowledgment in the Walton mortgage he parted with by the transfer of his notes to Fairbanks; that the last note and mortgage could not be considered a **renewal** of the five thousand dollar debt evidenced by the transferred notes; and that the Walton mortgage was a **lien upon the ditch** for the balance of the debt secured thereby, over and above the amount of five thousand dollars, superior to any lien retained by Parsons thereon for the payment of the balance due him.

Parsons v. Fairbanks, 22 Cal. 343.

260. Where a note secured by mortgage on lands is extended by the maker, and the lien of the mortgage thereby **extended**, and the maker and mortgagor afterwards sells the lands, with general covenant of warranty, to one ignorant of the extension, the **covenant in the deed** will not defeat the extension of the lien of the mortgage.

Lent v. Morrill, 25 Cal. 492.

261. The mortgagee of real estate can not, by virtue of the lien of his mortgage alone, cut off the **judgment creditors** of the mortgagor who have, by virtue of their **judgments**, acquired a lien on the mortgaged property subsequent to the mortgage, from all recourse upon the mortgaged property.

Alexander v. Greenwood, 24 Cal. 505.

MISCELLANEOUS DECISIONS.

262. A mortgagor, after disposing of the mortgaged premises by deed of sale, loses all control over them. His **personal liability** thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is as to the premises henceforth a mere **stranger**. And if, instead of selling the premises, he execute a **second**

mortgage upon them, he is equally without power to destroy or impair the efficacy of the lien thus created.

Lord v. Morris, 18 Cal. 482.

263. T. & Co. were in possession of certain property under a **verbal agreement** of sale from G., and employed W. to erect a building upon it. Before the completion of the building G. signed a deed to the land, and at the same time T. & Co. executed a mortgage for the purchase money: *Held*, that the conveyance and mortgage were but one act, and that no prior lien on the general property of T. & Co. could have **priority** over the plaintiff's mortgage.

Guy v. Carriere, 5 Cal. 511.

264. The language used by this court in some cases, that such conveyances take **effect from** the date of the mortgage **by relation**, explained as above.

Goodenow v. Ewer, 16 Cal. 461.

265. If the mortgagee has no notice of these transactions, he could have all the lots in the mortgage subjected to the payment of his debts. See facts.

Cheever v. Fair, 5 Cal. 337.

266. The object of this provision in the statute is **identification**. It is not an indispensable requisite to the validity of the mortgage which would be valid if it stated the parties to have no occupation or profession.

Ede v. Johnson, 15 Cal. 53.

267. The **severance and removal of a house** from land covered by a mortgage withdraws the house from the mortgage lien; and after the removal the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use.

Buckout v. Swift, 27 Cal. 434.

268. Pending a suit by **two joint owners** of land to recover possession, one conveys his half to the other, taking back a mortgage for the purchase money, conditioned to become due when the mortgagor recovers possession by the suit or compromise, or when he parts with his title: *Held*, that the mortgage does not become due by a sale of half the land to counsel employed to recover the possession, together with sales of most of the other half to various parties.

Steimbach v. Leese, 13 Cal. 363.

269. If the property in the hands of the mortgagor could be charged with the payment of the sum sued for only upon the happening of an **event in future**, there is no reason why it should be sooner liable in the hands of the **vendee**. *Id.*

270. Such sales do not render a compliance with the conditions of the mortgage impossible. A recovery of the property by the vendees would meet the terms of the contract and make the money due. *Id.*

271. Where the mortgagor **dies** after decree of foreclosure entered, and no admin-

istration is had upon his estate, it seems that there is no reason why the execution of the decree should be stayed. The suit is in the nature of a **proceeding in rem**. The decree binds the specific property, and the case is within the reason of the proviso in section 141 of the act concerning the estates of deceased persons. *Nagle v. Macy*, 9 Cal. 426.

272. In considering the operation of a mortgage upon **subsequently acquired title**, it is immaterial whether it be regarded as a conveyance of a conditional estate, as at common law, or as creating a mere lien or incumbrance, as by the law of this state. Whatever in the instrument, treating it as a conveyance, would operate to transfer a subsequently acquired title to the grantee, equally operates, treating the instrument as a lien or incumbrance, to subject such acquired interest to the purposes of the original security.

Clark v. Baker, 14 Cal. 612.

273. Terms of decree in an action, in the nature of a **bill to redeem** from a mortgage, is not governed by the provisions of the practice act relating to foreclosure of mortgages. In such case, a decree of **foreclosure** and sale is neither necessary nor proper, but the decree may properly prescribe the terms, including the time and manner of performance on which the redemption prayed shall be granted.

Cowing v. Rogers, 34 Cal. 648.

274. In such case, where default is made, the usual and proper judgment is that plaintiff's complaint be dismissed. This judgment is not rendered in the first instance, but on motion of the opposite party, when it is made in making redemption as decreed. *Id.*

275. A mortgage upon a **flume** or ditch not completed, but projected and in process of construction, covers the whole work when completed, if apt terms expressing that intent are used in the instrument.

Union W. Co. v. Murphy's F. Co., 22 Cal. 620.

276. A flume for the conveyance of water is in the nature of real estate, and a mortgage upon it will, without any special provisions, include all improvements then upon the line of the work; and also all those which may afterwards be put thereon. *Id.*

277. B. bought the premises in controversy, and executed a note in part payment, which was afterward transferred to the plaintiff. Soon after the transfer, the plaintiff loaned B. an additional sum, and took his note and a new mortgage on the same lot, and his interest in another lot, and caused the first mortgage to be canceled and satisfied of record. In a suit to foreclose the mortgage, the wife of B. intervened and claimed the premises as a homestead. *Held*, that the land was liable for the **remainder** of the purchase money, no matter to what purpose it might be devoted. The land is charged with a debt which can only be dis-

charged by **payment, voluntary relinquishment**, or the acceptance of some new or other security. *Dillon v. Byrne*, 5 Cal. 455.

278. Where the estate of an insolvent is subject to liens, or mortgages created before the application in insolvency, proceedings therein do not affect such liens or mortgages, and the right of the assignees is confined to the surplus.

Rix v. McHenry, 7 Cal. 89.

279. **Subsequent creditors** can not complain that the note and mortgage of a common debtor were executed without consideration. *Horn v. Volcano W. Co.*, 13 Cal. 62.

280. When the owner of land contracts in writing with two persons at the same time to execute to each a mortgage on the same, and each has **knowledge of the agreement** with the other, and nothing is said about **priority** of mortgages, the mortgages afterwards executed stand upon an equality, although one may have been first executed and recorded.

Daggett v. Rankin, 31 Cal. 321.

281. By the terms of a **chattel mortgage** of wheat, the mortgagor was to harvest the same, and to deliver it into possession of the mortgagees; and, the question being as to who should bear the loss of a portion of the wheat, alleged to have been shipped by railroad to the place of destination agreed upon, but which did not arrive, the court instructed the jury to the effect that if the wheat referred to was shipped in the name of the plaintiffs, and the bills of sale taken in their name with their knowledge and consent, then they were in the possession and the owners thereof, and were liable for any loss resulting from their own **negligence** or carelessness, or that of their agents and employees: *Held*, that the proposition was not law, and that the instruction was erroneous.

Perkins v. Eckert, 55 Cal. 400.

282. A mortgage given by the **husband and wife** during the life of the husband may be enforced in an action against the heirs after the husband's death.

Brown v. Orr, 29 Cal. 120.

283. A mortgage, although in some sense **merged in the decree**, remains a **muntment of the title** which passes to the purchaser at the mortgage sale, to be looked to, not only for the purpose of ascertaining the time at which the mortgage lien attached, but also (in the absence of express directions in the decree limiting the estate to be sold) the estate conveyed by way of mortgage.

Vallejo Land Ass. v. Viera, 48 Cal. 572.

284. Under section 72 of the code of civil procedure, "there can be but one action for the recovery of any debt * * * by mortgage." Accordingly, where a mortgagee had prosecuted an action in Ohio to final judgment, upon a note secured by mortgage on

land in this state: *Held*, that he could not afterward maintain an action for foreclosure.

Ould v. Stoddard, 54 Cal. 613.

285. A stipulation in a mortgage, allowing counsel fees for a foreclosure, does not entitle the plaintiff to counsel fees unless he pays them, or at least has become liable for them. The plaintiff can not, under such stipulation, recover counsel fees for foreclosing his own mortgage.

Patterson v. Donner, 48 Cal. 369.

286. The lessee of land, in possession of the same, may, before he has planted, execute a valid mortgage on the crop to be raised by him the coming cropping season.

Arques v. Wasson, 51 Cal. 620.

287. Where, upon a foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and docketts a judgment for the deficiency, the purchaser from the mortgagor of the land, pending the time for redemption, is entitled as successor in interest to redeem from the mortgagee, without paying the amount of the deficiency.

Simpson v. Castle, 52 Cal. 644.

288. Where a promissory note, due to a corporation two years after date, was secured by a mortgage which provided that "in case of default by the mortgagor in the payment of said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may, at its option, either commence proceedings to foreclose this mortgage in the usual manner, or cause the said premises or any part thereof to be sold." *Held*, that the failure to pay the interest as it became due authorized a foreclosure for such interest only, and not for the principal.

Bk. of S. L. Obispo v. Johnson, 53 Cal. 99.

289. A debt secured by note and mortgage made and executed before the passage of the legal tender act may be discharged in legal tender notes, if they contain no stipulation requiring payment to be made in coin.

Belloc v. Davis, 38 Cal. 243.

290. A subsequent mortgagee, who has been made a party to an action foreclosing a prior mortgage, can not maintain a separate action to enjoin a sale under the judgment, and to be subrogated to the rights of the plaintiff, on the ground of a tender of the amount due on the judgment; his remedy is by motion in the action foreclosing the mortgage.

Ketchum v. Crippen, 37 Cal. 223.

291. If the owner executes two mortgages upon the same land, and the prior mortgagee enforces his mortgage in equity, without making the junior mortgagee a party defendant, and purchases the property at the sale, and receives a sheriff's deed, the junior mortgagee may file a bill to redeem; but if his complaint contains only the usual averments in an action to enforce a mortgage,

and makes no reference to the prior mortgage, sale, and purchase, the court can not enter a decree authorizing him to redeem.

Carpenter v. Brenham, 50 Cal. 549.

292. In a suit to foreclose a mortgage, it is competent for the defendants to introduce in evidence a subsequent written agreement of the parties, by which an assignment of the rents of the mortgaged premises, until full payment of the mortgage debt, is made by the mortgagor and accepted by the mortgagee.

Angier v. Masterson, 6 Cal. 61.

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CHattel MORTGAGE,

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MOTION.

1. GENERALLY.

8. NOTICE OF.

GENERALLY.

1. A motion, within the meaning of the statute concerning fees, is an application for a rule or order by a party to an action or proceeding; and the motions, rules, or

orders, for the entry of which the clerk is entitled to collect fees, are such as are entered on the application of some party, who is bound by law to pay for the service rendered.

Bicknell v. Amador Co., 30 Cal. 237.

2. Where there was evidence before the jury, connecting a defendant not served with process with the trespass: *Hell*, that a motion by the other defendants to **strike his name from the record**, was properly overruled.

Gates v. Nash, 6 Cal. 192.

3. The motion must be made in the name of the plaintiff in the execution.

Wilson v. Broder, 10 Cal. 486.

4. A motion to set aside an order, entered at a term of the court next preceding the passage of the act of April 2, 1866, amending the sixty-eighth section of the practice act, and within five months after the adjournment of said term, was made in due time.

Bensley v. Ellis, 39 Cal. 309.

5. A motion may be made to vacate an **ex parte** order granting a writ of assistance.

San Jose v. Fulton, 45 Cal. 316.

6. A motion is an application for a rule or order made *ex parte* to a court or judge. Making out and filing a written application for such rule or order is not sufficient. The attention of the court must be called to it, and the court moved to grant it.

People v. Ah Sam, 41 Cal. 645.

7. A motion made, in the usual course of practice, which has once been denied, may be renewed by leave of the court; and unless there is an abuse of discretion in granting this leave, the order will not be disturbed by the supreme court.

Bowers v. Cherokee Bob, 46 Cal. 279.

NOTICE OF.

8. It is irregular to entertain an *ex parte* motion to take the defendant's answer off the files, without proof that a copy of the affidavit on which the motion is founded, together with notice of the motion, has been served on the defendant's attorney a reasonable time before making the motion.

Stevens v. Ross, 1 Cal. 94.

9. Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented.

People v. Turner, 1 Cal. 152.

10. Where both parties appear, no notice whatever is necessary to be shown.

McLeran v. Shartzer, 5 Cal. 70.

11. When the statute speaks of notice of a motion, it means written notice, or notice in open court, of which a minute is made by the clerk.

Borland v. Thornton, 12 Cal. 449.

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MUNICIPAL CORPORATIONS.

1. IN GENERAL.

17. POWERS.

43. POWER OF LEGISLATURE OVER.

56. ORDINANCES.

58. CONTRACTS.

68. IMPROVEMENTS.

71. LIABILITY.

IN GENERAL.

1. Municipal corporations are **compound beings**. They exercise governmental powers, and also possess the capacity to receive and dispose of their property, like private individuals. In the former capacity, the exercise of its **delegated discretion** can not be controlled by the judiciary, but in the latter, its acts are subject to **judicial control**.

Holland v. San Francisco, 7 Cal. 361.

2. As a city may, by legislative enactment, spring from the body of a county, there is no reason in law why it may not be resolved back into its original elements, or why the power which called this political being into existence may not again destroy it.

People v. Hill, 7 Cal. 97.

3. A town whose act of incorporation has been decided to be unconstitutional by the supreme court has no legal existence as a corporation, and a judgment against it would be a mere nullity.

Colton v. Rossi, 9 Cal. 595.

4. A municipal corporation, outside of its governmental capacity, is in many respects to be regarded the same as a private corporation, and its officers and agents through whom it acts must be presumed to know the contracts it enters into, the purchases it makes and the property it uses. The knowledge of such matters must rest with some of its officers, and the corporation can not shelter itself under an assertion of ignorance.

Gas Co. v. San Francisco, 9 Cal. 453.

5. A municipal corporation is a **public institution**, created for public purposes. The municipality is a political subdivision, or department of the state, governed, regulated and constituted by public law; the agents who administer its affairs derive their powers from the legislature, and can

only act in obedience to legislative authority. The original power to control, as well as to create them, is in the legislature; and the legislature can as well immediately direct the use and disposition of the public lands of such corporation, as a general rule, as it can mediate so do by appointing or providing for the appointment of agents, or giving authority for that purpose; in other words, what the legislature can authorize to be done, it can itself do.

Payne v. Treadwell, 16 Cal. 220.

6. A municipal corporation is an entity, possessing for many purposes the attributes of individuality, and in the exercise of its legitimate powers can only act by and through its agents appointed in the mode prescribed by the law of its creation. The rights of the individual corporators of a municipal corporation can only be enjoyed by and through the agents appointed by law to exercise the corporate powers.

People v. Coon, 25 Cal. 635.

7. An act of the legislature which requires the supervisors of a county, upon the petition of persons in the possession of more than one half of the acres of any specified portion of the county, to erect such specified portion into a levee district for the purpose of reclaiming the same from overflow, and then provides the details by which the reclamation shall be effected, makes a levee district organized by the board of supervisors a corporation, and a public corporation, even if the act does not in terms declare it a corporation.

Dean v. Davis, 51 Cal. 406.

8. Municipal corporations are but subordinate subdivisions of the state government, which may be created, altered, or abolished, at the will of the legislature, which may enlarge or restrict their powers, direct the mode and manner of their exercise, and define what acts they may or may not perform, subject, however, to the limitation that the legislature can not direct the performance of an act which will impair the obligations of a contract.

San Francisco v. Canavan, 42 Cal. 541.

9. Incorporated cities are mere governmental instruments for the purposes of internal administration, like counties created by law for the same purpose.

Winbigler v. Los Angeles, 45 Cal. 36.

10. The county of Sacramento is subject to the provisions of the code respecting the government of counties.

People v. Sacramento Co., 45 Cal. 692.

11. The act of 1863, which declares that the board of supervisors of Sacramento county shall be a body politic and corporate, does not make that county a municipal corporation within the meaning of that term as used in the nineteenth section of the political code.

12. A legislative act by which a city is incorporated is a public act of which courts are bound to take judicial notice.

People v. Potter, 35 Cal. 110.

13. There is a clear distinction between most municipal corporations as they exist in Great Britain, and those of a more recent date in the United States. The former depend upon prescription for their existence and authority, while the latter depend upon their respective charters.

Herzo v. San Francisco, 33 Cal. 134.

14. The individual corporators of the city and county of San Francisco did not acquire such right in the capital stock of the Central Pacific railroad company, separate and distinct from the municipal corporation, as to disable the legislature from conferring on the board of supervisors the authority to settle the claim of said company for six hundred thousand dollars of the bonds of said city and county, by withdrawing the subscription of the city and county to the capital stock of said company, and releasing its right to stock, and executing a less amount of bonds in lieu thereof.

People v. Coon, 25 Cal. 635.

15. If the petition to the board of supervisors appears on its face to be signed by persons owning a majority of acres, and the district is in fact exercising corporate powers, the validity of its corporate existence can be tested only by proceedings in behalf of the people, and it can not be shown in a collateral action that persons owning a majority of acres did not sign the petition, and that the charter was therefore procured through fraud.

Dean v. Davis, 51 Cal. 406.

16. Title 3, part IV of the political code does not apply to any municipal corporations existing at the time it went into effect.

Ex parte Simpson, 47 Cal. 127.

POWERS OF.

17. Corporations or quasi corporations, possess only such corporate powers as are expressly given by statute or by their charter, and such as are necessary to the exercise of the powers enumerated.

Dunbar v. San Francisco, 1 Cal. 355.

18. The powers of municipal corporations are limited to the express grant of their charters; and the object of their creation is governmental, and not commercial.

Low v. Marysville, 5 Cal. 214.

19. Charters of corporations are special grants of power. The corporation has no powers except those expressly given, or which are necessary to the exercise of those expressly given.

Oakland v. Carpentier, 13 Cal. 540.

20. Charters of municipal corporations are special grants of power from the sovereign authority, and must be strictly construed.

Whatever is not given expressly, or as necessary means to the execution of expressly given powers, is withheld.

Douglass v. Placerville, 18 Cal. 643.

21. Where the charter of a corporation points out a particular mode of conveying its property, it can only be conveyed in the mode prescribed.

Holland v. San Francisco, 7 Cal. 361.

22. A recital in a conveyance by the trustees of a town that it was made in obedience to a judgment of the county court, which judgment was subsequently decided to be void, does not invalidate the deed if it contain operative words of conveyance sufficient to transfer the title.

Ryan v. Tomlinson, 39 Cal. 639.

23. The recitals touching the void judgment may be rejected as surplusage, and the deed remain a valid operative conveyance, which can not be impeached by a stranger to the transaction, not in privity with any of the parties. Id.

24. Where a municipal corporation has the power to perform an act, and in the execution thereof the prescribed form is not followed, it has the power to subsequently ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner.

Lucas v. San Francisco, 7 Cal. 463.

25. Where the charter of a city authorizes the city council "to make by-laws and ordinances, not repugnant to the constitution and laws of the United States, or of this state; to make appropriations for objects of city expenditure; to purchase, receive, and hold, for the use of the city, real and personal estate; and to pass such other by-laws and ordinances for the regulation of said city as they may deem necessary;" the authorities may employ attorneys to protect the interests of the city in litigation.

Smith v. Sacramento, 13 Cal. 531.

26. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental charter, and when acting with reference to its private property, has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalities of legislation for the disposition of the city property as it did for the imposition of taxes, the regulation of the fire department and matters connected with the general welfare of the city.

McCracken v. San Francisco, 16 Cal. 591.

27. A municipal corporation derives all

its power from its charter, and where its charter prescribes the mode in which its contracts shall be made, no contract will bind the corporation unless made in that mode. Zottman v. San Francisco, 20 Cal. 90.

28. A municipal corporation is the creature of the statute, invested with such power only as is conferred by the statute. A municipal corporation has no power to receive money, unless authorized to do so by its charter. Herzo v. San Francisco, 33 Cal. 134.

29. An act authorizing a municipal corporation to enter into a contract with a party to supply the city with water and machinery, and connecting pipes for supplying the water, does not authorize the municipal authorities to purchase a site upon which to erect the water works.

People v. McClintock, 45 Cal. 11.

30. When the charter of a municipal corporation authorizes the municipal legislative body to enact ordinances to prohibit practices which are against good morals, or contrary to public decency, and such body determine as a fact that a particular practice, such as the uttering of profane language, is against good morals, and prohibit it by ordinance, the decision of such body on this question is final, and the court will not review it. Ex parte Delaney, 43 Cal. 478.

31. A municipal legislative body, if empowered by law to prohibit or suppress practices against good morals or public decency, may, by ordinance, punish the uttering of profane language, whether uttered frequently or only once by the same person. Id.

32. If the charter of a city requires any sale or lease of the real estate of such city to be made at public auction to the highest bidder, an ordinance of the council of the city making a lease of any portion of its realty to a corporation, upon the payment of a rent reserved, is void, and passes no title to the corporation.

S. F. & O. R. R. Co. v. Oakland, 43 Cal. 503.

33. A city ordinance, duly authorized, imposing a penalty for feeding still slops to cows, and also for vending the milk of cows so fed, amounts to an authoritative prohibition in both respects; and the prohibited act becomes thereby unlawful.

Johnson v. Simonton, 43 Cal. 242.

34. The amendments to the charter of the city of Marysville provide that the common council shall not take stock "in any public improvement, or effect a loan for any purpose, without first obtaining the consent of the people, at an election held for that purpose;" Held, that this could not be extended to improvements other than municipal in their character, and the legislature did not intend to invest the city with authority to embark in speculative enterprises of improvement. Under this provision the

city has no power to subscribe stock in the Citizens' steam navigation company.

Low v. Marysville, 5 Cal. 214.

35. The charter of the city of **Placerville** (stats. 1859, p. 77) does not authorize the authorities of the city to levy and collect a tax for making a survey of a railway route from that city to Folsom. The argument that a railroad extending from or to the city is as much a means of municipal benefit as a street in the city, gas or water works, and that the length or extent of the road is not important in this respect, the municipal character of the work depending on its adaptation to the benefit of the municipality, is conclusively met by the fact that, whether this be a municipal work or not, it is not a work authorized by the charter, neither expressly nor by necessary implication.

Douglass v. Placerville, 18 Cal. 643.

36. The common council of the city of **Stockton**, under the charter of 1862, have power to make ordinances to prevent cattle and hogs from running at large over the streets and public places within the corporate limits of the city.

Amyx v. Taber, 23 Cal. 370.

37. Parties dealing with a municipal corporation are chargeable with **full knowledge** of its powers, and act at their peril.

Branham v. San Jose, 24 Cal. 585.

38. A municipal corporation, if authorized to do so by law, may **compromise** a valid claim against it, and the valid claim is a consideration which will support the compromise.

People v. Sups. S. F., 27 Cal. 655.

39. Corporations in this state, except for municipal purposes, must be formed under **general laws**, and can exercise no powers except such as are conferred by these general laws. The **legislature** can not confer on such corporations any powers or grant them any privileges, by special act.

San Francisco v. S. V. W. W., 48 Cal. 493.

40. When the municipal authorities of a city act under an authority derived from a **statute**, they must follow strictly its provisions.

Glass v. Ashbury, 49 Cal. 571.

41. A municipal corporation can only act in the cases and in the **mode prescribed** by its charter.

McCoy v. Briant, 53 Cal. 248.

42. Where the legislature authorized a municipal corporation to issue bonds "at such time or times as the board of trustees may by resolution direct," and **bonds** of the city were issued under the corporate seal, but without the passage of a resolution authorizing the issue: *Held*, that the bonds were void.

Id.

POWER OF LEGISLATURE OVER.

43. The powers of a municipal corporation may be increased, restricted, or repealed by

the legislature at will, saving only vested rights.

Blanding v. Burr, 13 Cal. 343.

44. The legislature may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves.

Id.

45. The powers delegated by the government to municipal corporations are **trusts** not subject to be delegated by the corporation.

Oakland v. Carpentier, 13 Cal. 540.

46. Municipal corporations have no power to subscribe to the **stock** of private corporations without being authorized so to do by the legislature.

French v. Teschemaker, 24 Cal. 518.

47. The legislature has the constitutional power to direct a **sale of pueblo lands** owned by a municipal corporation, by commissioners, and an application of the proceeds to the erection of public buildings.

San Francisco v. Canavan, 42 Cal. 541.

48. The power of the legislature to **appropriate the moneys** of municipal corporations in payment of claims, ascertained by it to be equitably due to individuals, though such claims be not enforceable in the courts, depends largely upon the legislative conscience, and will not be interfered with by the judicial department, unless in exceptional cases.

Creighton v. San Francisco, 42 Cal. 446.

49. The legislature has the constitutional power to **direct and control** the affairs and property of a municipal corporation for municipal purposes, and may, for such purposes, so control its affairs by appropriate legislation as ultimately to compel it, out of the funds in its treasury, or by taxation, to pay a demand which in good conscience it ought to pay, though there be no legal liability to pay it.

Sinton v. Ashbury, 41 Cal. 525.

50. The **opening of streets** in a city is clearly a municipal purpose; and whether the cost of such enterprises should be borne by the contiguous property, or by all the property of the city, or a certain proportion of each, is a matter for legislative discretion.

Id.

51. An act of the legislature, authorizing and empowering the board in which the corporate authority of a city is vested, to **convey** to a railroad company "not to exceed five thousand acres of the land of the city, or such parcel thereof as they may deem advisable, and upon such terms and conditions as they may determine," even if mandatory, so far as the act of conveyance is concerned, vests the board with **discretionary power** as to the quantity to be conveyed, and the terms of the conveyance.

S. D. v. S. D. & L. A. R. Co., 44 Cal. 106.

52. If an act of the legislature, authorizing the board exercising the corporate authority of a city to convey its lands to a corporation, vests the board with any discretion

in the matter, a member of such board, who is a stockholder or director in the corporation, can not act officially in the board in relation to the matter, or in making the conveyance, and if he does, and his vote or signature to the deed was requisite to complete the conveyance, the deed will be set aside as a cloud on the title. *Id.*

53. The legislature has not the power to **levy an assessment** not uniform and equal, in an incorporated city, for the purpose of improving a street, nor can it, after an assessment has been made by the municipal authorities for such purpose which is void for want of uniformity and equality, validate it. *People v. Lynch*, 51 Cal. 15.

54. The legislature can not directly exercise the power of assessment within an incorporated city, but may empower the municipal authorities to do so. *Id.*

55. The legislature can not, by **special act**, deprive the city council or other appropriate local authority of a municipal corporation of **all discretion** in respect to a local improvement when, by the **charter** of the city, the matter of such improvements is left to the judgment and discretion of such local authority. *Id.*

ORDINANCES.

56. A clause in the charter of a municipal corporation having two boards of aldermen, which requires an ordinance that has passed one board to be published in a paper before it is sent to the other, and that no ordinance which has passed one board shall be acted on by the other on the same day, except by unanimous consent, in not merely directory, and an ordinance passed in violation of its provisions is void.

Herzo v. San Francisco, 33 Cal. 134.

57. Ordinances for the sale of property of a municipal corporation are subject to the rules of interpretation applicable to the written instruments of individuals, and not to those by which laws are construed.

Holland v. San Francisco, 7 Cal. 361.

CONTRACTS.

58. As to the contracts of corporations, the rule is that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the contract can not, in an action founded upon it, contest its validity. And this rule applies with equal force to all corporations, public or private.

Argenti v. San Francisco, 16 Cal. 235.

59. Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and depend on the same circumstances for their validity and effect. The doctrine of **ratifi-**

cation and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter. *Id.*

60. A municipal corporation may contract by ordinance, and an ordinance accepting of the terms of a proposition made to the municipality amounts to an assent to the contract on the part of the corporation, and not a mere declaration of intention to enter into a contract.

People v. Sups. S. F., 27 Cal. 655.

61. A municipal corporation is not bound by a **contract made by its officers**, unless the act of incorporation delegated the power to make it.

Wallace v. San Jose, 29 Cal. 180.

62. Those who contract with a municipal corporation are bound to know the **extent of the power** of its officers. *Id.*

63. Where, in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a **parol change** in the contract which the court refused to allow: *Held*, not to be error, as the **change in the contract** could only be by ordinance.

Sacramento v. Kirk, 7 Cal. 419.

64. In all matters in which a municipal corporation has power to contract, a **subsequent ratification** of a contract entered into on its behalf without authority, and which does not bind it, binds the corporation as effectually as though it had contracted in the first instance.

People v. Swift, 31 Cal. 26.

65. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance.

McCracken v. San Francisco, 16 Cal. 591.

66. Where the board of trustees of a municipal corporation makes a **grant of its franchises** and lands which is not void, but only voidable, the corporation can not obtain the aid of a court of equity to set aside the grant without doing equity—that is, without **tendering compensation** to the grantee for the **expenditures** which he may have incurred under the grant, relying upon its validity. *Oakland v. Carpenter*, 21 Cal. 642.

67. All persons contracting with a municipal corporation must, at their peril, inquire into the **power** of the corporation or its officers to make the contract, and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. *McCoy v. Briant*, 53 Cal. 247.

IMPROVEMENTS.

68. The words public improvements, when applied to a municipal government, must be taken in a limited sense, as apply-

ing to those improvements which are the proper subjects of police and municipal regulation, such as gas, water, almshouses, hospitals, etc., and can not be extended to subjects foreign to the object of the incorporation, and beyond its territorial limits.

Low v. Marysville, 5 Cal. 214.

69. The right to fit up a building for city or public purposes, and provide suitable accommodations for the transaction of the business of the city, is a necessary incident to the administration of every municipal government. People v. Harris, 4 Cal. 9.

70. If a city owns and is seised and possessed of land, and an act is passed by the legislature appointing commissioners to improve it, and authorizing them to take possession of it, the commissioners may, in a careful manner, remove from the premises one who occupies the same as a servant and employee of the city, and may also remove his buildings. Swift v. Canavan, 52 Cal. 417.

LIABILITY.

71. Under some circumstances a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It can not avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations.

Gas Co. v. San Francisco, 9 Cal. 453.

72. A corporation acting in the disposal of its property, under a full knowledge of the facts, can not plead ignorance of the law, and its contract being binding on it, is also binding upon the parties purchasing.

Holland v. San Francisco, 7 Cal. 361.

73. A corporate act is not essential in all cases to fasten a liability, and if it were necessary the law would sometimes presume, in order to uphold fair dealing, and prevent gross injustice, the existence of such act, and estop the corporation from denying it.

Gas Co. v. San Francisco, 9 Cal. 453.

74. Where the contract is executory, the corporation can not be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it. Id.

75. It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them, without authority, have been ratified. Id.

76. Incorporated cities are not liable for injuries sustained by private individuals,

caused by the neglect of the city officers in keeping its streets in repair, unless made so liable by the acts under which they are incorporated.

Winbigler v. Los Angeles, 45 Cal. 36.

77. As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out by the charter. But even a want of authority is not, in all cases, a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract, made without authority, can not be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned.

Argenti v. San Francisco, 16 Cal. 225.

78. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. Id.

79. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter, as for instance, upon the issuance of bills of credit. Id.

80. Cases as to the liability of municipal corporations on contracts, express or implied, just as individuals, are liable, cited and commented on. Cases opposed, cited and commented on. Id.

81. If a municipal corporation has become bound by a vote of its electors, taken under a law of the legislature, to subscribe to the stock of a railroad company, and pay the amount of its subscription in its bonds, and then makes a compromise with the railroad company by which it agrees to deliver the company a less amount of its bonds in consideration of being released from its subscription, the delivery of this less amount of bonds is not a donation to the railroad company, nor is the fact that the railroad does not touch the city and is not one of local interest, a defense in an action to compel the issuance of the bonds under the compromise.

People v. Sups. S. F., 27 Cal. 655.

82. Where a statute imposes upon the officers of a municipal corporation the duty of levying a tax to pay the corporate debts, such officers can be compelled by appropriate legal proceedings to discharge the duty.

Underhill v. Trustees Sonora, 17 Cal. 172.

83. A municipal corporation, acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, can not be rendered

liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for benefits received. The law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do.

Zottman v. San Francisco, 20 Cal. 96.

84. An act of the legislature authorizing a municipal corporation to subscribe for **stock of a railroad company**, the subscription to be made upon the condition that the municipal corporation shall not be liable for the debts of the company, and that the provision as to said liability be made a part of and be stipulated in all contracts made by the railroad company for the construction and equipment of its road, does not exempt the municipal corporation from liability for the **debts of the railroad company** further than such exemption can be secured by persons contracting with the railroad company expressly stipulating in their contracts to waive all claims against the municipal body for payment of the debt.

French v. Teschemaker, 24 Cal. 518.

85. If the **officers of a municipal corporation** receive into its treasury money obtained from a sale of the property of the city, which sale is void for want of power in the corporation to make it, the purchaser can not recover the money back from the city. In such case, if the **city** had no power to make the sale she has no power to receive the money, and the act of its officers in placing the money in the treasury is not the act of the city, but the unauthorized act of its agents, who alone are liable for the money. If, in such case, the city, after the money is in its treasury, appropriates it to municipal purposes, the **appropriation** makes it liable, provided it is made by valid ordinances; but if an appropriation is made by virtue of ordinances which are void, because not passed in accordance with the charter, the city is not liable for the money, even if it is applied by the officers to pay city debts and expenses. If the ordinance under which the treasurer of a municipal corporation pays out money is void, the payment by the treasurer is not an appropriation of the money by the city. Herzo v. San Francisco, 33 Cal. 134.

86. If the levee commissioners of a city, by virtue of authority vested in them by an act of the legislature, and independent of the city authorities, excavate a canal in the vicinity of the city, to turn the water flowing in a river, and prevent it from overflowing the city, one injured by the water flowing in the canal has no claim, equitable or legal, against the city for his **damages**.

Hoagland v. Sacramento, 52 Cal. 142.

87. At common law, and in the absence of statutory provisions, a municipal corporation is not liable for damages sustained by

the negligence of the persons acting in its fire department.

Howard v. San Francisco, 51 Cal. 52.

CONST. LAW, 56, 57.	JURISDICTION, 283.
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MUNICIPAL CRIMINAL COURT.

JURISDICTION, 285, 287.

MUNICIPAL FINE.

1. Fines properly imposed in the court of a mayor or recorder of a city, or before **any municipal officer** of a corporation, must be paid into the treasury of the city or other corporation.

People v. Sacramento, 6 Cal. 422.

2. There is no statute which alters the rule as to the city of Sacramento. Id.

3. A fine imposed in the county court for wrongfully demanding and collecting **toll** for the privilege of passing over a road, is not a municipal fine within the meaning of section 4 of article VI of the constitution.

People v. Johnson, 30 Cal. 98.

4. A municipal fine, within the meaning of section 4 of article VI of the constitution, is such a fine as is imposed by the local laws of particular places, such as towns or cities. Id.

5. On the trial of a **criminal action** for wrongfully collecting **toll** on a road, the legality of the fine to be imposed, in case of a conviction, is not involved within the meaning of section 4 of article VI of the constitution. Id.

MURDER.

CRIMINAL LAW, 9, 109, 125, 139, 399, 930, 1024.

NAME.

1. If a company is sued by a wrong name, but answers by its true name, and judgment is rendered against it by its true name, the judgment is not void, and the supreme court,

on appeal, in affirming the judgment, will direct the court below to substitute the true name in the complaint.

Mahon v. S. R. T. R. Co., 49 Cal. 269.

2. Where a party defendant is sued, and answers by a wrong name, and judgment is entered against him accordingly, no advantage can be taken of the misnomer.

McCreery v. Everding, 54 Cal. 168.

CORPORATION, 38, 66. JUDGMENT, 96.
CRIMINAL LAW, 246.

NAPA COUNTY.

HIGHWAYS, 65.

NATIONAL LAW.

1. By the law of nations, independent of treaty stipulations, the inhabitants of a ceded territory retain all rights of property; and, by the stipulations of the treaty of Guadalupe Hidalgo, those citizens of the Mexican republic, in the territories ceded, who elected to become citizens of the United States, are protected in the enjoyment of their property. Ferris v. Coover, 10 Cal. 589.

2. By the law of nations, independent of treaty stipulations, the cession of territory from one government to another does not impair the rights of the inhabitants to their property. They retain all such rights, and are entitled to protection in them to the same extent as under the former government. **Public property** and the **sovereignty** over the territory are only considered as passing by the cession.

Teschmacher v. Thompson, 18 Cal. 11.

3. When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations those rights were sacred and inviolable, and the obligation passed to the new government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new government, and to be executed by proper legislative action, when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals, or by existing legislation; and independent of the obligations arising from the law of nations, the United States, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants of the ceded territory. Id.

4. Assuming that the **Mexican grant**, upon which the patent of the plaintiffs in this case was issued, conveyed only an inter-

est requiring further action of the government, and that such action was not had previous to the cession; in other words, that it conferred a merely equitable title, which was never perfected under the former government, the title still constituted property, and as such the government of the United States was under obligation to protect it by the law of nations and by the stipulations of the treaty. This protection it could extend in its own way. To protect an **equitable title** is to perfect it, or to afford the means of its perfection. By the act of March 3, 1851, the government has afforded such means. It has there provided for protecting all titles, legal or equitable, acquired previous to the cession. Id.

5. Its power thus to provide results from the fact that it is sovereign and supreme as to all matter connected with the treaty, and the enforcement of the obligations incurred thereunder, or cast upon it, independent of the treaty, by the law of nations upon the cession of the country. It must determine for itself what claims to property existed at that date, which it is bound to protect, and the lands to which they apply, and the parties by whom they were then held. Id.

6. **Subsequent claimants** take in strict subordination to the action of the government, and they are not entitled to any notice of its proceedings. Whatever interests they may possess were acquired with full knowledge of the treaty, and of the obligations and powers of the new government. Id.

7. The acquisition of California by the United States did not affect the rights of the inhabitants to their property. The inhabitants retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. And independent of the obligations thus arising, the United States, by the treaty of Guadalupe Hidalgo, in effect stipulated for such protection.

Leese v. Clark, 20 Cal. 337.

8. Whether the title which passed by the Mexican grant, in this case, be regarded as perfect or imperfect, it constituted property, and as such, the **obligation to protect** it was cast upon the United States, upon the cession of the country, both by the law of nations and the stipulations of the treaty. Id.

9. The obligation was **political in its character**, binding upon the conscience of the new government, and could only be executed in such manner, and at such times, as the government in its judgment might deem expedient. By the act of March 3, 1851, the government determined the manner and conditions under which it would discharge this obligation, and at the same time provided the means to ascertain and separate private claims from the public lands. For

both of these objects the act was passed; and all titles, legal or equitable, were subjected to examination. **Legal titles**, such as were perfect under the former government, did not need any action of the new government for their protection; but their presentation was necessary to enable the new government to ascertain the extent of the property it had acquired by the cession of the country. **Equitable titles** required further action of the granting power for their protection, and their presentation was necessary to enable the new government to discharge its political obligations in this respect. *Id.*

10. The action of the government upon the title presented took effect upon that title as it existed at the time the jurisdiction of the former government over the subject ceased. The new government succeeded to the obligations of the former government with respect to the property claimed. Those obligations devolved upon the United States as a sovereign nation. Their power to enforce those obligations was therefore sovereign and supreme, and subsequent claimants took in subordination to their action. *Id.*

12. The state and individuals hold whatever property they possess which formerly belonged to the Mexican government through the United States, and subject, therefore, to the action of the United States, whilst they held it, and subject to any action with respect to such property which they covenanted or were bound to take upon its acquisition. The legal effect of the action of the government is the same as if such action had been taken the very day upon which the Mexican authorities were displaced. *Id.*

13. Mexicans who, previous to the acquisition of California by the United States, were established in and had acquired from the governments of either Spain or Mexico a perfect title to lands in California, and who chose to remain in California, were, by the treaty of Guadalupe Hidalgo, protected in the ownership and enjoyment of the land the same as though no change of sovereignty had taken place.

Minturn v. Brower, 24 Cal. 644.

14. The provisions of the treaty of Guadalupe Hidalgo operated as a confirmation in present of all perfect titles to lands in California held under Spanish or Mexican grants made prior to its ratification. P., a Mexican citizen, residing in California, had, at the time of its acquisition by the United States, a perfect title to a tract of land in California, granted to him by Spain in 1820. In 1851 he died intestate, leaving him surviving sons and daughters. The sons, claiming severally distinct portions of such tract by devise of their father, as they alleged, presented to

the board of commissioners their respective claims to such portions of the land for confirmation, and the same were confirmed and patented to them as severally claimed. The daughters were not parties to the petition presented to the board, nor to the confirmation, nor to the patents issued. The plaintiff, who had succeeded to the title and interest of one of the sons by grant of a distinct parcel of the portion of the land confirmed and patented to him, brought ejectment against the defendants, who had succeeded by grant to the title and interest of the daughters in and to the same parcel of land: *Held*, that upon these facts, which were pleaded by the defendants, and admitted by the plaintiff to be true, the court erred in giving judgment for the plaintiff. *Id.*

15. The treaty between the United States and the Hanseatic towns has not enlarged the rights of natives of those towns, in this respect, as the treaty only gives them the right to dispose of land, which they are prevented from inheriting by their character as aliens. *Siemssen v. Bofer*, 6 Cal. 250.

NATURALIZATION.

1. The power to naturalize is made a judicial power by act of congress.

Ex parte Frank Knowles, 5 Cal. 300.

2. Congress can not confer any judicial power upon a state court. *Id.*

3. The provision of the constitution of the United States, which gives congress the power to establish "an uniform rule of naturalization," is construed to mean, that the rule, when established, shall be executed by the states. *Id.*

4. The supreme court of this state, having exclusive appellate jurisdiction, has no power to naturalize. *Id.*

5. The legislature of California has, by express enactment, conferred jurisdiction on the district courts of this state to grant naturalization, according to the rules established by congress. *Id.*

6. All other courts of this state, being courts of inferior and limited powers, and although some are courts of record, yet having only statutory, and not common law jurisdiction, they have no power to grant naturalization, and any attempt of the kind by them would be *coram non jure*, and void. *Id.*

7. Under the act of congress of 1802, "every court of record in any individual state, having common law jurisdiction and a seal, and a clerk or prothonotary, shall be considered as a district court within the meaning of this act," and such courts have power to naturalize. *Id.*

CONSTITUTIONAL LAW, 40.

NAVIGATION.

1. Where a river has been declared navigable by the legislature, by an act which prohibits the erection of any dam or bridge across it, and the same act saved to the court of sessions the power to grant licenses for building bridges where the public convenience may demand, "provided such bridges shall not obstruct the navigation of such streams by steamboats and other water craft," no right thereby existed in the court of sessions to authorize an obstruction of the river, even for a single day.

Minturn v. Lisle, 4 Cal. 181.

2. A river beyond the ebb and flow of the tide may be navigable, when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers; and this has been extended to its capacity to float rafts of lumber.

American R. W. Co. v. Amsden, 6 Cal. 443.

3. The only other instance in which a stream is navigable, is when it is so declared by statute, and when so declared navigable to a certain point, by implication it is declared non-navigable above that point. *Id.*

4. To go beyond this and declare a stream navigable which can float a log, would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression. *Id.*

NE EXEAT.

1. The fact that plaintiff was about to leave the state does not alter his liability, the remedy in such cases being by *ne exeat*.

Bell v. Walsh, 7 Cal. 84.

2. The code of civil procedure prescribes the writ by which, and the proceedings upon which, a defendant may be arrested in a civil action, and the writ of *ne exeat* not being among the number, the district courts have no power to issue such writ.

Ex parte Harker, 49 Cal. 465.

3. The legislature has the power to abolish the writ of *ne exeat*. *Id.*

NEGLECT.

1. GENERALLY.

26. PROOF OF.

33. LIABILITY FOR INJURIES.

43. NEGLIGENCE OF FELLOW-SERVANTS.

49. LIABILITY OF CITY FOR DAMAGES.

53. NEGLIGENCE OF RAILROAD COMPANIES.

82. CONTRIBUTORY NEGLIGENCE.

108. QUESTIONS OF LAW AND FACT.

GENERALLY.

1. Negligence is the **omission** to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place or person.

Richardson v. Kier, 34 Cal. 63.

Jamison v. S. J. & S. C. Co., 55 Cal. 593.

2. Negligence is not absolute or intrinsic, but always relative to some **circumstance** of time, place or person.

Needham v. S. F. & S. J. Co., 37 Cal. 409.

3. That which would be but ordinary negligence as to a grown person, may be gross negligence as respects a **child**.

Schierhold v. N. B. & M. Co., 40 Cal. 447.

4. The negligence which disables a plaintiff from recovering must be a negligence which directly or by **natural consequence** conduces to the injury.

Richmond v. S. V. R. R. Co., 18 Cal. 351.

5. The rule, held in some authorities, that where the act of injury has been caused by the **negligence of the party injured**, he has no redress, commented on and qualified. *Id.*

6. He who avers a fact in **excuse** of his own malfeasance, must prove it.

Finn v. Vallejo St. W. Co., 7 Cal. 253.

7. Where in a suit a question has been made and decided by the supreme court, **counsel** can not be charged with negligence in acting upon that decision as the law of the case. Hastings v. Halleck, 13 Cal. 203.

8. Where the **board of supervisors** of a county allowed an account presented for services as tax collector, and the auditor drew his warrant in favor of E. for the amount, and he assigned it to defendant M., a *bona fide* purchaser, without notice; *Held*, that the county can not go into equity to cancel the warrant and enjoin its collection as against M., on the ground that the **account** was false and fraudulent as to some of its items, and was allowed by the board through ignorance of the fact and mistake; that the supervisors were acting within the scope of their authority, and the county can not visit upon an innocent party the consequences of their negligence.

El Dorado Co. v. Elstner, 18 Cal. 144.

9. A master is bound to use reasonable care and **diligence** to prevent accident or injury to the servant in the course of his employment, and is responsible in damages for failure to do so.

Halloway v. Henley, 6 Cal. 209.

10. The mere **omission of a deputy** to inform the **sheriff** of having process in hand is not such negligence as to charge the sher-

iff, in case a writ last in hand was executed first. *Whitney v. Butterfield*, 13 Cal. 335.

11. The owner of the dam is bound to see to his own property, and to govern and control it, that injury may not result to his neighbors.

Fraler v. Sears Union W. Co., 12 Cal. 555.

12. The want of reasonable care on the part of another, who is injured by the breaking of a dam, can not be set up in defense to an action for damages for the injuries thus suffered. *Id.*

13. The mere fact that the rock upon which the timbers of the dam lay presented outwardly a solid appearance, etc., does not necessarily show due diligence in making it a foundation, since many other circumstances, such as the knowledge by the defendants, or the builder, of the character or qualities of such rock, or a knowledge of it from testing it, etc., might still show it was unsafe for this purpose.

Hoffman v. Tuolumne W. Co., 10 Cal.

14. The question of negligence in the management of a water ditch, and the degree of it, must necessarily depend, in a great measure, upon the surrounding facts, such as the existence and exposure of property below the dam, and the like; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross or even criminal negligence.

Wolf v. St. Louis W. Co., 10 Cal. 541.

15. In an action for injuries to a garden, occasioned by the breaking of a reservoir, the court instructed the jury that to entitle plaintiff to recover it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of plaintiff been their own property; and that otherwise they had been guilty of gross negligence and were liable in damages: *Held*, that although the instruction without the explanation was wrong, still, with the explanation it was right and could not have misled the jury.

Todd v. Cochell, 17 Cal. 97.

16. Where a party was injured by falling at night into an excavation made in grading the street of a city under a city contract, owing to the failure to put lights or guards about the place, the contractor, and not the city, is liable.

James v. San Francisco, 6 Cal. 528.

17. A person, in time of imminent danger, is not negligent because he does not take every precaution that a careful calculation afterward will show he might have taken.

Karr v. Parks, 40 Cal. 188.

18. In an action to recover damages for

an alleged injury to the plaintiff's land, resulting from the careless management of the defendant's water ditch, which traversed the land: *Held*, that the defendant was bound to exercise no greater care to avoid the alleged injury to the adjoining lands than prudent persons would employ about their own affairs under similar circumstances.

Campbell v. B. R. & A. Co., 35 Cal. 679.

19. The true principle applicable to such cases is, that in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property as a prudent man would employ under similar circumstances, if he were himself the owner of the property exposed to damage. *Id.*

20. *Richardson v. Kier*, 34 Cal. 63, as to the liability of ditch-owners for damages done by water discharged or sold from ditches, affirmed.

Richardson v. Kier, 37 Cal. 263.

21. The failure of any person to perform a duty, imposed upon him by statute or other legal authority, in itself constitutes negligence. Accordingly, where the plaintiff was injured by a runaway horse, left unfastened in the street, in violation of an ordinance: *Held*, that the court, instead of leaving the question of negligence to the jury, might have instructed them that the proof fully established it.

Siemens v. Eisen, 54 Cal. 418.

22. In actions for negligence the damages to be recovered are only those of which the negligent act is the proximate cause.

Chidester v. Con. P. D. Co., 53 Cal. 56.

23. In an action brought to recover damages caused by the falling of lumber which is alleged to have been carelessly piled by the defendant, if the lumber was thus carelessly piled up, the facts that it remained in that condition a long time before the injury, and that the lumber was caused to fall by the negligence of a stranger, are no defense; for the negligence of the defendant, concurring with the negligence of the stranger, is the direct and proximate cause of the injury.

Pasteno v. Adams, 49 Cal. 87.

24. Drivers of vehicles and persons on horseback must exercise the greatest care and circumspection in passing along crowded thoroughfares in cities if they would avoid liability for injury to the persons of pedestrians.

Sykes v. Lawlor, 49 Cal. 236.

25. The question of the negligence, if any, by which the loss of the deed was occasioned is not to be considered, except with reference to costs. See facts.

Conlin v. Ryan, 47 Cal. 71.

PROOF OF.

26. There being some proof of negli

gence, the supreme court will not review the verdict. *Algier v. Steamer Maria*, 14 Cal. 167.

27. To maintain an action for causing by wrongful acts the **death** of or **injury** to a person, two things must be shown: First, an obstruction in the road by the fault of the defendant; second, no want of ordinary care on the part of the plaintiff. The gravamen of the action is the negligence of the defendant, and plaintiff can not recover where it appears that the negligence of the deceased or person injured contributed in any degree to the death or injury sustained.

Gay v. Winter, 34 Cal. 153.

28. But in cases where the negligence of the defendant is affirmatively shown, and there is no proof of the conduct of the deceased or person injured, the jury are at liberty to infer **ordinary care and diligence** on his part, taking into consideration his character and habits, as proved, and the natural instinct of self-preservation. *Id.*

29. In such actions, if the plaintiff makes a case which does not charge the deceased or the person injured with negligence, the case should be permitted to go to the jury, under appropriate instructions. *Id.*

30. To charge an **attorney** with negligence in failing to set up a defense, based upon certain facts communicated to him by his client, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of his attorney. *Hastings v. Halleck*, 13 Cal. 203.

31. The fact that **fire** was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, is, *prima facie*, proof of negligence sufficient to go to the jury.

Hull v. S. V. R. R. Co., 14 Cal. 387.

32. That the **overflow**, or **leakage**, was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants opened their case.

Jackson v. F. R. W. Co., 14 Cal. 18.

LIABILITY FOR INJURIES.

33. No more in law than in morals can one wrong be justified or excused by another. *Needham v. S. F. & S. J. Co.*, 37 Cal. 409.

34. A person is bound to conduct himself with reasonable care and prudence toward a **wrong-doer**, and if he can so conduct himself and does not, he is liable if injury is sustained by the latter. *Id.*

35. A railroad company which continues running its cars upon an open track, undertakes, at its peril, that no harm shall come

to the stock running in the field through which the road runs, for the want of a proper fence. *McCoy v. Cal. P. Co.*, 40 Cal. 532.

36. The fact that the street is made for travel does not justify a **trespass** upon the person of one who is there for other purposes. *Schierhold v. N. B. & M. Co.*, 40 Cal. 447.

37. When the owner of fixed property, requiring repairs, employs a **contractor** to do the entire work with his own means and by his own **servants**, he is not responsible for personal injuries to third persons occurring through negligence in the performance of the work. *Du Pratt v. Lick*, 38 Cal. 691.

38. Responsibility for injuries in such cases is upon him who has the contract and management of the work; and unless the relation of master and servant exists between the owner and the person through whose negligence the plaintiff sustained his injury, the doctrine of **respondent superior** does not apply. *Id.*

40. K. was indebted to B. & Co., and B. & Co. drew their draft on him for the amount, indorsed it, and sent it to M. to collect, as their agent. M. indorsed it, and delivered it to W., F. & Co., who were an express company, and acting as collecting agents, for collection. The draft was not paid by K., the drawee, and W., F. & Co. failed to protest it, and did not give M. notice of non-payment. M. sued W., F. & Co. for negligence; *Held*, that as M. only received the bill as the agent of B. & Co. for collection, that W., F. & Co. were not liable to him for damages; *held, further*, that the facts that B. & Co. were indebted to M., and that M., on receipt of the bill, credited them with the same, did not fix the liability of W., F. & Co., but that W., F. & Co. could introduce evidence to explain the credit thus given, and to show that the credit was not intended to make M. the owner of the bill, but was a mere memorandum to simplify book-keeping, made with the intention of charging B. & Co. with the amount, if the bill was not collected. *Merrill v. Wells*, 50 Cal. 108.

41. If a **court commissioner** whose duty it is, in tax cases, in case of default, to draft a decree, drafts one, inserting therein that summons has been served, without any previous effort to ascertain that fact, he is guilty of gross negligence, and the negligence is none the less if he acts in good faith and without any fraudulent intent.

Martin v. Parsons, 50 Cal. 498.

42. If a person presents a **telegraph order** for money to a bank, and represents himself to be the person named in the order, and a man of good character and standing identifies him as the person named in the dispatch, and indorses his signature to a receipt for the money as correct, the bank is not guilty of negligence in paying him the

money, although it turns out that he is not the person named in the order.

Bk. of Cal. v. W. U. T. Co., 52 Cal. 280.

NEGLIGENCE OF FELLOW-SERVANT.

Injuries to Servants.

43. The common employer is not liable for injuries to a servant caused by the negligence of a fellow-servant, in the absence of evidence that the employer had neglected to use ordinary care in the selection of the fellow-servant.

McDonald v. Hazletine, 53 Cal. 35.

44. The master is not liable to his servant for damages sustained by the negligent act of a fellow-servant while engaged in the same general employment, unless the master was negligent in the selection of the servant at fault.

Hogan v. C. P. R. Co., 49 Cal. 128.

45. An employer is not bound to indemnify an employee for damages he sustains in consequence of the negligence of a fellow-employee employed by the same employer in the same general business.

McLean v. Blue Pt. M. Co., 51 Cal. 257.

46. The above rule is not changed by the fact that the employee through whose negligence the injury came was the superior of the employee who was injured, in the service in which they were engaged. Id.

47. The court, at the request of servant plaintiff, gave the instruction: "The servant assumes no risk, except such as existed at the beginning of the employment, and such as are incidental to the business." Held, that the court should have added words equivalent to, "or which existed during the course of the employment of which the employee had knowledge or was bound to have knowledge."

Sowden v. Idaho M. Co., 55 Cal. 443.

48. Certain instructions, defining the liability of master to servant for injury incurred in course of employment, approved. (The instruction will be found in statement of the case.) Id.

LIABILITY OF CITY FOR NEGLIGENCE.

49. When the act of incorporating a city requires sewers to be constructed under contracts to be let by the city, the contractor in performing the work, is not the agent or servant of the city; and any negligence in performing the work is his negligence, and the city is not liable for injuries sustained through his negligence.

O'Hale v. Sacramento, 48 Cal. 212.

50. James v. San Francisco, 6 Cal. 528, affirmed. Id.

51. When the charter of a city requires work on the improvement of streets to be

done by contract, or by the owners of adjacent lots, and an action is brought against the city for an injury sustained by negligence in the work on such improvements, an averment in the complaint that the work was being done at the instance of the city will be construed as alleging that the work was being done as the charter directed.

Krause v. Sacramento, 48 Cal. 221.

52. When the charter of a city requires work in improving streets to be done by contract or by the owners of adjacent lots, the city is not liable for damages sustained by reason of the negligence of the contractor, or owner of adjacent lots in performing such work. Id.

NEGLIGENCE OF RAILROAD COMPANIES.

53. If the track of a railroad passes along the street of a city, crossing another street, and a train of cars is stopped in the first street so that the last car in the train stands in the cross street, and while a person is walking along the cross street over the track, behind the train, the train, without any notification, is suddenly backed, and the person is knocked down and injured by the cars, the employees of the company are guilty of gross negligence.

Robinson v. W. P. R. Co., 48 Cal. 409.

54. The person injured in such case is exercising an undoubted right in crossing the railroad track on a public street, and is not guilty of such want of care or diligence as contributes to the injury, and the railroad company is not released from liability on the ground of contributory negligence. Id.

55. The person injured in such case had a right to presume that he would be notified that the train was about to move, and was not bound to wait because the train was on the street, or assume that it might move suddenly backward without notice. Id.

56. If the bell of the train was rung, this does not of itself establish proper care by the employees of the company; for, although the bell is intended to give notice to all, it is the duty of the engineer to see that all have acted on the notice. Id.

57. In such case the railroad company should provide a lookout, upon whose signal that the track was clear, the engineer should have acted. Id.

58. It is no defense to an action for the injury in such case, that the plaintiff, by his own act, has contributed to his injury, but it must appear that by his own fault he has so contributed. Id.

59. The fact that the agents of the defendant in such case did not know that the person injured was on the track amounts to culpable negligence on their part. Id.

60. A foot passenger is not debarred the

use of the street because a train of cars occupies a portion of such street. Id.

61. If a railroad company permits dry grass, which will readily take fire, to remain on its track, it is not negligence *per se*, but a fact from which negligence may be inferred by the jury in an action to recover damages for the destruction of a crop, alleged to have been set on fire by sparks from an engine.

Perry v. S. P. R. Co., 50 Cal. 578.

62. A person crossing the track of a railroad upon a public highway is bound to exercise proper care to avoid the cars of the railroad company; and if he does not do so, and for that reason is injured, and by the exercise of such care could have avoided the danger, he can not recover damages.

Hearne v. S. P. R. Co., 50 Cal. 482.

63. If a person, while crossing the track of a railroad on a public highway, is injured by a passing train, his negligence, if it contributes at all to the injury, contributes directly and proximately. Id.

64. If a crop is destroyed by fire on the line of a railroad, and the fire originates from a spark emitted from the engine, which ignites the grass some distance from the crop, the question whether the destruction of the crop was the proximate result to be reasonably expected from the carelessness of the railroad company, is one of fact for the jury.

Perry v. S. P. R. Co., 50 Cal. 578.

65. If, by the negligence of a railroad company, a fire, communicated from the sparks of an engine, commences on the premises of one proprietor and spreads to those of another, and destroys his crop, the latter may recover damages for the injury, if the injury was the direct consequence of the original firing.

Henry v. S. P. R. Co., 50 Cal. 176.

66. Where an unfenced line of railroad passes through a field, in which the live stock of the owner, or occupier of the field, are running, and the stock of the occupant stray into the road and are killed by the train, these facts, unexplained, make a *prima facie* case of negligence against the railroad company.

McCoy v. Cal. P. R. Co., 40 Cal. 532.

67. The ignition of combustible substance lying along the track of a railroad, by sparks dropped by a passing engine, is not an unavoidable accident.

Flynn v. S. F. & S. J. Co., 40 Cal. 14.

68. It is not negligence, in a legal sense, for a farmer to leave the grass and stubble standing on his pasture and grain field along the side of which, and separated therefrom by a fence, a railroad passes. Id.

69. The negligence which was the proximate cause of the injury, where a fire was communicated to an adjacent grain field by the falling of sparks from a passing engine,

which ignited the dry grass and weeds lying along the track, was the leaving the combustible matter upon the railroad where it was liable to be so set on fire. Id.

70. If the plaintiff claims damages from a railroad by reason of the negligence of one of its employees, and the evidence of the plaintiff tends to show that the act of the employee was willful and without the scope of his duty, the defendant must take advantage of it by motion for a nonsuit, or asking an instruction to the jury.

Hahn v. S. P. R. Co., 51 Cal. 605.

71. In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the uninclosed commons," where the defense is negligence on the part of the plaintiff in thus allowing the horse to run at large.

Waters v. Moss, 12 Cal. 535.

72. Plaintiff was not guilty of negligence in thus allowing his horse to run at large. Id.

73. The plaintiff entered the defendant's cars without procuring a ticket, and handed to the conductor the ticket fare. The conductor thereupon demanded of the plaintiff the additional amount required by the rules of the company to be paid by persons paying on the train, and, on the plaintiff's refusal to pay, ejected him from the cars, and then returned him his money: *Held*, that the conductor had no right to eject the plaintiff without first returning the money which he had paid.

Bland v. S. P. R. Co., 55 Cal. 570.

74. If a passenger who has purchased a ticket from a railroad company which is silent on the subject of his stopping over, stops over before he reaches the point to which the ticket entitled him to ride, he can not resume his journey on the ticket.

Drew v. C. P. R. Co., 51 Cal. 425.

75. If a passenger on a railroad leaves the train before he has arrived at the point to which his ticket entitled him to ride, he voluntarily terminates his contract with the company to carry him to such point. Id.

76. Where a railroad track passes along a street, both the railroad trains and teams are entitled to the use of the street, and if horses are frightened by the appearance of the train or the ordinary noise of its passage, the railroad company is not liable for damages.

Hahn v. S. P. R. Co., 51 Cal. 605.

77. So if the cylinder-cocks are opened and the steam is blown off, and this is necessary in the prudent management of the engine, and the horses are frightened thereby, the railroad company is not liable for the damages. Id.

78. If an act of the legislature authorizes the laying down in a public street of a rail-

road, a **switch turnout**, and side track, the laying down of the switch turnout and side track and the use of it is the exercise of a lawful right, from which no liability for damages for consequential injury arises, unless there is some misconduct or negligence.

Carson v. C. P. R. Co., 35 Cal. 325.

79. Where a railroad company has leased its road and rolling stock to another company, it remains liable, under the sections of the law above referred to, for **cattle killed** by the trains of the **lessee**, on the unfenced portions of the lessor's railroad.

Fontaine v. S. P. R. Co., 54 Cal. 645.

80. The proviso in section 30 of the railroad act of May 20, 1861, simply provides that a railroad company shall not be compelled to perform the offer or agreement (referred to in the preceding part of the section) to **fence** on the sides of its road where it runs through uninclosed lands, until the owner of the land has built fences abutting on the railroad. It does not exempt the company from the liability created by section 40 for the value of animals killed by its locomotives on unfenced portions of the road.

Id.

81. A railroad company which continues running its cars upon an open track undertakes, at its peril, that no harm shall come to the **stock running in the field** through which the road runs, for the want of a proper fence.

McCoy v. Cal. P. R. Co., 40 Cal. 532.

CONTRIBUTORY NEGLIGENCE.

82. The rule that the plaintiff can not recover damages if his own wrong, as well as that of the defendant, conduced to the injury, is confined to cases where the **plaintiff's wrong** or negligence has immediately or approximately contributed to the result.

Kline v. C. P. R. Co., 37 Cal. 400.

83. The rule releasing a defendant from responsibility for damages because of the negligence of the plaintiff, is limited to cases where the act or omission of the plaintiff is the **proximate cause** of the injury.

Flynn v. S. F. & S. J. Co., 40 Cal. 14.

Kline v. C. P. R. Co., 37 Id. 400.

84. The rule releasing the defendant from the responsibility for damages, in cases where the plaintiff by his negligence or wrong contributed to the result, is confined to cases where the act of the plaintiff is the proximate cause of the injury. Proximate cause means negligence at the time the injury happened.

Needham v. S. F. & S. J. Co., 37 Cal. 409.

85. The reason why the law does not hold the defendant responsible for damages where the plaintiff had by his negligence or wrongful act contributed to the result complained of, is, not that the wrong of the plaintiff jus-

tifies or excuses the defendant, but because it is impossible to **apportion damages** between the parties; and wherever this impossibility does not exist the defendant's exemption from liability does not exist. Id.

86. Where the negligence of the plaintiff has contributed proximately to the injury complained of, the defendant can not be held liable, unless the injury is the result of a **wanton or willful act** on his part.

Maumus v. Champion, 40 Cal. 121.

87. The negligence of the **parents** in allowing their child to be left alone in the street does not relieve the defendant from liability, if the injury occurred through the gross negligence of its employee.

Schierhold v. N. B. & M. Co., 40 Cal. 447.

88. Unless there is some unusual exposure to danger, it is not negligence on the part of the parent to allow a child between ten and eleven years of age, ordinarily active and intelligent, to be in the street.

Karr v. Parks, 40 Cal. 188.

89. That a child, five years of age, was permitted to walk in the street, within sixty feet of her father's house, where there was no particular reason to apprehend danger, and in a street almost entirely unused, would not as a matter of law be held evidence of negligence on the part of the parent. Id.

90. The **owner of stock** is not guilty of contributory negligence from the fact that he knew the road was not fenced when he turned his stock into the field.

McCoy v. Cal. P. R. Co., 40 Cal. 532.

91. If the plaintiff is guilty of negligence or even of possible wrong in placing his animals on a railroad track, yet the railroad company are bound to exercise **reasonable care and diligence** in the use of their road; and if for want of that care the animals are injured, the company is liable. In such case the company is also bound to use reasonable care and diligence in removing the animals.

Needham v. S. F. & S. J. Co., 37 Cal. 409.

92. The fact that plaintiff was **standing** on the rear platform of a street car, with his hand on the railing, when his hand was injured by defendant's dray, as it passed the rear of the car, is not, as a matter of law, such negligence as contributes to the injury.

Seigel v. Eisen, 41 Cal. 109.

93. A person who is guilty of contributory negligence can not recover damages, even if the **defendant** contributed to the loss by his negligence.

Flemming v. W. P. R. Co., 49 Cal. 253.

94. If a person is driving a four-horse team along a road running parallel with, and near to, a **railroad**, and is approaching a **crossing**, and the air is so filled with dust that he can not see the railroad, and his wagon makes some noise, and he attempts to

cross the railroad without stopping his team to listen for an approaching train, and his horses are killed by the engine, he is guilty of contributory negligence, and can not recover damages. *Id.*

95. In an action for damages to the person, alleged to have been sustained by carelessness or negligence of the employees of a railroad company, while a passenger on a train, contributory negligence on the part of the plaintiff is a matter of defense to be proved by the defendant.

McQuilkin v. C. P. R. Co., 50 Cal. 7.

96. The above rule does not prevent the trial court from directing judgment, as in case of **nonsuit**, if the evidence introduced by the plaintiff conclusively establishes the defense of contributory negligence. *Id.*

97. When the negligence of the injured party contributes directly to the injury complained of, the law will afford no redress; but negligence is not absolute or intrinsic, but always relates to some circumstance of time, place, or persons, and whether there was contributory negligence in any given case, is generally one for the jury to pass upon or determine.

Jamison v. S. J. & S. C. R., 55 Cal. 593.

98. In an action to recover damages for an injury to the person, sustained by the alleged negligence of the defendant, the question of contributory negligence is to be decided by the court as a **question of law**, when the facts are clearly settled, and the course which common prudence dictates can be readily discerned; but when the facts are doubtful, or when they are such that it is doubtful whether the act imputed to the plaintiff as negligence was such as a person of ordinary prudence would have performed, it is to be submitted to the jury, under instructions from the court.

Fernandez v. Sac. City R. Co., 52 Cal. 45.

99. If, in such action, it is a question to be decided upon admitted facts whether a man of common prudence would have acted as the plaintiff did, and the common knowledge and experience of men do not enable the court to determine whether the plaintiff's conduct was negligent, the question of contributory negligence is to be submitted to the jury, under proper instructions. *Id.*

100. In such action the negligence of the plaintiff does not release the defendant from liability, unless it contributes proximately to the injury sustained by the plaintiff. *Id.*

101. The statute (sec. 486, civil code) provides, in substance, that a locomotive bell must be rung when the engine is approaching a crossing, under a penalty for failing so to do; and declaring that the railroad corporation is also liable for all damages sustained by any person, and caused by its loco-

motives, trains, or cars, when the bell is not rung: *Held*, that a failure to ring the bell does not abrogate the doctrine of contributory negligence.

Meeks v. S. P. R. Co., 52 Cal. 602.

102. If plaintiff was guilty of such negligence as materially and proximately contributed to his injury, the defendant is not responsible in an action for such injury, even though the defendant failed to ring its bell. *Id.*

103. It is negligence, *per se*, for parents to allow an infant of six years to make use of a railroad track for a play-ground, and to lie down upon it unattended, and this, whether the child was asleep or awake. *Id.*

104. If the negligence of a parent, or person standing *in loco parentis*, materially and proximately contributes to the injury, the defendant is not liable. *Id.*

105. If the neglect of ordinary care by the plaintiff concurs as a proximate cause in producing the injury for which the action is brought, the railroad company is not liable, even if its agents are at fault.

Robinson v. W. P. R. Co., 48 Cal. 409.

106. In an action for damages for a personal injury, negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff. *Id.*

107. The act of leaving a span of horses unhitched in close proximity to a railroad, at a time when the train usually comes along, is negligence, and if the owner afterwards, when the train arrives, and when the horses have moved to the track, attempts to rescue them, and is injured, he is guilty of additional negligence, which proximately contributes to his injury, and he can not recover damages. *Deville v. S. P. R. Co.*, 50 Cal. 383.

NEGLECTANCE—QUESTIONS OF FACT AND OF LAW.

108. Negligence or want of skill in the grading of a street by a contractor, under a city contract, will not be presumed, nor inferred from the mere fact of damage, but must be proved. *Shaw v. Crocker*, 42 Cal. 455.

109. In a suit against a contractor for damages occasioned to contiguous property by raising the grade of a street under a city contract, it is incumbent upon the plaintiff to show that the work was performed in an improper or negligent manner, or that the damage resulted from a want of care or skill on the part of the contractor or his servants. *Id.*

110. Negligence is generally an inference from facts and circumstances, which it is the province of the jury to find; and in an action for damages for injury caused by negligence, a nonsuit upon the ground of con-

tributory negligence should only be granted, when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside.

Schierhold v. N. B. & M. Co., 40 Cal. 447.

111. Whether there is negligence on the part of the parents in allowing a child of seven years old to be in the streets untended is a proper question to be submitted to the jury. *Id.*

112. The question whether the collision by which the injury was caused could have been avoided by proper care is a question of fact for the jury. Siegel v. Eisen, 41 Cal. 109.

113. In an action to recover damages caused by defendant's dray running against a street car, the fact that the collision would not have occurred except for the slipping of the wheels of the dray on the iron track does not conclusively repel the imputation of negligence. *Id.*

114. In a suit brought by a boy sixteen years old for damages for injury sustained by being forcibly expelled from a railroad car, if the testimony tends to show that the plaintiff is told he can not ride, and that he is ordered by the conductor, with a show of force, to get off the car, a nonsuit should not be granted upon the ground that the plaintiff contributed to his injury.

Kline v. C. P. R. Co., 37 Cal. 400.

115. If a boy, sixteen years of age only, leaps from a railroad car while in motion, in obedience to the command of the conductor, accompanied by a show of force, the court can not say judicially that the act of the boy was voluntary, but should leave it to the jury to say whether, under all the circumstances, the conduct of the conductor did not amount to compulsion. *Id.*

116. If, in such case, the conductor sees the person attempting to get on the car, he may use force to prevent him, and no liability will result from injury; but if the person is once fairly on the car, care must be exercised in his removal. *Id.*

117. In an action for personal injuries alleged to have been sustained by reason of the negligence of the defendant, the presence or absence of negligence on the part of the defendant, and of contributory negligence on the part of the plaintiff, are questions of fact for the jury, in view of all the circumstances proved.

McNamara v. N. P. R. Co., 50 Cal. 581.

118. In an action to recover damages alleged to have been caused by the negligence of the defendant, when the facts are established by uncontradicted evidence, the question of negligence is a matter of law to be passed on by the court.

Flemming v. W. P. R. Co., 49 Cal. 253.

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GENERALLY.

1. The exercise of a **sound discretion** in granting a new trial, upon a review of the facts alone, will not be disturbed.

Watson v. McClay, 4 Cal. 288.

2. Whether good cause is shown, is a question properly addressed to the discretion of the court. People v. La Farge, 3 Cal. 130.

GROUND FOR NEW TRIAL.

Irregularity in the Proceedings.

3. A new trial will be ordered when there is such irregularity in the proceedings that the ends of justice will be better subserved.

Sannickson v. Brown, 5 Cal. 58.

4. A verdict of a jury will not be set aside

on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject-matter of the suit, when no objection to him was made until after the verdict was rendered, and it not appearing that he had **formed or expressed an opinion** before the trial, or was in any way biased in favor of the plaintiff.

Lawrence v. Collier, 1 Cal. 37.

5. As to new trial because of an **incompetent juror**, see facts.

Thompson v. Paige, 16 Cal. 77.

6. Where a jury are instructed to bring in a **sealed verdict**, and they retire, and, after agreeing upon the verdict, seal it up and give it to the officer in charge of them, the clerk being absent, and request him to give it to the clerk, which is done; and after the meeting of the court the following morning, the verdict is opened, in the presence of the jury, and read by the clerk without exception: *Held*, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the court itself as if it had been directly delivered to the clerk.

Paige v. O'Neal, 12 Cal. 483.

7. Under any circumstances, the **withdrawal of a juror**, and the continuance of a case thereby, is no ground for reversing a judgment subsequently obtained.

Benedict v. Cozzens, 4 Cal. 382.

8. After a jury have once retired, it is error to allow them to come into court and receive **instructions** in the absence of the parties or their counsel.

Redman v. Gulnac, 5 Cal. 148.

9. Unless the irregularity complained of in the formation of the jury goes to the **merits of the trial**, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed.

Thrall v. Smiley, 9 Cal. 529.

10. Questions of **discretion** of the judge below can not be reviewed in the supreme court, except in cases of gross abuse, to the injury of the party.

Smith v. Billett, 15 Cal. 26.

11. Refusing or granting a new trial will not be disturbed, except where there is a **gross abuse of discretion**; nor where the decision of the court is upon bare questions of fact.

Speck v. Hoyt, 3 Cal. 413.

12. A new trial will not be granted unless the record discloses a gross abuse of discretion.

Duell v. B. R. & A. Co., 5 Cal. 84.

13. If a new trial is granted on the ground of **irregularity in the presence of the court**, the supreme court will not, on appeal from the order granting it, review the question of fact, as to whether the court was mistaken about the alleged irregularity.

Thompson v. Thornton, 47 Cal. 76.

14. Where, in an action for personal prop-

erty, with damages for its detention; the verdict was for defendant, and subsequently the court below made an order granting a new trial, from which order defendant appealed to the supreme court, giving an undertaking for damages and costs under the three hundred and forty-eighth section of the practice act, and then the court below, against the objection of the defendant, proceeded to try the cause a second time, when plaintiff had verdict and judgment: *Held*, that the judgment must be reversed, because the court below could not proceed with a **second trial** until the appeal from the order was determined. *Ford v. Thompson*, 19 Cal. 118.

15. Where, in a suit for damages for collision between plaintiff's vessel, the Gipsy, and defendant, the complaint, verified, averred that plaintiff had been damaged in the sum of one thousand five hundred dollars, and the answer denied plaintiff's ownership of the Gipsy, or that defendant was in fault, or that "the plaintiff was damaged by reason of such collision in the sum of one thousand five hundred dollars;" and after evidence on both sides as to the damages, the jury found for plaintiff six hundred dollars, and then, on motion of plaintiff, the court entered judgment in his favor of one thousand four hundred and ninety dollars: *Held*, that the court erred in entering judgment **non obstante veredicto** after plaintiff had gone into proof as to damages, and the jury had returned a verdict upon the facts; that going into proof, etc., might well have induced defendant not to move to amend his answer, which motion the court would probably have granted, and hence defendant might have been taken by **surprise**. *Rouiff v. The Cynthia*, 18 Cal. 669.

16. Where it is evident that the jury must have acted under a **mistaken impression** as to the legal effect of the evidence, or in total disregard of it, a new trial will be ordered. *Minturn v. Burr*, 20 Cal. 48.

17. The fact that the officer having charge of the jury after they had retired to deliberate was absent some minutes from the room in which he had placed them, it not appearing that they were allowed to separate; and the fact that some person outside the jury-room spoke to a juror, and that some of the jurors spoke to two persons outside, it not appearing what was said or that it had any reference to the trial; and the fact that after the jury had agreed upon their verdict, and were brought into the court-room, they were allowed to remain there in the **presence of other persons** while the officer went to the porch in front of the court room and waited some minutes for the judge, it not appearing that any communication was had with the jury in the mean time, are not sufficient grounds for requiring a new trial.

People v. Boggs, 20 Cal. 432.

18. Where the **interference of strangers**

with the jury is unattended with corruption in the latter, and has not been prompted by a party, and it does not appear that any injustice had thereby been done, the verdict will not be disturbed, whether the case be civil or criminal, a capital trial or otherwise. *Id.*

19. What latitude shall be allowed to a plaintiff in introducing **evidence in rebuttal** after defendant has rested, is entirely discretionary with the trial court, and its action in this respect is not subject to review upon appeal.

Brooks v. Crosby, 22 Cal. 42.

20. Where a **demurrer** is interposed to an answer, and the cause is tried by the court without first disposing of the demurrer, and no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial.

Calderwood v. Tevis, 23 Cal. 335.

21. **Bias or prejudice** on the part of the judge constitutes no legal incapacity to sit on the trial of cause; nor is it a sufficient ground to authorize a change of the place of trial.

People v. Williams, 24 Cal. 34.

22. If the court, after the case is submitted, examine **books of account** as evidence, which have not been given in evidence during the trial, a new trial will not be granted for the irregularity, unless it is stated in the records to be one of the grounds on which the motion will be made.

Wilcoxson v. Burton, 27 Cal. 237.

23. A new trial will not be granted in a criminal case because a sheriff takes charge of the jury where a **deputy sheriff** was sworn, nor because the judge informs the jury through the sheriff, that if they do not agree in five minutes they must remain in the jury-room over night.

People v. Hughes, 29 Cal. 257.

24. The bare fact that **evidence** is brought to the notice of the jury out of its regular order is no ground for a new trial, if the evidence would have been competent in any stage of the trial.

Rice v. Cunningham, 29 Cal. 492.

25. That a **child**, for an assault upon whom defendant is being tried, not having sufficient capacity to be a witness, was sworn and questioned but withdrawn before she had testified to any material fact, is no ground for granting a new trial. The suggestion that her appearance was calculated to excite the sympathy of the jury and influence their judgment, is not entitled to any consideration.

People v. Graham, 21 Cal. 261.

26. Where the **judgment of the appellate court** directs the court below what judgment to render, a new trial in the court below is not authorized, and a judgment rendered upon such a new trial is null and void. *Argenti v. San Francisco*, 30 Cal. 458.

27. Where the court overrules an objection to the **admissibility of evidence**, and admits the evidence, but when the findings come to be drawn, changes its opinion and comes to a different conclusion from that entertained when the evidence was admitted, thereby depriving the party of the opportunity to amend his pleadings or introduce other evidence, a new trial will be granted.

Carpentier v. Small, 35 Cal. 346.

28. The failure of the district court to require the **shorthand reporter** to file his notes of testimony as he is required to do by the statute, is not an error for which an order granting a new trial will be reversed, if the shorthand reporter was incompetent, and could not take down the testimony as it was given, nor read such notes as he did take.

Sais v. Sais, 49 Cal. 263.

Misconduct of Jury.

29. Where the jurors agree each one to mark down the sum he thinks proper to find as damages and then to divide the total amount of these sums by the number of persons composing the jury, which result should be their **verdict**, a verdict thus formed is irregular and will be set aside.

Wilson v. Berryman, 5 Cal. 44.

30. But if such means be adopted merely to arrive at a proper result, for the purpose of determining what the verdict shall be, without any being bound thereby, and afterwards the jury agree upon such sum as their verdict, the court will not disturb it.

Id.

31. Such verdicts are regarded in the same light as **gambling verdicts**.

Id.

32. The **remark of a juror**, during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and that the lawyer who made the shortest speech would win the case, was not such misconduct as will vitiate the verdict.

Taylor v. Cal. Stage Co., 6 Cal. 228.

33. Where a **slip from a newspaper** was handed by the deputy sheriff to the jury, during the progress of the trial, containing matters relating to the trial, but not in evidence, and was perused by them, and the court subsequently, upon discovery of the fact, instructed the jury that the slip was not in evidence and that it should be wholly disregarded by them, and it appeared that the perusal could not, from the character of the matter contained in the slip, have prejudiced the losing party: *Held*, not to be ground for a new trial.

Thrall v. Smiley, 9 Cal. 529.

34. The **affidavit of jurors** will not be allowed to contradict their verdict.

Castro v. Gill, 5 Cal. 40.

35. The amendment of 1862 to section 193 of the practice act, allowing the affidavits of the jurors to be received to im-

peach their own verdict, relates merely to the remedy, and governs in all applications for new trials made after its passage, although the verdict and judgment sought to be set aside were rendered previously.

Donner v. Palmer, 23 Cal. 40.

36. The verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside.

Id.

37. The jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover, and that the several sums thus marked should be added together and the total amount divided by twelve, and the quotient, whatever that might be, should be their verdict without further consultation or discussion: *Held*, that this was not a **chance verdict**, within the meaning of the second subdivision of the one hundred and ninety-third section of the practice act; *held*, further, that such verdict was vicious, and should be set aside if the facts were proved by competent testimony.

Turner v. Tuolumne W. Co., 25 Cal. 400.

38. A verdict which is arrived at by each one of the jurymen marking such sum as he thinks proper, and then adding the several sums together and dividing the total by twelve and making the quotient the verdict, is not a chance verdict within the meaning of the second subdivision of section 193 of the practice act.

Boyce v. California Co., 25 Cal. 460.

People v. Hughes, 29 *Id.* 257.

39. The verdict of a jury can not be impeached by the **affidavits of the jurors**, except when the verdict is arrived at by a resort to the determination of chance.

Id.

40. The **testimony of the sheriff** is competent to disclose what transpires in the jury-room.

Wilson v. Berryman, 5 Cal. 44.

Accident or Surprise.

41. Surprise is not of itself ground for a new trial, or a reduction of damages. To authorize a new trial, or reduction of damages, the surprise alleged must be such that ordinary prudence could not have guarded against it, and the proceeding which creates it must have prevented the presentation of the case upon its merits. With the allegation of surprise, the party must show that he has been injured by it.

Patterson v. Ely, 19 Cal. 28.

42. Where a motion for a new trial is made on the ground of surprise, the **affidavits** on which the motion is founded should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses on a new trial; and *held*, where the affidavits did not set forth the facts to which the party expected

his witnesses would testify, that a new trial was properly refused.

Rogers v. Huie, 1 Cal. 429.

43. Where a new trial is asked on the ground of surprise, by the **non-attendance of witnesses**, the affidavits of the witnesses themselves should, if practicable, be procured, setting forth the facts, within their knowledge, to which they can testify in case a new trial should be granted. *Id.*

44. Where a motion for a new trial is made on the ground that the party was taken by surprise at the trial by the non-attendance of witnesses, it should appear that the party had used **reasonable diligence** in endeavoring to procure the attendance of his witnesses at the first trial. *Id.*

45. In cases where the surprise is clearly established, and the consequences can be avoided on another trial, and where it appears that the party was guilty of no laches, and acted in good faith in failing to apply for relief at an earlier stage of the proceedings, the rule may properly be relaxed so as to enable the party to avail himself of the surprise as a ground for a new trial.

Delmas v. Martin, 39 Cal. 555.

46. The general rule is that the party surprised on the trial must apply for relief at the **earliest practicable moment**, and in such method as will produce the least vexation, expense and delay. *Id.*

47. Where evidence tending in some degree to establish the value of plaintiff's services was admitted as competent, after objection, the **finding** that there was no proof of the value of the services was calculated to operate a surprise on the plaintiff, and was therefore erroneous.

Hartson v. Hardin, 40 Cal. 264.

48. Surprise resulting from an **amendment to the complaint**, during the progress of the trial, in the presence of defendant's attorneys, is not a sufficient ground for granting a new trial.

Mendelsohn v. Anaheim L. Co., 40 Cal. 657.

49. Mere surprise at the **evidence** given by the witnesses of the defendant is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict.

Live Yankee Co. v. Oregon Co., 7 Cal. 40.

50. A new trial will not be granted on affidavit by a witness of **mistake** in his testimony on the trial, unless there be a clear showing of mistake; and, further, that it was injurious to the party, and that he had no means or had used due diligence to counteract the mistake or to correct it.

Howe v. Briggs, 17 Cal. 385.

51. Where a **slight degree of prudence** would guard against surprise, it is not a sufficient ground to allege for a new trial.

Brooks v. Lyon, 3 Cal. 113.

52. Surprise at the **ruling of the court**, on the trial, as to the admission of testimony, is not ground for a new trial.

Fuller v. Hutchings, 10 Cal. 523.

53. Where plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the court below to refuse a new trial, the motion for which was based on **affidavit** of defendant that he was taken by surprise, arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. Eagan v. Delaney, 16 Cal. 85.

54. Surprise at the **testimony** of a witness called by the adverse party is no ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify.

Taylor v. Cal. Stage Co., 6 Cal. 228.

55. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: *Held*, that this court will not revise the discretion of the court below in granting the new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge.

Smith v. Richmond, 15 Cal. 501.

56. A party who is unprepared for trial at the time of the calling of the case, should move for a **continuance**, and if he fail to do this, he waives his want of preparation, and can not afterwards, when judgment has gone against him, move for a new trial on this ground. Turner v. Morrison, 11 Cal. 21.

57. It is not sufficient for a new trial to aver that the party thus represented was ignorant, at the time of the trial, of the facts. He must show that he could not, with the use of due **diligence**, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. Williams v. Price, 11 Cal. 213.

58. Where, in an action for goods sold and delivered, the defendant in his answer set up a promissory note as a counter claim, which purported on its face to have been made for value received, and the plaintiffs, in an answer to defendant's cross-complaint, alleged that the note was given without consideration: *Held*, that testimony on the trial by the defendant, in support of the averments in his answer as to the making of the note and the consideration therefor, did not constitute such a surprise to the plaintiffs as to entitle them to a new trial.

Armstrong v. Davis, 41 Cal. 494.

59. The **mistake of counsel** as to the competency of a witness is no ground for granting a new trial.

Packer v. Heaton, 9 Cal. 563.

60. Where one party to an action is **misled** by the act of the other, justice demands that a new trial should be granted.

Pinkham v. McFarland, 5 Cal. 137.

61. In order to move for a new trial on the ground of surprise, it must be shown not only a surprise, but one that **ordinary prudence** could not guard against; and to show that he has been injured by it; to show that upon a new hearing he can make out such a title as would probably be not only a legal but an equitable defense of the action. And he must also show what the title is.

Patterson v. Ely, 19 Cal. 28.

62. A new trial will not be granted on the ground of surprise at the introduction of **false evidence**, when the evidence related solely to a point not necessarily involved in the decision of the action, and which in fact had no influence upon the judgment.

Guy v. Hanly, 21 Cal. 397.

63. False testimony, given by mistake or otherwise, is sufficient to avoid a verdict or decision based upon it, if **ordinary prudence** has been observed by the losing party. Id.

64. An **affidavit of a party** that he was surprised at the admission of a witness on the trial, because his attorney had advised him that the witness was incompetent, and that he was also surprised by the testimony of the witness in stating a certain conversation incorrectly, is not sufficient to authorize the granting of a new trial on the ground of surprise. Klockenbaum v. Pierson, 22 Cal. 160.

65. Where, during the progress of a trial, the existence or the materiality of **absent evidence** is first discovered, the party desiring such evidence should move for a continuance until it can be obtained, and failing to do this, he can not have a new trial on the ground that the evidence was newly discovered. Id.

66. A new trial will not be granted on a showing, alone, of surprise, which ordinary prudence could not have guarded against, but it must also be made to appear that the moving party has a **valid defense** to some material part of the plaintiff's cause of action, and that on the new trial the result may be different from that on the first trial.

Cook v. De la Guerra, 24 Cal. 237.

67. Where a plaintiff fails to appear when a cause is regularly called for trial, and at defendant's request the trial proceeds and judgment is rendered for defendant, the court has no power to relieve the plaintiff from the judgment under the sixty-eighth section of the practice act, on the ground of **mistake**, inadvertence, surprise, or **excusable neglect**, on a motion made after the adjournment of the term at which the judgment was rendered.

Casement v. Ringgold, 28 Cal. 335.

68. If relief can be obtained in such cases,

it must be by a motion for a new trial, on the ground of accident or surprise, which **ordinary prudence** could not have guarded against. Id.

69. Where a party to an action, previous to the trial of the same, is told by a witness that he will testify in a certain manner in relation to a fact material to the issue, and the party to whom the declaration is made, relying on the same, neglects to procure other testimony, and secures the attendance of the witness, and when called to the stand the witness, either by **collusion** with the party against whom he is called, or by reason of any fact or occurrence for which the party calling him is not responsible, testifies contrary to what he had previously stated he should do, this is a surprise in the sense in which that word is used in the law of new trials, and a new trial will be granted, provided the party applying for the same shows that he will be able on the new trial to supply the testimony required. In such case it is not necessary for the party surprised to move for a **continuance** at the time.

Rodriguez v. Comstock, 24 Cal. 85.

70. The party alleging surprise during the progress of a trial should show it by the **best evidence** within his reach.

Schellhaus v. Ball, 29 Cal. 605.

71. If, during a trial, facts exist which amount to legal surprise, these facts should be shown by the **affidavits of the attorney**, and not of his client. Id.

72. On an application for a new trial on the ground that the court denied a **continuance**, in a criminal as well as in a civil case, the defendant should procure the affidavits of the absent witnesses, showing that they can testify to the facts sought to be proved, or give good reason for not obtaining such affidavits. People v. Jocelyn, 29 Cal. 562.

73. A new trial will not be granted in a criminal case, on the ground of being taken by surprise by the testimony of a witness, unless the **affidavits** show that the testimony of the witness was not true. Id.

74. A new trial on the ground of surprise should not be granted unless it clearly appears that the **verdict** is mainly attributable to the facts out of which the surprise resulted, and that the surprise has not resulted from the fault or negligence of the moving party. Schellhaus v. Ball, 29 Cal. 605.

75. When, during the progress of a trial, conditions are found to exist which may amount to legal surprise, the court should, if an application is made therefor, grant **relief** at once, if the facts are such as would justify the court in setting aside the verdict after the trial. Id.

76. If the party claiming to have been surprised can relieve himself, either by a **nonsuit**, a continuance, or the introduction

of other testimony, or in any other way, and fails to do so, a new trial will not be granted. Id.

77. If, during the argument of a case to the jury, a dispute arises between counsel as to whether a certain paper was introduced in evidence, and the court decides it was, the party claiming to be surprised by the decision should apply to the court at once for leave to introduce **rebutting testimony**, if he has such testimony, and, if he fails to do so, a new trial will not be granted. Id.

78. In order to sustain a motion for a new trial on the ground of surprise, the moving party must show not only surprise, but that he is **injured** by it; and this he must do by showing what case he can establish in the event of a new trial.

Brooks v. Douglass, 32 Cal. 203.

79. The **appellate court** will not reverse an order of the court below denying a new trial, applied for on the ground of surprise, unless there has been an **abuse of discretion** in the court below refusing a new trial.

Nooney v. Mahoney, 30 Cal. 226.

80. When a party defendant is taken by surprise by the **testimony of a witness** produced by the opposite party several days before the close of the trial, and knows of a witness who resides out of the state by whom he can contradict the witness whose testimony surprises him, he should move for a **continuance** at once in order to take the deposition of the witness who resides out of the state, and not wait to move for a new trial, on the ground of the surprise.

Ferrer v. Home Mutual, 47 Cal. 418.

Newly Discovered Evidence.

81. On a motion for a new trial on the ground of newly discovered evidence, the newly discovered evidence should be **fully set forth**, or the motion must be overruled.

Perry v. Cochran, 1 Cal. 180.

82. An application for a new trial on the ground of newly discovered evidence must show affirmatively that the evidence is **new, material, and not cumulative**; that the applicant has used due diligence in preparing his case for trial; that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not directly in issue on the trial, or were not then known or investigated by proof.

Bartlett v. Hogden, 3 Cal. 55.

Brooks v. Lyon, Id. 113.

Burritt v. Gibson, Id. 396.

Live Yankee Co. v. Oregon Co., 7 Id. 42.

83. A new trial, which was demanded on the grounds of newly discovered evidence which was **cumulative**, and that the findings of the court were not supported by the evidence, which was conflicting, was properly refused. Meyer v. Mowry, 34 Cal. 514.

84. Newly discovered evidence, when cumulative merely, furnishes no ground for a new trial; at least, unless it clearly appears that its production would have changed the result, and that the **strictest diligence** would not have enabled the moving party to procure the same at the trial.

Levitsky v. Johnson, 35 Cal. 41.

85. Newly discovered evidence, which is only cumulative, furnishes no ground for a new trial.

Jones v. Jones, 33 Cal. 584.

Spencer v. Doane, 23 Id. 418.

Aldrich v. Palmer, 24 Id. 513.

Hobler v. Cole, 49 Id. 250.

Reed v. Clark, 47 Id. 194.

People v. McDonell, 47 Id. 134.

86. When the alleged newly discovered evidence is merely cumulative, and every material fact disclosed by the affidavits is contradicted by **counter affidavits**, and the appellate court can not clearly say that the court below erred in refusing it, a new trial will not be ordered.

Doyle v. Sturla, 38 Cal. 456.

87. A new trial will not be granted because of the discovery of new evidence which is merely cumulative, and which, if produced, would only tend to **contradict a witness** of the opposing party.

Klockenbaum v. Pierson, 22 Cal. 160.

Live Yankee Co. v. Oregon Co., 7 Id. 40.

88. There is no **presumption** that newly discovered evidence is cumulative.

Hobler v. Cole, 49 Cal. 250.

89. A large **discretion** is accorded to courts in the disposition of motions for a new trial, made on the ground of newly discovered evidence, and it devolves on the appellant to show that this discretion was not properly exercised. Id.

90. That the newly discovered evidence is cumulative is, however, an affirmative proposition, and, if it does not appear in the moving papers, the fact must be **shown by the party opposing** the motion. Id.

91. A new trial will not be granted on the ground of newly discovered evidence, if the **affidavit** on which it is claimed is shown by **counter affidavits** to be exposed to the suspicion of bad faith; nor if the newly discovered evidence fails to raise a reasonable presumption that, if produced, it would change the result. Merk v. Gelzhauer, 50 Cal. 631.

92. A new trial will not be granted on account of newly discovered evidence, if the same was cumulative, or if with **proper diligence** it might have been procured on the former trial. Russell v. Dennison, 45 Cal. 337.

93. Sufficient newly discovered evidence to support a motion for new trial considered.

Armstrong v. Davis, 41 Cal. 494.

94. In an action for the recovery of real property sold under execution, the mere fact that the purchaser, who was not called as a

witness, omitted to disclose the fact that at the time of the sale he had **notice of a prior conveyance** of the same property, is of itself no ground for a new trial.

Butler v. Vassault, 40 Cal. 74.

95. To entitle him to relief, he is held to a strict proof of diligence, and a general averment is not sufficient. He must state particularly what acts he performed, in order that the court may decide whether proper **diligence** was used. Id.

96. In an action to review a former judgment and for a new trial therein, on the ground of newly discovered evidence, it is incumbent on the plaintiff to establish that he has been guilty of no **laches**, and that the failure to produce the evidence on the former trial was imputable to no lack of diligence on his part. Id.

97. In cases of **conflicting testimony**, newly discovered evidence, merely cumulative, is no ground for a new trial.

Taylor v. Cal. Stage Co., 6 Cal. 228.

97a. A new trial, on the ground of newly discovered evidence, should not be granted where such evidence is merely cumulative, and is that of a witness whose **deposition** was used on the trial, and particularly where the verdict shows that the jury disbelieved his first statement.

Gaven v. Dopman, 5 Cal. 342.

98. A new trial will not be granted on the ground of newly discovered evidence which is in **conflict** with the evidence given on the trial.

People v. McCauley, 45 Cal. 146.

99. When, in **ejectment**, the parties claim title derived from a common source, and the defendant, to show his title the oldest, relies on a purchase made, and a note given for part of the purchase money, and a bond for a conveyance, executed to him by the common grantor, which bond is claimed to be lost, and proves that it was the grantor's custom to give a bond when credit was given, and the plaintiff recovers judgment, a subsequent discovery of the note is sufficient ground on which to grant a new trial.

Jones v. Singleton, 45 Cal. 92.

100. If the plaintiff in ejectment relies on a **paper title**, and recovers judgment, and after the trial the defendant discovers that prior to the commencement of the action the plaintiff had conveyed the title to a third person, a new trial should be granted.

Cranmer v. Porter, 41 Cal. 463.

101. Motions for new trial on the ground of newly discovered evidence must be **regarded with suspicion** and disfavor. In such cases, the motion must be supported by the affidavit of the moving party that he did not know of the newly discovered evidence, and usually by the affidavits of the newly discovered witnesses, stating what

they know and will testify. The affidavit of the party can not be received in lieu of the affidavits of such witnesses, unless for good cause shown it appears that the affidavits of the latter can not be obtained in time, or in such further time as may have been granted for that purpose.

Arnold v. Skaggs, 35 Cal. 684.

102. A party who relies on such ground must make a **strong case** by the best evidence obtainable, both in respect to diligence on his part in preparing for the trial, and as to the truth and materiality of the newly discovered evidence. Id.

103. In such a case the moving party must show by his own **affidavit** that the new evidence was not known to him at the time of the trial. Upon that question, the affidavits of other persons are not sufficient. Id.

104. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that he used **reasonable diligence** to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own **laches**; that the newly discovered evidence is not simply cumulative, that it is not to impeach an adverse witness, that it is material, and is so important that it would probably have changed the verdict had it been in on the former trial. Stoakes v. Monroe, 36 Cal. 383.

105. It is not good ground for a new trial that the defendant discovered material testimony at **too late a period** to produce the same at the trial. It would, however, be good ground on which to base a motion for **continuance**. Berry v. Metzler, 7 Cal. 418.

106. The facts stated in an **affidavit** of newly discovered evidence, on motion for a new trial: *Held*, not to disclose sufficient grounds for granting the motion.

Kern Valley Bank v. Chester, 55 Cal. 49.

107. A party ought not to rely upon his own **single unsupported statement**, on a motion for a new trial, of the newly discovered evidence, but should, if possible, procure the **affidavits** of the persons whose testimony he deems material, so that the court may be satisfied as to what facts he will testify. Rogers v. Huie, 1 Cal. 429.

108. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of one of the defendants as to what an **absent witness** will testify is insufficient. It should be accompanied by the affidavit of the witness himself; if that can not be obtained in time, additional time should be applied for.

Jenny Lind Co. v. Bower, 11 Cal. 195.

109. Motions for new trial on the ground of newly discovered evidence are regarded with **distrust and disfavor**, and the strictest showing of diligence, and all other facts

necessary, is required. This is especially true when the new testimony is to impeach a witness on the trial, or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. In this case the party himself was present. *Baker v. Joseph*, 16 Cal. 173.

110. Where it did not appear that the defendant had made any efforts to have his witnesses subpoenaed, or to procure their attendance, until the morning of the day for which the cause was set down for trial, and on which it actually was tried: *Held*, that the party had not used proper diligence, and that the decision of the district court refusing a new trial was correct.

Rogers v. Huie, 1 Cal. 429.

111. A new trial will not be granted on the ground of newly discovered evidence, which is alleged to be a deed, recorded in the county recorder's office a year before the trial, and the record of a judgment in the same court in which the cause was tried.

Weimer v. Lowery, 11 Cal. 104.

112. Where the report of a referee disclosed some hesitation and doubt in arriving at the conclusions of fact, and after the report had been made up, but before it was filed, the defendant applied to the referee for leave to introduce newly discovered evidence, which was refused, from a doubt as to his powers, he at the same time intimating to the court, in a supplemental report, that if such newly discovered evidence had been adduced on the trial, the result would probably have been different: *Held*, under the circumstances, it was error in the court below to refuse a new trial.

Hoyt v. Saunders, 4 Cal. 345.

113. Where, upon the trial, the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery.

Wright v. Carillo, 22 Cal. 595.

114. When the motion for a new trial is based upon newly discovered evidence, or that the verdict is against evidence, an enlarged discretion is vested in the court below; and the supreme court will rarely interfere with the action of the court below, in granting a new trial.

O'Brien v. Brady, 23 Cal. 243.

115. Where a defendant, whose property has been attached, files an evasive answer under oath, which admits the indebtedness sued on, and then, on a trial between an intervenor, a subsequent attaching creditor, and the plaintiff, without intimating that he would do so, testifies that the debt was not due, it is sufficient cause for a new trial on the ground of surprise.

Coghill v. Marks, 29 Cal. 673.

Excessive Damages.

116. The court will set aside a verdict, where the damages given are unjustifiable.

McDaniel v. Baca, 2 Cal. 323.

117. It is a proper exercise of power in a court to grant a new trial on the ground of excessive damages, when the verdict is grossly inconsistent in its relation to the facts.

Potter v. Seale, 5 Cal. 410.

118. In an action for malicious prosecution, if the damages awarded by the jury are greatly disproportionate to the actual damages, the court may regard it as sufficient evidence that the verdict was rendered under the influence of prejudice or passion, and direct a release of part of the damages, or award a new trial.

Kinsey v. Wallace, 33 Cal. 462.

119. Objections to the form of a verdict, or that excessive damages were thereby awarded, can only be made available on motion for a new trial, or on appeal from an order denying a new trial.

Campbell v. Jones, 41 Cal. 515.

120. A new trial may be granted to the party who obtained a verdict, when the damages awarded to him are less than he was entitled to.

Mariani v. Dougherty, 46 Cal. 26.

121. A verdict for two hundred dollars damages is not a just and fair compensation for the damages sustained, caused by the careless and reckless taking of human life, and such verdict justifies the court in granting the plaintiff a new trial.

Id.

122. If the verdict is excessive the supreme court will award a new trial, unless after the remittitur goes down, the party in whose favor it was rendered files with the clerk a written consent that the judgment be modified.

Atherton v. Fowler, 46 Cal. 323.

123. The rules by which courts are governed in setting aside the verdicts of juries on the ground of excessiveness of damages, considered.

Payne v. Pacific Mail Co., 1 Cal. 33.

124. In an affidavit for a new trial, the allegation of the affiant that "as he is informed and believes, the damages assessed were excessive and more than could be recovered on a fair trial of the action," is insufficient as a statement of a meritorious defense upon which to justify any disturbance of the verdict. The facts should be stated from which the court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim.

Patterson v. Ely, 19 Cal. 23.

125. It is not error in the court below to refuse a new trial, provided the successful

party will consent to a **reduction** of his judgment. *Chapin v. Bourne*, 8 Cal. 294.

126. An **ejectment** case tried by the court found that plaintiff was entitled to the possession of the premises, and that the damages were one thousand five hundred and sixty-six dollars, and gave judgment accordingly. It appears from the evidence that plaintiff was only entitled to one half, he being a **tenant in common** with another not a party to the suit, and, on a motion made for the purpose, the court set aside the judgment and ordered a new trial. The plaintiff concedes that the judgment should have been but for one half, but insists that he should have been offered to remit the excess, and only on his refusal to grant the new trial: *Held*, that the new trial was properly granted, it being discretionary with the court; if the judgment had been that the plaintiff was entitled to the possession of one half of the premises as tenant in common with another, this court might have corrected the judgment as to damages, and made it conformable to the findings. But in this case both correspond.

Clark v. Huber, 20 Cal. 196.

127. The verdict will not be disturbed on motion for a new trial unless the amount is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or as to suggest at the first blush, **passion or prejudice**, or corruption on the part of the jury.

Wheaton v. N. B. & M. Co., 36 Cal. 590.

128. In **ejectment**, the complaint verified alleged ownership in plaintiffs' possession by defendants of the premises from a designated period, and the withholding of that possession from plaintiffs from that period, and that the value of the use and occupation, rents, and profits of the premises during such possession was ten thousand dollars; the answer contained no specific denial of these allegations, and under directions of the court plaintiffs had verdict and judgment on the pleadings for ten thousand dollars damages: *Held*, that the verdict and judgment must stand; and that, the claim for damages resting entirely upon the uncontroverted allegations of the complaint, the court below erred in granting a new trial, unless plaintiffs should **remit all** the damages except one dollar.

Patterson v. Ely, 19 Cal. 28.

129. Where damages are laid at a certain sum in a declaration, the judgment will be reversed if the jury render a verdict for a greater sum.

Palmer v. Reynolds, 3 Cal. 396.

129a. But the **excess** may be **remitted** and the judgment stand.

Pierce v. Payne, 14 Cal. 420.

130. If the damages assessed by the verdict of a jury are clearly excessive, and were

evidently given under the influence of **passion or prejudice**, the appellate court will grant a new trial.

McCarthy v. Fremont, 23 Cal. 196.

131. In such cases, the court will not disturb the verdict of a jury on the ground that the damages are excessive, unless the amount of damages is so **disproportionate** to the injury proved as to justify the conclusion that the verdict is not the result of the cool dispassionate consideration of the jury.

Aldrich v. Palmer, 24 Cal. 513.

132. In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the **judgment of the jury**, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice.

Boyce v. Cal. Stage Co., 25 Cal. 460.

133. This court will not interfere with the verdict of a jury, where the question upon which they have passed is one solely of unliquidated damages, unless beyond doubt the verdict be **unjust and oppressive**: so *held*, in an action brought by a passenger against the owners of a steamer for not furnishing him with the conveniences during the voyage which the contract of conveyance required.

George v. Law, 1 Cal. 363.

134. The plaintiff recovered judgment against the defendant for one thousand dollars, that sum being the amount of damages awarded by a jury before whom the cause was tried. On motion for a new trial, the judge of first instance ordered that the judgment should be set aside, and a new trial granted, unless he would consent to remit four hundred dollars of the judgment which had been rendered in his favor. On appeal from this order: *Held*, that this court had **jurisdiction of the appeal**, and the order was reversed and set aside.

Payne v. Pacific Mail Co., 1 Cal. 33.

135. It seems that a verdict for three thousand dollars, in a suit on an **attachment bond**, where no property has been levied on under the writ of attachment except real estate, in the possession of which the debtor has not been disturbed, will be **deemed excessive** and reversed on that ground.

Heath v. Lent, 1 Cal. 410.

136. Where the suit on the bill had been accompanied by an attachment, under which the property of the drawer had been held for four months, when it was released by giving bond: *Held*, that in an action by the drawer for the **malicious prosecution** of said suit, where the jury gave fifteen thousand dollars damages, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the

court could not disturb the verdict, unless it clearly appear that injustice has been done.

Weaver v. Page, 6 Cal. 681.

137. If the verdict is excessive, the supreme court will award a new trial, unless after the remittitur goes down, the party in whose favor it was rendered files with the clerk a written consent that the judgment be modified. Atherton v. Fowler, 46 Cal. 323.

138. Plaintiff, a woman of color, being desirous to take passage on one of the street cars of defendant, hailed the conductor; he disregarded her signal, and by reason of his declining to stop she was unable to get upon the car. It was also proved, under objections from the defendant, that the conductor, on being urged by a lady passenger to stop for the plaintiff, replied, "We don't take colored people in the cars;" and it was further proved that there was ample room for plaintiff, and that she was provided with the usual passage tickets, and was ready and willing to pay her fare. There was no proof of any special damage or malice. The jury returned a verdict for the plaintiff for five hundred dollars: *Held*, that the damages were excessive.

Pleasants v. N. B. & M. Co., 34 Cal. 586.

Insufficiency of the Evidence.

139. The action of the district court in granting a new trial on the ground of alleged insufficiency of the evidence, will not be interfered with when the evidence is conflicting, although the appellate court may differ in opinion with the lower court as to the weight of the evidence.

Oullahan v. Starbuck, 21 Cal. 413.

140. Where the evidence is insufficient, a new trial should be granted.

Potter v. Carney, 8 Cal. 574.

141. If on any material fact the court finds contrary to, or without sufficient evidence, it is ground for a new trial.

Hathaway v. Ryan, 35 Cal. 188.

142. If a verdict be wholly unsupported by the evidence, as to the quantity, quality, and value of the property sued for, it should not be allowed to stand.

Campbell v. Jones, 38 Cal. 507.

143. The general rule is that the appellate court will not disturb a judgment, or verdict, or finding, or order denying a new trial or granting a new trial where there is a substantial conflict in the testimony, and no rule of law appears to have been violated. The supreme court has often held that it would not interfere with the verdict of a jury on the ground that such verdict is against the weight of evidence, except in extraordinary cases. It is almost impossible for an appellate court to satisfy itself in a decision upon such matters, so much depends upon the manner, bearing, character

of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony.

Kimball v. Gearhart, 12 Cal. 27; 10 Id. 446; 14 Id. 167.

Johnson v. Pendleton, 1 Id. 133.

Scannell v. Strahle, 9 Id. 177.

Weddle v. Stark, 10 Id. 301.

Bensley v. Atwill, 12 Id. 240.

Ritter v. Stock, Id. 402.

McGarrity v. Byington, Id. 432.

Visher v. Webster, 13 Id. 60.

Stevens v. Irwin, 15 Id. 504.

Adams v. Pugh, 7 Id. 150.

Ritchie v. Bradshaw, 5 Id. 228.

Knowles v. Joost, 13 Id. 620.

Brown v. Smith, 10 Id. 508.

Gagliardo v. Hoberlin, 18 Id. 394.

Lewis v. Covillaud, 21 Id. 178.

Tebbs v. Weatherwax, 23 Id. 58.

Preston v. Keys, 23 Id. 193.

Lubeck v. Bulcock, 24 Id. 338.

Ellis v. Jeans, 26 Id. 275.

Wilcoxson v. Burton, 27 Id. 232.

Wilkinson v. Parrott, 32 Id. 102.

Livermore v. Stine, 43 Id. 275.

Price v. Sturgis, 44 Id. 591.

Witherby v. Thomas, 55 Id. 9.

144. If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on the ground that the evidence is insufficient to justify the verdict.

Kile v. Tubbs, 32 Cal. 332.

145. If the proof does not warrant the damages awarded in an action of forcible entry, the defendant, if he wishes to have the question reviewed, should either move for a new trial on that ground, or specify in his bill of exceptions in what particulars the evidence did not justify the decision.

Jones v. Shay, 50 Cal. 508.

146. The objection that the evidence does not warrant the judgment can be entertained only on motion for a new trial.

James v. Williams, 31 Cal. 211.

147. Where three witnesses who testify to a matter are contradicted by only one, and he is a party to the record, and on another point his testimony conflicts with his sworn answer, it is not a case of substantial conflict in the evidence, and a finding of the court in favor of the party to the record will be set aside.

Braunson v. Caruthers, 49 Cal. 374.

148. If there is a substantial conflict in the evidence, the court will not grant a new trial on the ground that the verdict is against the evidence, unless the preponderance of evidence in favor of the party applying for the new trial is so great as to show that the jury must have acted under the influence of passion or prejudice.

Iburg v. Suanet, 47 Cal. 265.

149. Where the verdict is a general one,

and there is sufficient evidence to justify the verdict on one of the issues, the verdict will not be set aside.

Crosett v. Whelan, 44 Cal. 200.

150. In a trial in an action of ejectment upon a question of boundary, the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger; the court found the fact as recited in the deed: *Held*, that the finding was so far opposed to the evidence as to justify awarding a new trial. *Franklin v. Dorland*, 28 Cal. 175.

151. The rule that where there is a substantial conflict in the evidence, the supreme court will not grant a new trial because the verdict is against the weight of evidence does not apply to the court below in which the trial was had. There, if the judge is satisfied that the verdict is against the weight of evidence, he should grant a new trial, even if there is a conflict in the evidence.

Sherman v. Mitchell, 46 Cal. 576.

152. If the finding of a fact on a material point is contrary to a stipulation of the parties made in the course of the trial as a substitute for evidence, a new trial will be granted, on the ground that the finding is contrary to the fact as stipulated, and therefore unsupported by the evidence.

Carpenter v. Small, 35 Cal. 346.

153. The decision mentioned in section 648 of the code of civil procedure, an objection to which, on the ground of the insufficiency of the evidence to sustain it, must specify the particulars in which the evidence is alleged to be insufficient, is the facts found and conclusions of law drawn therefrom.

Covey v. Hale, 49 Cal. 552.

154. A specification in a bill of exceptions as a reason why a new trial should be granted, "that the said judgment is contrary to the evidence in this" (then stating wherein), does not enable the court to inquire whether the findings are justified by the evidence.

Id.

155. In an application for a new trial on the ground that the evidence does not justify the decision, a specification that the evidence is insufficient to justify the judgment, is not sufficient.

Kelly v. Mack, 49 Cal. 523.

156. In such case, a specification that the cause of action set forth in the complaint is not sustained by the evidence is not sufficient.

Id.

157. It is the settled rule that an order granting a new trial for insufficiency of evidence to support the verdict will not be disturbed in the supreme court, when the evidence was conflicting in its character.

Sperry v. Spaulding, 49 Cal. 232.

158. If the defendant in ejectment moves for a new trial, and relies on the point that he was entitled to recover upon his evidence

of adverse possession, he must include it in his specification of reasons why a new trial should be granted.

Abbey H. Ass. v. Willard, 48 Cal. 614.

159. Insufficiency of the evidence to justify the judgment is not a ground of motion for a new trial. It is insufficiency of the evidence to justify the verdict, or other decision of fact, upon which a new trial must be asked.

Martin v. Matfield, 49 Cal. 42.

160. It is not an error of law that the evidence is insufficient to justify a particular finding of fact. There is no distinction in this respect between the verdict of a jury and a finding of the court.

Smith v. Christian, 47 Cal. 18.

161. That the judgment is broader than the facts alleged and found will justify is no ground for a new trial. The remedy is by an appeal from the judgment on the judgment roll.

Shepard v. McNeil, 38 Cal. 72.

162. Where, in an action by P. and R. against Putnam and others for the recovery of four mules, their harness, a wagon, and a saddle, or their value, Putnam, in answer, claimed title and right of possession of three of the mules, without designating which ones, and judgment passed for Putnam for the four mules, or their value, which were valued together only in a gross sum: *Held*, first, that the judgment was not authorized by the pleadings; and, second, that as the judgment can not be modified for want of data, it must be reversed and a new trial granted.

Putnam v. Lamphier, 36 Cal. 171.

163. Where there are no findings, and the case is brought to the supreme court upon the evidence, and the judgment is erroneous, the supreme court will not direct the court below what judgment to enter, but will reverse the judgment, and remand the case for a new trial.

Poorman v. Mills, 43 Cal. 323.

164. The rule laid down in *Piper's* appeal, 32 Cal. 530, as to granting a new trial on the ground that the judgment is not warranted by the evidence, affirmed.

Appeal of Brooks, 32 Cal. 559.

165. The decision of a referee upon a question of fact will not be set aside where the evidence upon such question is conflicting, and where the testimony of some of the witnesses, if credited, supports the finding.

Brady v. Brown, 20 Cal. 520.

166. A court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence before the referee was insufficient to justify his decision.

Cappe v. Brizzolaro, 19 Cal. 607.

167. If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on the ground that the evidence is insufficient to justify the verdict.

Kile v. Tubbs, 32 Cal. 333.

168. Where it is evident that the jury must have acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be ordered. *Miuturn v. Burr*, 20 Cal. 48.

169. The supreme court will not attempt to weigh the evidence and decide between conflicting statements.

Peteric v. Bugbey, 24 Cal. 419.

170. But it will always review the evidence, if the point is made that the verdict or judgment is contrary to the evidence, and if they find there is a substantial conflict in the same, so that the jury might find either way without becoming obnoxious to the charge of passion, prejudice, misconception, or caprice, the verdict will not be disturbed. *Rice v. Cunningham*, 29 Cal. 492.

171. The appellate court will decline to review the facts of the case unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial.

Smith v. Phelps, 2 Cal. 121.

Griswold v. Sharpe, Id. 23.

Whitman v. Sutter, 3 Id. 179.

172. The appellate court will not review the facts of a case unless a new trial was asked in the court below.

Brown v. Graves, 2 Cal. 118.

Smith v. Phelps, 2 Id. 120.

Griswold v. Sharpe, Id. 17.

Ingraham v. Gildermester, Id. 483.

Brown v. Tolles, 7 Id. 398.

Rhine v. Bogardus, 13 Id. 73.

Liening v. Gould, Id. 598.

Hihn v. Peck, 30 Id. 280.

173. The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the court on its own motion, become established facts in the case, and can not be questioned in the supreme court for the first time. *Duff v. Fisher*, 15 Cal. 375.

174. The findings of fact in the court below will not be reviewed on appeal, unless there was a motion for a new trial, and this whether the case be in equity or at law, tried by a jury or by the court.

Gagliardo v. Hoberlin, 18 Cal. 394.

175. Where there is a conflict of testimony on any question of fact, the supreme court will not ordinarily disturb the finding, but where the testimony is all one way on any one point essential to sustain the judgment, and the finding is contrary to the evidence, a new trial will be granted. *Lyle v. Rollins*, 25 Cal. 437.

176. Nor will the court set aside the findings and grant a new trial, on the ground that the findings are not warranted by the evidence, unless the evidence was such that if the questions had been submitted to a

jury, the court would set aside the verdict as contrary to evidence.

Moore v. Murdock, 26 Cal. 524.

177. Where the findings of the court are not warranted by the evidence, a new trial should be granted.

Bolton v. Stewart, 29 Cal. 615.

178. Where there is no evidence upon a point essential to sustain the verdict, a new trial will be ordered.

Cummins v. Scott, 20 Cal. 83.

179. Where the verdict of the jury is clearly against the evidence, a new trial will be awarded. *Hill v. Smith*, 32 Cal. 166.

Bagley v. Eaton, 8 Id. 159.

180. If, in an action to recover lands, the testimony of five witnesses who know the premises, on a question of damages, is contradicted by one who testifies with respect to a much larger tract, including the premises in dispute, but without knowing their location, it is not such a conflict of testimony as will preclude the appellate court from setting aside a finding in accordance with the testimony of the one.

Carpentier v. Gardiner, 29 Cal. 160.

181. The presumption of law is that the evidence warranted the verdict. If the jury in their verdict necessarily pass on a material question of fact, the appellate court will not reverse the judgment, on the ground that there was no evidence to warrant the verdict, unless a motion is made for a new trial, and a statement made which shows that no evidence was introduced to prove the fact. The presumption of law is that there was evidence to sustain every material fact found by the jury. *Doll v. Anderson*, 27 Cal. 250.

182. Where there is no issue tendered in the pleadings upon a material matter, the court or jury will not be presumed to have found on such matter.

Gifford v. Carvill, 29 Cal. 589.

183. The supreme court is not authorized to presume the finding of a fact not within the issue. *Bernal v. Gleim*, 33 Cal. 669.

Error in Law.

184. For error of law, excepted to, an appeal lies, without motion for new trial.

Rice v. Gashirie, 13 Cal. 53.

185. Where improper evidence is submitted to the jury, under objection, a new trial will be granted on appeal, unless the court can see that such evidence could not possibly have had the effect upon the jury prejudicial to the appellant.

Innis v. Steamer Senator, 1 Cal. 459.

Santillan v. Moses, Id. 93.

186. Where incompetent evidence was given, which might have had an influence on the mind of the jury in determining whether certain premises in dispute were included within that portion of the Mission Dolores

which was claimed to be confiscated, or that portion which was said to have been reserved: *Held*, that a new trial should be granted on the ground of the admission of improper testimony. *Santillan v. Moses*, 1 Cal. 92.

187. Whether driving piles in Frontstreet, in the city of San Francisco (the street being laid out over the waters of the bay), is an obstruction to the free use of the street by the public, is a question of fact for the jury; and when that question was not so submitted, a new trial was granted.

San Francisco v. Clark, 1 Cal. 386.

188. Where the instructions of the court, though incorrect in law, are all in favor of the defendant, he can not complain of the error. *Gaven v. Dopman*, 5 Cal. 342.

189. An error in an instruction which does not militate against the appellant, or a mere want of perspicuity on the part of the court below in framing instructions, is not a ground of reversal.

People v. Moore, 8 Cal. 94.

190. If the court instructs the jury upon an abstract proposition not before them, and there is anything in the instruction calculated to mislead, a new trial will be granted. *Slaughter v. Fowler*, 44 Cal. 195.

191. When instructions to the jury upon a material point in issue are contradictory and inconsistent, it is impossible to know by which instruction the jury was influenced, and a new trial will be granted.

McCreery v. Everding, 44 Cal. 246.

192. A verdict of a jury, in disobedience to the instructions of the court, although the instruction itself was not correct in point of law, is a verdict "against law," under subdivision 7, section 193, practice act.

Emerson v. Santa Clara Co., 40 Cal. 543.

193. When there is some competent evidence to support the verdict of a jury, a new trial will not be granted on the ground that it is not supported by the evidence.

Deffeniz v. Pico, 46 Cal. 289.

194. If the court below is of the opinion that the evidence preponderates against the verdict, it is its duty to grant a new trial.

Mason v. Austin, 46 Cal. 385.

195. A new trial will not be granted by reason of an error committed during the trial, which does the moving party no harm.

Gambert v. Hart, 44 Cal. 542.

196. That a judgment is against law is not a ground of motion for a new trial. That a verdict, or other decision of fact, is against law is a ground of motion for a new trial.

Martin v. Matfield, 49 Cal. 42.

197. A verdict obtained upon incompetent evidence may be set aside; but this can not be done if the evidence were admitted without objection; nor can it be done

upon the ground that effect was given to the evidence by the jury, even if objected to.

McCloud v. O'Neill, 16 Cal. 392.

198. On motion for new trial, on the sole ground that the verdict is not sustained by the evidence, the court below, in passing on the motion, can not disregard any portion of the evidence before the jury. The question as to the competency of the evidence can not be raised on such motion. *Id.*

199. In such cases that which vitiates the verdict is the error of the court in admitting the evidence; and if the party seeking to set aside the verdict be not in position to take advantage of this error, he can not object that the evidence was improperly admitted. *Id.*

200. On an appeal from an order denying a new trial in an equity case, the appellate court, under the system of practice in force in this state, will apply the same rule with reference to balancing conflicting testimony which it would if it had been an action at law.

Doe v. Vallejo, 29 Cal. 386.

201. But this rule does not apply when the evidence in the court below consisted of depositions. *Wilson v. Cross*, 33 Cal. 60.

202. The same rule applies to the report of commissioners appointed to assess the damages and estimate the benefits resulting from the widening of a street and to the judgment of a court affirming the report, where the commissioners make a personal inspection of the premises with even greater force than two verdicts, or findings of a court based on evidence alone.

Appeal of Piper, 32 Cal. 530.

203. It is error for the court to instruct the jury to find upon a question of fact in relation to which there is no evidence before them. *Whitman v. Steiger*, 46 Cal. 256.

204. If the court erroneously allows respondent to introduce evidence upon a matter not denied in the answer, but the appellant is not prejudiced thereby, a new trial will not be granted. *Tully v. Harloe*, 35 Cal. 302.

205. A new trial will not be granted on account of the giving of instructions to the jury which could not have injured the party complaining.

Tomkins v. Mahoney, 32 Cal. 231.

206. Although the supreme court may be satisfied that the verdict of a jury is reasonable in amount, a new trial will be granted where an erroneous instruction has been given by the district judge, which may have influenced the verdict.

Yonge v. Pacific Mail Co., 1 Cal. 353.

207. The whole charge of a district judge to the jury should be taken together, and when considered in this way, if it appear that the jury could not have been misled by it, a new trial will not be granted,

although some of the instructions may, in slight respects, be repugnant to each other.

Carrington v. Pacific Mail Co., 1 Cal. 475.

208. Instructions of the court to the jury must all be taken together, and if, when thus viewed, the case appears to have been fairly presented to the jury, the verdict will not be disturbed.

Dwinelle v. Henriquez, 1 Cal. 387.

209. Where, in suit for the value of horses alleged to have been purchased by B., it was proven, among other things, that the horses were purchased for the use of the overland mail line, and the court instructed the jury that, under the evidence, B. was to be considered the sole proprietor of that line: *Held*, that the instruction was wrong, because violating the constitutional provision prohibiting judges from charging juries with respect to matters of fact; but, *held*, further, that as no other conclusion could be arrived at from the evidence, the error could not have prejudiced defendant, and, therefore, is not ground of reversal.

Pico v. Stevens, 18 Cal. 376.

210. An erroneous instruction will be disregarded, if the jury came to the proper understanding and rendered a correct judgment.

Haskell v. McHenry, 4 Cal. 411.

211. Though instructions may not be technically correct, yet if the questions upon which the case turns seem to have been fairly put to the jury, and the verdict sustained by the testimony, the supreme court will not interfere.

Smith v. Harper, 5 Cal. 329.

212. This court will not disturb the instructions of the district court to the jury, on the ground that there was no evidence upon which to base them, when there was some evidence, although it may have been slight.

Pearlberg v. Gorham, 10 Cal. 120.

213. If an objection is taken to evidence by counsel, and the objection is overruled by the court, and no exception is taken to the ruling, the presumption is that the counsel acquiesced in the ruling.

Turner v. Tuolumne W. Co., 25 Cal. 398.

214. Objection to the reception of testimony, whether parol, or in the form of depositions, must be made at the trial, and can not, for the first time, be raised on motion for a new trial. The absence of the party against whom the evidence is offered makes no difference in the rule.

Clark v. Gridley, 35 Cal. 398.

215. To entitle an objection to notice, it must not only be on a material matter affecting the substantial right of the parties, but its point must be particularly stated. The party must lay his finger on the point of his objection.

Kiler v. Kimbal, 10 Cal. 267.

216. In a suit to recover goods on the ground of fraud in the vendee, the admis-

sion of evidence that he was insolvent two months after the purchase is not sufficient to reverse the judgment, unless it is clearly shown that the evidence was irrelevant, and injurious to the party objecting.

Coghill v. Boring, 15 Cal. 213.

217. The admission by the court, under the objection of defendants, of improper evidence offered by plaintiff to prove a fact alleged in his complaint, and not denied in the answer, is no cause for granting a new trial.

Wells v. McPike, 21 Cal. 215.

218. A new trial will not be granted on account of the admission of improper evidence to prove a fact not material to the decision of the action, and independent of which the verdict is supported.

Clark v. Lockwood, 21 Cal. 220.

219. A judgment will not be reversed on account of the admissions of improper evidence which is mere surplussage, and immaterial to the issues.

Mills v. Barney, 22 Cal. 240.

220. A., a witness for plaintiff, when cross-examined, was asked questions by defendant, which, on plaintiff's objection, were erroneously ruled out by the court. Defendant afterwards called the same witness and asked the same questions, which were answered without objection: *Held*, that the judgment would not be reversed by reason of the error committed by the court, as defendant had suffered no injury thereby.

Hicks v. Whiteside, 23 Cal. 404.

221. If the court errs in the admission of testimony during the trial, but afterwards instructs the jury to disregard such testimony, the error is not sufficient to entitle the party objecting to the testimony to a trial.

Union W. Co. v. Crary, 25 Cal. 504.

222. If in the course of a trial a portion of plaintiff's evidence is excluded by the court, and a nonsuit is granted and judgment rendered for defendant, and an order afterwards made granting a new trial, from which defendant appeals, and the record contains the evidence excluded, and the court of review comes to the conclusion that if the evidence excluded had been admitted, plaintiff could not have recovered, the order granting a new trial will be reversed.

Merle v. Mathews, 26 Cal. 455.

223. A court of review will not reverse the judgment of an inferior tribunal for errors committed in excluding evidence, if the evidence excluded is contained in the record, and it appears that the party complaining would not have been entitled to recover if the evidence had all been admitted.

Id.

224. If incompetent testimony is admitted without objection, the court will treat the testimony as competent on motion for nonsuit and on motion for a new trial.

Jansen v. Brooks, 29 Cal. 214.

225. If the court refuses to allow the defendant to **amend his answer**, and then allows him to introduce his evidence on the point to which the amendment referred, and it appears from such evidence, and the facts found upon other issues, that the amendment is material, no injury results from the refusal, and judgment will not be reversed on that ground. *Jones v. Block*, 30 Cal. 227.

226. If there is **uncontradicted testimony** sufficient to warrant the verdict of the jury, the judgment will not be reversed because there was some irrelevant testimony admitted upon the point in issue. *Zeigler v. Wells*, 28 Cal. 263.

227. If the evidence was conflicting, even though the judge who passed on the motion for a new trial did not preside at the trial, and for that reason declined to review the evidence, the supreme court will not disturb the verdict. *Rice v. Cunningham*, 29 Cal. 492.

228. An erroneous ruling by the court, in excluding certain testimony, is not a ground for a new trial where, from the mode of submission to the jury and their finding, it is evident that the testimony offered could have had **no influence** upon the verdict. *Carpenter v. Norris*, 20 Cal. 437.

229. A new trial will not be granted because the court made an **erroneous finding** on an immaterial point. *Lovell v. Frost*, 44 Cal. 471.

230. A new trial will not be granted for an error by which the rights of the party were not prejudiced. *Kilburn v. Ritchie*, 2 Cal. 148.

Tyler v. Green, 23 Id. 406.

Carpentier v. Gardner, 29 Id. 160.

231. A judgment will not be reversed for an error favorable to the appellant. *Wilkinson v. Parrott*, 32 Cal. 102.

232. It is useless to put parties to the additional trouble and expense of a new trial, when we see clearly that after perhaps a protracted litigation, the **result** must be the same. *Tohler v. Folsom*, 1 Cal. 213.

Smith v. Compton, 6 Id. 26.

233. A new trial will not be granted where the evidence shows that a case can not be made out, and it would consequently be a **useless** expense. *Suñol v. Hepburn*, 1 Cal. 285.

234. An order granting a new trial will not be reversed because the **reason** assigned for granting it is a **bad one**, provided there was a good reason for granting the same. *Bolton v. Stewart*, 29 Cal. 615.

235. The appellate court, in reviewing an order granting a new trial, is not confined to the reasons assigned by the court below in granting it. *Id.*

236. If the court below makes an order granting a new trial, and for any cause the order was correct, the appellate court will

not set it aside because the reason assigned for it may have been wrong. *Grant v. Moore*, 29 Cal. 644.

237. An order granting a new trial does not stand or fall upon the reasons which the court making the order assigned for it, but upon all the facts in the record. *Coghill v. Marks*, 29 Cal. 673.

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

Must be in Writing.

238. When the statute speaks of notice of motion, it means written notice. *Borland v. Thornton*, 12 Cal. 448.

239. The reasons for which a motion for a new trial will be made may be stated generally in the notice that such motion will be made. *Butterfield v. C. P. R. Co.*, 37 Cal. 381.

240. If, in an action to obtain the specific performance of a contract, and to have an account taken, the principles upon which the account is to be taken are not raised as issues in the pleadings, but an issue is made only on the plaintiff's right to have the account taken, and the court enters an interlocutory judgment that the plaintiff is entitled to a specific performance, and to have an account taken, and orders a reference to take the account on principles fixed in the order, a notice of motion for a new trial need not be given until ten days after the confirmation of the report of the referee. *Harris v. S. F. S. R. Co.*, 41 Cal. 393.

Time may be Extended Thirty Days.

241. A notice of intention to move for a new trial may be extended by the court thirty days. *Harper v. Minor*, 27 Cal. 113.

242. An order extending time to prepare and file motion for a new trial extends the time to prepare and file a notice of motion for a new trial. *Cottle v. Leitch*, 43 Cal. 321.

243. If an order is made extending the time in which to give notice of a motion to move for a new trial, and the party gives such notice before the statutory time expires, he derives no benefit from the order. *Id.*

244. If, after the findings of fact are filed, a notice of motion for a new trial is given, before the service of notice of filing such findings, **notice of such filing** is rendered unnecessary. *Id.*

245. When written findings are not requested, and none are filed at the time of the decision of a cause tried by the court, the time within which a party intending to move for a new trial shall file and serve his notice will commence running from the **time of service of written notice of the decision**. *Polhemus v. Carpenter*, 42 Cal. 377.

246. When **written findings** are duly requested, as provided in section 180 of the practice act, as amended in 1866, the court is bound, and on proper proceedings will be required to file them; and a party will have ten days after written notice of the filing to move for a new trial. *Id.*

247. The right to give notice of intention is lost when the right to move for a new trial is lost, and the right can not be restored by an order of the court.

Thompson v. Lynch, 43 Cal. 482.

248. A failure to serve a notice of intention to move for a new trial is immaterial, when it appears from the record that the appeal was from the judgment and not from the order denying the new trial.

Young v. Rosenbaum, 39 Cal. 648.

249. Where notice of intention to move for a new trial is not given to the adverse party, nor waived by appearance or otherwise, an order denying the trial can not be reviewed on appeal.

Wright v. Snowball, 45 Cal. 654.

250. An order extending time to prepare and file motion for a new trial extends the time to prepare and file notice of motion for new trial.

Cottle v. Leitch, 43 Cal. 320.

251. If the statement, as settled, recites that the defendant had given notice of his intention to move for a new trial, it will be intended that the notice given was in due time and form.

Frost v. Meetz, 52 Cal. 604.

252. A proceeding to obtain a new trial is not initiated until the notice of the motion is served and filed.

Kelly v. Larkin, 47 Cal. 58.

253. In an equity case, when the special issues are submitted to a jury, and they find thereon, and the court afterwards renders a judgment, the party against whom the judgment is rendered, if he wishes to have the findings of fact reviewed on a motion for a new trial, must wait until the judgment is rendered by the court before giving notice and moving for a new trial.

Bates v. Gage, 49 Cal. 126.

Time within which Notice must be Served.

254. If the notice of motion for a new trial is not served and filed within five days after the rendition of the verdict, where the case is tried by a jury, the right to move for a new trial is waived, and although a statement may be afterwards made, filed, and settled, and the motion for new trial passed on by the court below, yet the supreme court will, if the objection be taken, strike the statement from the transcript.

Ellsasser v. Hunter, 26 Cal. 270.

A special verdict is within the rule.

Garwood v. Simpson, 8 Cal. 108.

Duff v. Fisher, 15 Id. 380.

255. On the rendition of a special verdict, the trial is terminated, and notice of motion for a new trial must be given within the statutory time thereafter, or the proceedings based upon such notice will be disregarded.

Allen v. Hill, 16 Cal. 113.

256. Judgment is rendered when it is announced and entered in the minutes.

Casement v. Ringgold, 28 Cal. 337.

Gray v. Palmer, 28 Id. 416.

Peck v. Courtis, 31 Id. 207.

Genella v. Relyea, 32 Id. 159.

Carpentier v. Thurston, 30 Id. 123.

257. Notice of motion for a new trial may be served within ten days after receiving written notice of the rendering of the decision by the court, if rendered in open court.

Carpentier v. Thurston, 30 Cal. 123.

258. The time to serve notice of intention to move for a new trial does not commence to run till written notice of the rendering of the decision is served.

Roussin v. Stewart, 33 Cal. 208.

259. Where the trial was before the court, without a jury, and it does not appear that the notice of ten days required by the statute was given, the statement can not be objected to on the ground that it was not filed within the time prescribed by the practice act.

Burnett v. Stearns, 33 Cal. 468.

260. If the case is tried by the court, and a decision orally announced in favor of plaintiff from the bench, and entered by the clerk in his minutes, and the judge several days afterwards, in vacation, signs the formal written findings and a draft of judgment, and delivers them to the plaintiff to be filed, a notice served by plaintiff on defendant, on the day of the signing and delivery of said findings and judgment, that the findings have this day been signed by the judge, and his decision herein rendered in favor of plaintiff, is a notice of the findings and decision thus signed in vacation, and not of the decision first made in open court. The decision of which notice was thus given can not be said to have been rendered till it was filed by the clerk and became a record of the court; and a notice of motion for new trial given within two days after such filing is in time.

Carpentier v. Thurston, 30 Cal. 123.

261. Notice of motion for new trial, given one day before judgment rendered, and six days after filing the report of the referee, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of judgment, the notice was premature, and the proceedings on the motion are void.

Mahoney v. Caperton, 15 Cal. 313.

262. Under the practice before the adoption of the code of civil procedure, the party intending to move for a new trial could give

notice of his intention to do so at any time within ten days after the opposite party had given him written notice that the decision had been rendered, provided the case was tried by the court and no written findings had been filed.

Sawyer v. San Francisco, 50 Cal. 370.

263. A notice of intention to move for a new trial must be filed within **thirty days** after the findings of fact are filed.

Coveny v. Hale, 49 Cal. 552.

264. The party intending to move for a new trial must file with the clerk, and serve upon the adverse party, notice of his intention to do so, within thirty days after the decision or verdict.

Clark v. Gridley, 49 Cal. 105.

Time when Case is Sent to Referee.

265. If the case is tried by the court, and findings of fact are made and filed, and the case is then sent to a referee to take and state an account, the necessary steps to apply for a new trial should not be taken until the final report of the referee is filed.

Crowther v. Rowlandson, 27 Cal. 376.

Notice, How Waived.

266. On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial.

Williams v. Gregory, 9 Cal. 76.

267. If the record does not show that the party resisting an application for new trial proposed any amendments to the statement, or participated in its settlement, it will not be presumed that he waived service of notice.

Calderwood v. Brooks, 28 Cal. 151.

Notice, When Waived.

268. Notice of intention to move for a new trial must be given to the opposite party or his attorney within the time required by the one hundred and ninety-fifth section of the practice act, or the right to move for a new trial is waived.

B. R. & A. Co. v. Boles, 24 Cal. 354.

269. If a party who does not give notice of motion for a new trial files a statement, and the opposite party settles the statement, or files amendments, and the statement is settled without reserving his right to object for want of notice, he waives the notice.

Hobbs v. Duff, 43 Cal. 485.

Notice Necessary to Confer Jurisdiction.

270. If the notice is not given or waived, the making and filing of a statement does not give the court jurisdiction over the subject-matter of a new trial, and an order granting a new trial will be reversed.

B. R. & A. Co. v. Boles, 24 Cal. 354.

Acknowledgment of Service.

271. An acknowledgment of service indorsed on a notice of appeal as follows: "Duo service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late.

Towdy v. Ellis, 22 Cal. 650.

272. G. D. B. filed his complaint signed, "G. D. B., plaintiff's attorney." On the trial G. D. B. and H. V. R. appeared as counsel for the plaintiff. Service of motion for a new trial was accepted by "H. V. R., one of the attorneys for the plaintiff." Service of notice of appeal was admitted by "G. D. B. and H. V. R., plaintiff's attorneys." Service of the transcript was admitted by "G. D. B. and H. V. R., attorneys for plaintiff and respondent." Transcript was indorsed "G. D. B., Esq., and H. V. R., Esq., attorneys for respondent," and briefs filed with similar indorsements. Then G. D. B. files a separate brief, making the point that the notice of motion for new trial had not been served upon himself as attorney of record: *Held*, that the objection came too late.

Sowden v. Idaho M. Co., 55 Cal. 443.

Filing Second Notice.

273. A party can not abandon the first notice and file a second.

Le Roy v. Rasette, 32 Cal. 171.

Presumption that Notice was Duly Given.

274. A case where it was presumed that a notice of motion had been regularly given, although none appeared in the record.

Godchaux v. Mulford, 26 Cal. 316.

Notice, Effect of, as a Stay.

275. A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment, and preserves all rights until it can be heard and determined; and is not affected by the adjournment of the court for the term.

Lurvey v. Wells, 4 Cal. 106.

276. Pendency of a motion for a new trial does not operate as a suspension of an injunction.

Ortman v. Dixon, 9 Cal. 23.

277. If, after the court has filed its finding of facts, and made an order sending the case to the referee, to take and state an account, a motion is made for a new trial, the motion will not stay the proceedings pending before the referee.

Crowther v. Rowlandson, 27 Cal. 376.

THE STATEMENT.

In Cases Tried by a Referee.

278. The provisions of the practice act relating to new trials are general, and vest

in courts the same power, in cases tried by a referee, as in cases tried by the court itself, or by a jury. *Cappe v. Brizzolara*, 19 Cal. 607.

Office of Statement.

279. The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section 193 of the practice act, and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial.

Harper v. Minor, 27 Cal. 107.

280. There is no distinction as to the manner in which a statement is to be prepared between a case at law and a case in equity. The grounds of appeal must in both cases be stated; and in both cases much, if not the greater portion, of the evidence will be immaterial for the determination of these grounds in the supreme court.

Barrett v. Tewksbury, 15 Cal. 354.

Rulings Reviewed without Motion.

281. It seems that errors in the rulings of the court below will be reviewed on appeal, although no motion for a new trial is made or overruled.

Soule v. Dawes, 6 Cal. 473.

Allen v. Hill, 16 Id. 117.

Cravens v. Dewey, 13 Id. 42.

282. Where plaintiff was nonsuited on the ground that the allegations of the complaint were not sustained by the evidence, and judgment for costs rendered against him, no motion for new trial is necessary.

Darst v. Rush, 14 Cal. 81.

283. Where the questions in a case arise upon motion for nonsuit, and upon the action of the court in giving and refusing instructions, a motion for new trial is unnecessary.

Sullivan v. Cary, 17 Cal. 80.

284. In a vast majority of cases there would be no occasion for a motion for a new trial, if the findings were what they ought to be; for, in nine cases out of ten, where the trial is by the court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this court in any form. Every such case ought to come here upon the judgment roll.

Tewksbury v. Magraff, 33 Cal. 237.

Three Distinct Steps to be Taken.

285. There are three distinct steps recognized by the practice act in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed: First, a notice of intention to move for a new trial; second, filing and

serving statement or affidavits; third, the motion for a new trial.

Jenkins v. Frink, 27 Cal. 337.

286. An order extending the time for taking either of these steps should express with precision the object to be attained. Id.

Preparing, Filing, Serving, Amending and Settling Statement.

Time for.

287. The statement must be filed within five days after the notice of the motion is served on the opposite party; or, if the time for giving notice of motion for a new trial is extended by the court, the party to whom the extension is given has five days from the time notice is given within which to file his statement as an absolute right, and the court has power to extend the time twenty days further.

Harper v. Minor, 27 Cal. 107.

288. If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavits, by consent of the respective attorneys, the respondent is precluded in the appellate court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served.

Millard v. Hathaway, 27 Cal. 119.

289. Where the statement on motion for a new trial is not filed within the time prescribed by law, this court will only look to the judgment roll.

Lafferty v. Brownlee, 11 Cal. 132.

290. An order of court granting a party twenty days within which to file a statement, to be used on a motion for a new trial made before a notice of intention to move for a new trial has been given, must be construed as extending the time to file the statement twenty days from the date of the order, and not twenty days from the time the notice is given.

Easterby v. Larco, 24 Cal. 179.

291. An order of court allowing a party twenty days within which to file a statement on motion for a new trial must be construed as giving twenty days from the date of the order, and not twenty days beyond the time of giving notice, or twenty days beyond the time allowed by statute.

Jenkins v. Frink, 27 Cal. 337.

292. The court has no power to extend the time more than twenty days beyond the expiration of the five days' notice.

Harper v. Minor, 27 Cal. 114.

293. An order made by the court, after time fixed by the one hundred and ninety-fifth section of the practice act for filing a statement on motion for a new trial has expired, extending the time to file a statement, is void. The court made the following order the day after the rendition of judgment: "It is ordered that all proceedings under the

judgment recovered by plaintiff against defendants be, and they are hereby, stayed and superseded until the fifth day of May next, in order that counsel may present and prepare his statement on motion for new trial." *Held*, that this order did not extend the **statutory time** within which to file a statement. A notice of motion for a new trial should be in writing.

B. R. & A. Co. v. Boles (No. 1), 24 Cal. 354.

294. Where an order has been made extending the time allowed by statute to prepare a statement on motion for a new trial, and the **term has adjourned**, the court has no **power** at a subsequent term to **amend the order**, so as to make it include a notice of intention to move for a new trial, unless a motion to amend has been made at the term during which the order was entered and continued, or unless the record discloses that the entry does not correctly give what was the order of the court.

De Castro v. Richardson, 25 Cal. 49.

295. If the statement on appeal from a judgment is not served on the respondent's attorney until more than twenty days after the rendition of the judgment, and no extension of time is obtained, a statement is **waived** and the appellate court can not review any alleged errors, except such as appear in the judgment roll.

Kavanagh v. Maus, 28 Cal. 261.

296. Under section 195 of the practice act, either the court or a **court commissioner** may extend the time for filing a statement on motion for a new trial twenty days beyond the five or ten days given by statute.

Carrillo v. Smith, 37 Cal. 337.

297. Where a judge on being asked to extend the time for filing a statement on motion for new trial, said that he would have an order to that effect entered of record at the meeting of the court, but failed, by **oversight**, to have it done: *Held*, that the time was not extended.

Campbell v. Jones, 41 Cal. 515.

298. An order extending the time for filing statement, on motion for new trial, should in all cases be **in writing**, and either entered on the minutes of the court, in open session, or signed by the judge and filed within the time prescribed by section 195 of the practice act.

Id.

299. An order extending the time in which to file a statement on motion for a new trial, thirty days beyond the time allowed by law, can only have the force of extending such time twenty days.

Cottle v. Leitch, 43 Cal. 320.

300. A statement on motion for a new trial need not be **served** unless there is a rule of court requiring service. The statute only requires such statement to be filed.

Brundage v. Adams, 41 Cal. 619.

Manner of Preparing Statement.

301. The statute prescribing the practice in motions for new trials is plain and simple. The moving party prepares his statement, and submits it to the opposite party. If satisfactory to him, they add a certificate, which they sign. If not, he proposes amendments, and submits them to the moving party, and if they are accepted by him, the statement is then engrossed accordingly, and to the engrossed copy a certificate is added, and signed by them, to the effect that the statement is correct and agreed to by them. If they can not agree, the statement and proposed amendments are submitted to the judge, who allows or denies according to circumstances. After the judge has thus determined what shall constitute the statement, it is engrossed accordingly, and a certificate added to the effect that it is correct, and if not signed by counsel, must be signed by the judge. Nothing can be regarded by the supreme court as a statement which is not authenticated in one of these modes.

Cosgrove v. Johnson, 30 Cal. 510.

Introducing Evidence, etc., in Statement.

302. The statement should contain a clear **specification** of the particular grounds relied on by the appellant, and then so much of the **evidence**, rulings of the court, instructions, etc., as may be necessary to explain the points relied on.

Hutton v. Reed, 25 Cal. 493.

McMain v. Whelan, 27 Id. 319.

303. Evidence not bearing on the points specified in the statement should be excluded.

Harper v. Minor, 27 Cal. 167.

304. If the appellant insists that the verdict is not supported by the evidence, the statement should state in **what particulars** it is **insufficient**, and contain all the evidence on the point or points relied on, and no more.

Id.

305. Judges or courts, in settling statements, should see that the above rule is complied with.

Id.

306. Instruments are sometimes admissible for one purpose and inadmissible for another; and when objected to, the grounds of the objection should be stated; and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the **pertinency and materiality of the objections** taken, otherwise they can not be regarded.

Provost v. Piper, 9 Cal. 552.

307. Omit all matter that does not seem to illustrate the points made on appeal.

Leave out **verifications, acknowledgments** of deeds, and titles of court, where no point is made on them.

Where the record is certified by the attorneys, it will answer all purposes to say,

"duly verified," "duly acknowledged," "title of the cause," etc., substituting the date of the document or filing.

Estate of Boyd, 25 Cal. 513.

See also, to the same effect, 27 Cal. 654.

308. A copy of the statement on motion for a new trial, which is made a part of the statement on appeal from the order granting a new trial, and in which certain exhibits are referred to, and directed to be incorporated therein, but are not inserted, does not tend to show that such exhibits were not considered on the hearing of the motion for a new trial. *People v. Bartlett*, 40 Cal. 142.

309. It is seldom necessary to insert an entire deed in a statement. When the deed is regular, and no question is made on it, it is sufficient to say that a deed was introduced from A. to B., showing that A.'s title had vested in B.

Kimble v. Semple, 31 Cal. 657.

310. Deeds may be inserted in the transcript instead of the statement, if they are mentioned in a statement on motion for a new trial as having been in evidence.

Hess v. Winder, 30 Cal. 349.

311. Instead of copying into a statement, for a new trial or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose, and is all that the practice act requires. *Knowles v. Inches*, 12 Cal. 212.

312. Where documentary evidence is referred to in the statement on motion for a new trial, and directed to be inserted, the appellant can not, without the assent of the other party, insert copies of the same in the transcript on appeal, unless the statement has been engrossed as settled, and afterwards authenticated, or unless the originals are on the files of the court or constitute a part of its record, so that they can be authenticated as a part of such record by the certificate of the clerk. *Kimble v. Semple*, 31 Cal. 657.

313. Where documents and depositions are read or referred to on the argument of a motion for a new trial in the court below, and are not embodied in the statement, it will be sufficient for the judge to add, upon rendering his decision, a certificate of the matters thus read or referred to. This certificate will be sufficient identification of the documents and depositions used, and a copy of them, together with the statement and judgment roll, will constitute the only record necessary in the supreme court.

Loucks v. Edmondson, 18 Cal. 203.

314. If a deed is mentioned in a statement on motion for a new trial as having been in evidence, but is not presented in the statement, the appellant may make it a part of the record on appeal by printing it in the transcript, with a certificate of the judge

that it is the deed referred to in the evidence, and that it was before him on motion for a new trial.

Hess v. Winder, 30 Cal. 349.

315. The finding of the court need not be embodied in the statement or bill of exceptions.

Reynolds v. Harris, 8 Cal. 618.

Specification of Grounds of Error.

316. A specification of the particular grounds of error is the essential element of a statement; the evidence is the mere incident. *Hutton v. Reed*, 25 Cal. 483.

Patridge v. San Francisco, 27 Id. 415.
Fitch v. Bunch, 30 Id. 208.

317. An erroneous construction may be assigned for error, if there be any evidence rendering it pertinent to the issue.

Barrett v. Tewksbury, 15 Cal. 359.

318. Assignments of error may be as follows: That the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question; that the suit is barred by a former adjudication between the same parties upon the same subject-matter; that the property in question was the separate property of the wife; that the cause of action is barred by the statute of limitations. Id.

320. A specification of errors, made in the language of section 193, is sufficient.

Hutton v. Reed, 25 Cal. 490.

321. If there is only one question of error that could be raised on the record, this does not excuse the necessity of specifying it. *Zenith M. Co. v. Irvine*, 32 Cal. 302.

322. The appellate court will not entertain an objection, however well founded, unless it is specified as an error in the statement.

Crowther v. Rowlandson, 27 Cal. 385.

Moore v. Murdock, 26 Id. 524.

Burnett v. Pacheco, 27 Id. 408.

323. If the statement on motion for a new trial does not specify the particulars in which the evidence is alleged to be insufficient, the appellate court will assume the facts admitted in the pleadings as well as those found.

Love v. Sierra Nevada Co., 32 Cal. 639.

324. There may be some cases of equitable relief where the general ground of appeal will be that the decree is not warranted by the evidence; still, in the majority of cases this general ground will be subject to more particular specification; or that the evidence does not establish a contract, or show a tender, or compliance with particular conditions precedent, or the like, which will constitute the matters urged upon the court.

Barrett v. Tewksbury, 15 Cal. 358.

325. On an appeal by a defendant from an order denying a new trial, among the grounds for the motion was, "error in disregarding the evidence offered by defendant to show the title to the lands in dispute to be

in him, and in sustaining either or any of the objections made by the plaintiff to the admissibility of said evidence, or any part thereof." This form of specifying the grounds of the motion disapproved, but the point considered on appeal under the peculiar circumstances of the case.

Sharp v. Lumley, 34 Cal. 611.

326. If a new trial is applied for on the ground that the findings of fact are against the evidence, the moving party should specify in his statement each particular finding of fact which, in his opinion, is against the evidence, instead of stating in general terms that an alleged finding, which is the result of several facts found separately, is against the evidence. Le Roy v. Rogers, 30 Cal. 229.

327. Specifications in a statement on motion for new trial, "that the first finding is not sustained by the evidence," "that the second finding is not sustained by the evidence," etc.: *Held* (with reference to the finding cited by the court), to be insufficient. Eddebuttel v. Durrell, 55 Cal. 277.

328. *Held*, that an objection to the verdict, that it included the value of the property thus released, could not be considered under the specification (of insufficiency of evidence) that the said property had never been taken by the defendant.

Rider v. Edgar, 54 Cal. 127.

329. Where on motion for new trial the verdict is objected to on the ground that the damages are assessed in too great or too small a sum, it is a sufficient specification to say that the verdict in respect to said damages is not sustained by the evidence.

Du Brutz v. Jessup, 54 Cal. 118.

330. It is not enough that in the history of a case exceptions appear scattered here and there through a statement made on motion for a new trial; but it is necessary in the statement to specify the particular errors upon which a party will rely.

Beans v. Emanuelli, 36 Cal. 117.

331. If, at the close of a statement on motion for a new trial, the moving party says that he "will rely on the argument of the motion for new trial in this cause upon the following grounds," and then enumerates his grounds, he will be considered as abandoning all the grounds not enumerated.

Id.

332. On appeal from an order denying a new trial, this court will not review the action of the court below in refusing an instruction asked by the appellant to be given to the jury, although at the time duly expected to, where the appellant failed to include it in his specification of errors on motion for a new trial.

Richardson v. Kier, 37 Cal. 263.

333. An assignment of errors at common law, even if included in a statement on

motion for a new trial, is not such a specification of the errors upon which a party will rely as is required by our practice act.

Butterfield v. C. P. R. Co., 37 Cal. 381.

334. An assignment of errors appended to the end of a transcript, but not included in the statement on motion for a new trial, is not a specification of the particular errors upon which the party will rely, even if sufficient in form as such specification. The specification must be in the statement itself.

Id.

335. The grounds of motion for a new trial are indispensable to the statement. They constitute its basis, and if they are wanting, the statement should be disregarded.

Spencer v. Long, 39 Cal. 700.

336. When a motion for a new trial is made on a statement, no point will be considered by the court, and no alleged error will be noticed, unless it is specified under one of the grounds of the motion.

Hawkins v. Abbott, 40 Cal. 639.

337. The specification of reasons why a new trial should be granted, to be made in the statement, is not a general one of errors, in admitting or excluding the evidence, as set forth in the foregoing statement, but a particular specification, and a pointing out and reference to each alleged error.

People v. C. P. R. Co., 43 Cal. 398.

338. On appeal, the facts as stated in the findings must be accepted as facts in the case, where the statement on motion for new trial does not specify wherein the evidence is insufficient to support them.

Cowing v. Rogers, 34 Cal. 648.

339. A specification in a statement on a motion for a new trial in a case tried by the court where findings of fact have been filed, that a particular finding, naming it, was not justified by the evidence, is sufficient to enable the court to review the evidence so far as it relates to each finding thus pointed out.

Strang v. Ryan, 46 Cal. 33.

340. When a motion is made for a new trial on the ground that the evidence is insufficient to justify the verdict, a specification of such insufficiency of the evidence is good if it direct the attention of the adverse party to the particular point on which it is claimed the evidence is insufficient.

McCullough v. Clark, 41 Cal. 298.

341. A statement on motion for a new trial should be settled or agreed to by the parties, and should contain specifications of the grounds upon which the moving party will rely.

Budd v. Drais, 50 Cal. 120.

342. A specification in a statement on motion for a new trial, that there was no evidence tending to show that the defendant wrongfully entered upon the demanded premises, or ejected the plaintiff therefrom, is not sufficient to enable the court to review

the evidence on such point. It only points to the character of the defendant's entry.

Doherty v. Enterprise M. Co., 50 Cal. 187.

343. If the statement of the plaintiff on motion for a new trial, specifies as a reason why a new trial should be granted, that "there is no evidence to show that the title ever has been in the defendant," it is sufficient to enable the court to review the evidence as to the defendant's title by **adverse possession**. Morris v. De Celis, 51 Cal. 55.

344. A statement on motion for a new trial, if filed **before it is settled**, need not be filed afterwards.

Gately v. Irvine, 51 Cal. 172.

345. A statement on motion for new trial, which does not **specify** the particular **reasons** on which the party will rely for a new trial, must be disregarded.

Ferrer v. Home Mutual, 47 Cal. 416.

346. Neither the notice of motion for a new trial, nor affidavits filed in support of such motion, have properly any place in a statement on motion for a new trial. *Id.*

347. The failure to insert in a statement the **particular points** on which the party will rely is not cured by inserting such points in the notice of motion for a new trial. *Id.*

348. Specifications in a statement for a new trial "of particulars in which the court erred," can not be considered as specifications of the particulars wherein the **evidence was insufficient**. Smith v. Christian, 47 Cal. 18.

349. A stipulation made on the day that a statement, on motion for a new trial, should be filed, "that the foregoing constitutes a true and correct, engrossed and settled statement, . . . hereby waiving all informalities in respect to filing and service of the same," does not justify the moving party in **neglecting to file** the statement for five months after the date of the stipulation.

O'Neil v. Dougherty, 47 Cal. 164.

350. In such case the right to move for a new trial is waived by the neglect to file the statement. *Id.*

351. A statement on motion for a new trial made before the code took effect, must, if it is claimed that the verdict is against the evidence, specify the particulars wherein it is claimed that the **evidence is insufficient**.

Coleman v. Gilmore, 49 Cal. 340.

352. Even if counsel for the respective parties may, by **consent**, reserve the right to except to the charge of the court to a jury, this consent is of no avail unless the exception is contained in the statement on motion for a new trial. *Id.*

353. A statement in support of a motion for a new trial must specify the particular errors of the law relied on, and the **particu-**

lar reasons why the verdict is alleged to be contrary to the evidence.

Hill v. Weisler, 49 Cal. 146.

354. The appellant from an order denying a new trial can not avail himself of an error appearing in the statement, unless he mentions it in his specification of **reasons** why a new trial should be granted.

Himmelmänn v. Hoadley, 44 Cal. 213.

355. When a **nonsuit** is granted, and the plaintiff makes a statement on motion for a new trial, in the specification of reasons why a new trial should be granted, he must insert the alleged error of granting a nonsuit.

McCreery v. Everding, 44 Cal. 284.

356. It is sufficient in the specification made in the statement on motion for a new trial, of reasons why a new trial should be granted, to assign errors in law occurring by "giving of each of the instructions asked by the defendants." Such specification sufficiently points out the **particular errors** in the instructions relied on. *Id.*, 246.

357. When the **findings** of fact are **defective**, the remedy is by motion in the statutory mode, in the first instance, for their correction; while, if made contrary to the evidence, the remedy is by specifying the erroneous findings on motion for a new trial.

Pralus v. Jefferson M. Co., 34 Cal. 558.

358. If the moving party, on motion for new trial, intends to rely on the point that a finding of fact is contrary to the evidence, he should specify in his statement wherein such finding is not justified by the evidence. It is not sufficient for him to state generally that the **evidence is insufficient** to justify the findings. Beans v. Emanuelli, 36 Cal. 117.

359. The allegation in the statement, on a motion for a new trial, that the **verdict is against law**, is not sustained by showing that it is not justified by the evidence.

Brunnagim v. Bradshaw, 39 Cal. 24.

360. A statement on motion for a new trial must contain the specifications particularly pointing out wherein the judgment is not warranted by the evidence, or wherein the **facts found are contrary to the evidence**, or what the errors in law were, if the new trial is asked on said grounds, or it will be disregarded.

Kusel v. Sharkey, 46 Cal. 3.

361. Where, notwithstanding written findings have been filed, the judgment rendered therein rests upon other findings of fact not expressed, but which will be implied, it is competent for the losing party, without excepting for the want of express findings, to move for a new trial on the ground, among others, that the evidence is insufficient to sustain the findings of the court, under which specification he may avail himself of the **insufficiency of the evi-**

dence to sustain the implied, as well as the expressed findings of fact.

Morrill v. Chapman, 35 Cal. 85.

362. Where in such case the defendants moved for a new trial, which was denied, upon a statement containing the evidence, on the ground that said **presumed findings** were contrary to the evidence, this court will, on appeal from the order denying the motion, review said evidence, as though the court below had expressly found on all of said issues against the defendants, and if the evidence, without a substantial conflict, is against such presumed findings, or such of them as are essential to sustain the judgment, this court will reverse the judgment and grant a new trial.

Steinback v. Krone, 36 Cal. 303.

363. D. R. sued C. R. for the recovery of money alleged to be due as part of the purchase price of land held in common; C. R. denied the debt, alleged a copartnership, and indebtedness by D. R. to him; he demanded judgment for a dissolution of the copartnership, an accounting, and a sale of the land. The court decreed a sale of the land and the payment of a sum of money to D. R., the remainder of the proceeds to be equally divided between the parties. The record failed to show findings as to the existence of the copartnership, or as to the tenancy in common. On appeal from the judgment upon the judgment roll alone: *Held*, that the judgment must be reversed and the cause remanded for a **restatement of account** between the parties, or for a new trial, as the court below may direct.

Robinson v. Robinson, 42 Cal. 270.

364. Where the statement on motion for new trial fails to state the particulars in which the **evidence** is claimed to be **insufficient to sustain the verdict**, the point will be disregarded on appeal.

Reamer v. Nesmith, 34 Cal. 624.

365. Where a statement on motion for new trial fails to "specify the particulars" wherein the evidence is sufficient to justify, or is contrary to the findings of fact, such findings will not be reviewed on appeal as to their sufficiency in those respects.

Pralus v. Pacific M. Co., 35 Cal. 30.

366. Where a statement on motion for a new trial fails to specify wherein the evidence is insufficient to justify the decision, such insufficiency as a ground of the motion will be disregarded.

Sanchez v. McMahon, 35 Cal. 218.

367. Where the statement on motion for a new trial did not contain that part of the evidence upon which the sufficiency of which the truth of said implied findings of fact depended, but showed merely that the moving party, at the trial, "introduced evidence tending to prove" a state of facts adverse to those thus impliedly found, and the express

findings were clearly sustained by the evidence set out in the statement: *Held*, that the statement was insufficient to show the moving party entitled to a new trial, because it did not appear that said evidence which "tended to prove," amounted, in fact, to proof of said state of facts.

Morrill v. Chapman, 35 Cal. 85.

368. A statement on motion for a new trial must contain a specification of the particular errors upon which the party moving for a new trial will rely; and if one of the grounds is that the evidence is insufficient to justify the verdict, it must specify the particular in which the evidence is sufficient, or it will be disregarded by the court.

Butterfield v. C. P. R. Co., 37 Cal. 381.

369. Under section 195 of the practice act, this court can not review the action of the court below in refusing a new trial, if the statement upon which the motion is founded fails to specify the particulars in which the evidence is insufficient to justify the decision, and there be no **errors of law**, except on the assumption that the decision was contrary to the evidence.

Green v. Killey, 38 Cal. 201.

370. The appellate court will not review any **finding of fact** by the court below, unless the statement on motion for a new trial specifies the particulars in which the evidence is alleged to be insufficient to justify the findings.

Spanagel v. Dellinger, 38 Cal. 278.

371. If the statement on motion for a new trial fails to specify wherein the evidence was insufficient to justify the verdict, the appellate court is precluded, by the statute, from all inquiry upon that subject, notwithstanding the statement purports to contain **all the evidence** given on the trial.

Brumagim v. Bradshaw, 39 Cal. 24.

372. A statement on a motion for a new trial, which does not specify particularly wherein the evidence is insufficient to sustain the judgment, nor any **error alleged to have occurred** at the trial, is insufficient.

Harding v. Vandewater, 40 Cal. 77.

373. The points that the evidence failed to establish a compliance with the conditions precedent of a deed under which the prevailing party claimed, and that the evidence failed to show that the property in controversy was within the calls of such deed, can not be urged in the supreme court, if not specified as grounds of a motion for a new trial.

Footte v. Richmond, 42 Cal. 439.

374. On a motion for new trial the general ground of insufficiency of the evidence to justify the findings is of no avail, unless there are proper specifications of particulars wherein it is insufficient.

Id.

375. The **presumption** is that all the testimony is included in a statement on mo-

tion for new trial, unless the contrary appears. *Clark v. Gridley*, 35 Cal. 398.

376. Newly discovered evidence relied on to obtain a new trial has no place in a statement. It should be presented in affidavits. *Beans v. Emanuelli*, 26 Cal. 117.

377. The judgment roll need not be inserted in a statement on motion for a new trial.

Butterfield v. C. P. R. Co., 37 Cal. 381.

Defective Specification of Errors—Remedy.

378. If the statement and notice of motion for new trial are defective, in not setting forth, specifically, the grounds of the motion, an objection should be made on this ground, in the court below, to enable the supreme court to review the action of the court below. *Brady v. O'Brien*, 23 Cal. 244.

Omission of Specifications.

379. When the appeal is from an order denying a new trial, and the statement does not contain the specific grounds of error relied on, the order will be affirmed, or, on motion, the appeal will be dismissed.

Hutton v. Reed, 25 Cal. 478.

Walls v. Preston, 25 Id. 59.

Affidavits.

380. Affidavits in support of a motion in the court below will not be considered by the supreme court unless they are incorporated in the statement or bill of exceptions.

People v. Honshell, 10 Cal. 83.

381. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent on the face of the record.

Branger v. Chevalier, 9 Cal. 353.

382. Affidavits or documents copied into the transcript on appeal, but not made a part of the record, either by a certificate of the clerk or judge, or by a statement, or bill of exceptions, can not be considered.

Gordon v. Clark, 22 Cal. 533.

383. It is not error for the court to exclude affidavits filed on a motion for a new trial, which were written in a foreign language. *Spencer v. Doane*, 23 Cal. 419.

Waiver of Objections for Want of Statement.

384. The following is a copy of the order of the court in denying the application for a new trial: "Now, on this day, in open court, comes on to be heard defendant's motion for a new trial, and thereupon, after having heard the arguments of counsel, the court overrules the same, to which ruling of the court de-

fendants, by counsel, except:" *Held*, that the order did not show an appearance of the counsel of the plaintiff at the argument of the motion, and, therefore, did not show a waiver of the objection to the filing of the statement. *Munch v. Williamson*, 24 Cal. 167.

385. A stipulation to refer the whole matter is a waiver of any objection that the motion for a new trial and to set aside the award was not made in statute time.

Heslep v. San Francisco, 4 Cal. 2.

386. The party who claims the benefit of a waiver of the failure to file a statement in due time must prove it beyond doubt, and not leave it to be ascertained by conjecture or doubtful inference.

Munch v. Williamson, 24 Cal. 167.

387. Proposing amendments to a statement is not a waiver of the objection that the statement was not filed in time, if such objection is reserved, and no particular form of reserving the objection is required.

Cottle v. Leitch, 43 Cal. 321.

Amendments.

388. The time within which proposed amendments to a statement on motion for a new trial are to be made and filed is left for the regulation of the court.

Vilhac v. Biven, 28 Cal. 409.

389. Five days is a reasonable time.

Warden v. Mendocino Co., 32 Cal. 655.

390. A defendant in a motion for a new trial may file amendments to the statement without waiving his right to object that the notice or statement was not filed or served in time, by a preface that he does so without prejudice to his right to object at the hearing to the notice or statement on these grounds. *Quivey v. Gambert*, 32 Cal. 304.

391. The statute makes no provision for the service of amendments to a statement or a copy thereof upon the adverse party, and if notice is given of the time and place of the settlement of a statement before the judge, the engrossed statement as settled will not be stricken out because the amendments were not served on the opposite party.

Vilhac v. Biven, 28 Cal. 409.

Notice of Settlement.

392. If the notice of the time and place of the settlement of a statement before a judge on motion for a new trial is given to the appellant, and he does not attend, he can not afterwards complain of the statement as settled. *Vilhac v. Biven*, 28 Cal. 409.

393. Proposing amendments to a statement on motion for a new trial is a waiver of a failure to serve a notice of the motion, unless the party proposing the amendments makes the objection, or reserves his right to make it, when he proposes his amendments.

Brundage v. Adams, 41 Cal. 619.

Settlement and Authentication of.

394. The practice which prevails in some of the lower courts, of **submitting a motion** for a new trial, and **not preparing the statement** until after the motion has been denied, is irregular and not to be tolerated. *Waggenheim v. Hook*, 35 Cal. 216.

395. Such statement should be **settled** by the judge, and **certified** by him before the motion is decided. *Id.*

396. A paper containing the grounds of a motion for a new trial, if **unsigned**, constitutes no part of the statement. *Spencer v. Long*, 39 Cal. 700.

397. It is the duty of the court to settle a proposed statement in all cases where the attorneys are **unable to agree** to it as filed, no matter what reasons exist which render them unable to agree to it.

Lucas v. Marysville, 44 Cal. 210.

398. New trials may be granted by the county court in cases of appeal from the judgment of a justice of the peace, and it is the duty of the county judge to settle a statement or motion for a new trial which has been duly filed and presented to him for settlement. *Cummings v. Irwin*, 40 Cal. 354.

399. A statement which was filed in the court below, on motion for a new trial, and is neither agreed to by counsel nor settled by the judge trying the case, has not sufficient authentication to constitute any portion of the record which this court can notice.

Doyle v. Seawall, 12 Cal. 425.

Paige v. O'Neal, 12 Id. 492.

400. The **certificate of a judge** is a sufficient authentication of a statement; and where a party does not think proper to file amendments, or the judge to correct the statements, the certificate of that fact by the judge is all that is necessary.

Redman v. Gulnac, 5 Cal. 148.

401. If the statement filed in support of a motion for a new trial is not settled by the judge, it can not be therefore inferred that it was agreed to. Such statement must either be **agreed to**, or it must be **settled** by the judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected.

Linn v. Twist, 3 Cal. 89.

402. It is no objection that the statement does not affirmatively show that the settlement was upon proper **notice**, or in the presence of both parties. In the absence of evidence to the contrary, the **presumption** of law is in favor of the **regularity** of all official acts. *Battersby v. Abbott*, 9 Cal. 565.

403. A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the records. *Jessup v. King*, 4 Cal. 331.

404. A statement on motion for a new

trial must specify the particulars wherein it is alleged the evidence is insufficient to justify the verdict and the errors upon which the appellant will rely.

Vilhac v. Biven, 28 Cal. 409.

405. A statement on motion for a new trial will not be regarded unless it is **agreed to by the attorneys** of the respective parties, or **settled and authenticated by the court**. *Cosgrove v. Johnson*, 30 Cal. 509.

406. A motion by the moving party to **strike out** the other party's proposed amendments to his statement on a motion for a new trial, and a denial thereof by the court, is not a settlement and authentication of the statement by the court.

Id.; *Harley v. Young*, 4 Cal. 234.

407. Where the statement is filed and served by the moving party, on motion for a new trial, and amendments thereto are made by the opposing party, and the only settlement of, or certificate to, the same was an **indorsement** by the judge at the bottom of the settlement that the amendments to the statements were allowed: *Held*, that the statement would not be considered on appeal.

Baldwin v. Ferre, 23 Cal. 461.

408. Where the record shows simply a statement signed by the district judge, without any **certificate** preceding as to the correctness of the statement, and it does not purport to be a statement on motion for a new trial, and no order appears disposing of the motion for new trial: *Held*, that there is no statement on motion for a new trial or on appeal. And the **grounds of the motion** for new trial not being filed within the time required by law, the appeal is from the judgment alone.

McCartuey v. Fitz-Henry, 16 Cal. 184.

Settlement by Stipulation.

409. If the attorneys for appellant and respondent stipulate in writing that the statement contained in the record is a correct statement on motion for a new trial, and that the judgment roll, orders, and instructions, given and refused by the court, the statement and stipulation constitute a true and correct statement on appeal to the supreme court, and may be used as such without further certificate or identification; all technical objections to the transcript are waived, and it will be presumed that a notice of motion for a new trial was regularly given, although none appear in the record.

Godchaux v. Mulford, 26 Cal. 316.

410. If the parties agree to a statement of facts, and stipulate that it may be used by either party in any and all proceedings in the action, the statement of facts becomes a part of the judgment roll.

Burnett v. Pacheco, 27 Cal. 409.

411. If a statement on motion for a new

trial is prepared, which omits a specification of the points upon which the moving party will rely, and both parties stipulate that it is correct, and it is filed, the moving party may afterwards, and within the time allowed to file the statement, amend, by adding such specifications; and it is the duty of the court to settle the same, and allow the other party to suggest amendments to make it conform to the truth. *Lucas v. Marysville*, 44 Cal. 210.

412. After a proposed statement on motion for a new trial has been made, and amendments have been proposed and allowed by the court, a stipulation of counsel that the engrossed statement may be made by writing in the proposed statement the amendments, and when so engrossed, the same shall be the statement, and that the exhibits and documents referred to in the statement may be used on the argument, without being copied into the statement, but shall be inserted in the transcript on appeal, and a stipulation added to the engrossed statement that it is the engrossed statement, as settled by the judge, and engrossed according to the former stipulation, are equivalent to the certificate, as provided in the statute. *McCreery v. Everding*, 44 Cal. 246.

Engrossment, Authentication.

413. Where there are amendments to a proposed statement on appeal, the draft proposed and the amendments allowed should be incorporated into one document, as in their separate form they can not be regarded as any part of the record. *People v. Edwards*, 9 Cal. 286. *Skillman v. Riley*, 10 Id. 300.

414. Where amendments are made to a statement on appeal, a fair copy of the statement so amended should be made. Otherwise the supreme court will not look into it. *Marlow v. Marsh*, 9 Cal. 250.

415. The proper practice is to engross the statement as settled, including so much of the deeds and other documentary evidence pertaining to the case as is directed to be inserted, and have the authentication of the judge or attorneys indorsed on the engrossed statement. *Kimball v. Semple*, 31 Cal. 657.

416. A statement ought always to be engrossed where any amendments are allowed, or where documentary evidence is directed to be inserted, especially when such documents constitute no part of the files or records of the court. *Id.*

417. The court should not decide a motion for a new trial before the statement, as settled, has been engrossed and certified as correct. *Morris v. De Celis*, 41 Cal. 331.

418. It is not the duty of the clerk of the district court to engross the statement either on new trial or appeal; nor is it his

duty when a copy of a statement is required to insert any document which is merely referred to and directed to be inserted. *People v. Bartlett*, 40 Cal. 142.

419. Exhibits referred to in a statement on motion for a new trial, but which are not copied into the statement, will be deemed to have been considered on the hearing of the motion. *People v. Bartlett*, 40 Cal. 142.

420. A copy of the statement on motion for a new trial which is made a part of the statement on appeal from the order granting a new trial, and in which certain exhibits are referred to and directed to be incorporated therein but are not inserted, does not tend to show that such exhibits were not considered on the hearing of the motion for a new trial. *Id.*

421. Where a transcript on appeal showed that a notice of motion for new trial was given and argued in due time, and that the points made on such motion could not properly be considered without a statement on such motion, and that no objection was made on such motion for want of such statement; and the transcript contained a statement manifestly intended as a statement on new trial, but headed "statement on appeal:" *Held*, that such statement should be treated as a statement on motion for a new trial. *Morris v. Angle*, 42 Cal. 236.

422. The statement on motion for new trial, and amendments, as allowed by the court, must be engrossed into one, and authenticated by the signature of the judge, in order to be regarded as the statement required by law, and to be considered on appeal. Accordingly, the court, upon the ground that the statement was not engrossed, affirms the order of the court below. *Smith v. Davis*, 55 Cal. 26.

Waiver of Authentication.

423. Where a party appears and argues a motion for a new trial, he can not afterwards object that the statement was not agreed to by him, and that it was not settled by the judge. *Dickinson v. Van Horn*, 9 Cal. 207.

424. On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76.

425. When it appears from the bill of exceptions, signed by the judges, that the motion for a new trial was heard on statement, counter statement, and affidavits, it can not be objected that the statement was not settled. *Id.*

426. A statement on motion for new trial, signed by the judge, and appearing, from the minutes of the court, to have been used on the hearing of the motion, is sufficiently

authenticated. The statute points out no mode of authentication, and any satisfactory evidence in the record, in some legitimate and proper form, that the statement has been examined and approved by the judge, is sufficient.

Kidd v. Laird, 15 Cal. 161.

427. The courts should look at the **substance of the contents** of the statement, and disregard its imperfections in form.

Ringgold v. Haven, 1 Cal. 113.

428. By agreeing to submit a motion for a new trial without the statement having been settled or authenticated, the party resisting a new trial does not waive his right to object to the **want of a properly authenticated statement**.

Cosgrove v. Johnson, 30 Cal. 509.

429. A statement on motion for a new trial, which is **not certified** as correct by the parties or by the judge, will not be regarded in the appellate court.

Vilhac v. Biven, 28 Cal. 409.

Cosgrove v. Johnson, 30 Id. 509.

Amendments after Settlement.

430. A statement on motion for a new trial, regularly settled and signed by the judge, and containing all the grounds of the motion, but without any specification thereof, may be **amended by the judge**, so as to insert a specification of the grounds of the motion, after the time for filing a statement has passed. Such an amendment, adding no facts or exceptions, can not affect the merits, and its allowance is in furtherance of justice, and matter of discretion, not of power.

Valentine v. Stewart, 15 Cal. 387.

431. The court below may allow an amendment to a statement on motion for a new trial, by adding the grounds of the motion after the time for filing a statement has passed, affirming Valentine v. Stewart, 15 Cal. 396.

Loucks v. Edmondson, 18 Cal. 203.

432. On motion for new trial the court below should not, unless good reason be shown, receive an affidavit made, after the time for filing affidavits or statements on the motion has elapsed. Howe v. Briggs, 17 Cal. 385.

433. The court should not entertain a motion to amend **after it has been filed and served** on the opposite party.

Levy v. Getleson, 27 Cal. 685.

434. Such statement should, on motion of the opposite party, be **stricken from the files** of the court. Id.

435. When the specification in the statement is that the **judgment is contrary to the evidence**, it has been regarded as a clerical error, and that verdict instead of judgment was intended.

Wendt v. Ross, 33 Cal. 630.

436. A statement agreed on by parties should not probably be amended by the court

on motion, unless under a very clear showing of mistake or fraud.

Hutchinson v. Bours, 13 Cal. 52.

437. The court refused to remand the cause for the purpose of amending a **bill in equity for a new trial**; but the court declined to decide that a **new bill**, with proper amendments, could not be filed.

Mulford v. Cohn, 18 Cal. 42.

Statement may be Corrected in Supreme Court.

438. If the appellant was not satisfied with the action of the court below in settling the statement on motion for a new trial, and desired to correct the same in this court, as provided in section 189 of the practice act, he should have presented a petition for that purpose before the final submission of the case. He can not be allowed to incorporate in his transcript *ex parte* affidavits impeaching the statement, and after the final submission of the case, bring the question before us for the first time in his brief.

Warmouth v. Gardner, April term, 1868.

439. A motion to correct a statement or exceptions, where the court below refuses to make the same conform to the facts, is an original proceeding in this court, and must be instituted by a petition in writing, setting forth at length the exceptions which were taken at the trial and not allowed by the judge, and so much of the evidence as may be necessary to illustrate them. The petition should be presented with the record, and the application made before the case is submitted. Id.

Presumption that Statement Contains all the Evidence.

440. It is presumed that the statement on motion for new trial contains all the evidence pertinent to the motion.

Smith v. Athearn, 34 Cal. 506.

441. If the statement on motion for a new trial specifies certain particulars, in relation to which it is claimed a finding of fact is unsupported by the evidence, the presumption will be that all the evidence upon the point specified is contained in the statement, although the record does not show affirmatively that such was the case.

Hidden v. Jordan, 28 Cal. 301.

Owen v. Morton, 24 Cal. 375, as to this point, overruled.

442. Where the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence. Moore v. Tice, 22 Cal. 513.

A Statement can not be Waived.

443. Where the attorneys of both parties appear in open court, and by consent argue

a motion for a new trial, this consent, even if it is a waiver of a notice of intention to move for a new trial, is not a waiver of a statement in some proper form of the grounds of the motion.

Walls v. Preston, 25 Cal. 59.

Statement can not be Stricken Out.

444. The court should not strike out a notice or statement on motion for a new trial under any circumstances. The motion should be denied that the action of the court may be reviewed on appeal.

Quivey v. Gambert, 32 Cal. 304.

445. If there are any technical grounds upon which a motion for a new trial may be resisted, such a failure to file and serve notice of motion, or to file a statement in time, the proper practice is to raise such grounds on the argument of the motion as a reason why the motion should be denied. Id.

446. An order striking out a statement on motion for a new trial can not be brought before the supreme court for review by a bill of exceptions. Id.

447. But an unauthenticated document, purporting to be a statement on motion for a new trial, will be stricken from the transcript on appeal. Id.

448. If notice of intention to move for a new trial is not given within the statutory time, and no waiver of the failure to give the same is shown, the supreme court will, on motion, strike the statement from the transcript.

De Castro v. Richardson, 25 Cal. 49.

449. Where a statement on motion for new trial was filed in time, but not served on the opposite party, and for this reason the court, on motion, struck it from the files: *Hell*, that such striking from the files was error. Calderwood v. Peyser, 42 Cal. 111.

450. While a motion for a new trial may be denied, for failure to serve the statement on the opposite party, an order striking such statement from the files can not be properly made under any circumstances. Such statement need not be served on the opposite party. Id.

Waiver of Right to Move for a New Trial.

451. A party failing to give notice in time of his intention to move for a new trial, or to file his statement in time, waives his right to move for a new trial.

Caney v. Silverthorne, 9 Cal. 67.

452. A failure to file a statement, on motion for new trial, within time, amounts to a waiver of the motion.

Campbell v. Jones, 41 Cal. 515.

453. A failure to file a statement, setting forth the grounds upon which a party in-

tends to rely, on motion for a new trial, operates as a waiver of the right to the motion.

Wing v. Owen, 9 Cal. 247.

454. If the statement on application for a new trial is filed more than five days after the filing and service of the notice, the right to move for a new trial is waived, unless it appear from the transcript that the objection to the failure to file the statement in season has been waived by the opposite party, either expressly or by implication.

Munch v. Williamson, 24 Cal. 167.

455. If a statement on motion for a new trial is not filed within five days after notice of intention to move for a new trial is given, or within such further time as may be granted by the court, not exceeding twenty days, the right to move for a new trial is waived.

Easterby v. Larco, 24 Cal. 179.

Jenkins v. Frink, 27 Id. 337.

Le Roy v. Rasette, 32 Id. 171.

456. If a statement prepared on motion for a new trial is not filed within the time prescribed by the one hundred and ninety-fifth section of the practice act, the right to move for a new trial is waived; and where such right is thus waived, the court has no power to restore it.

Hegeler v. Henckell, 27 Cal. 491.

457. If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed by the appellate court. Id.

MOTION FOR NEW TRIAL—ARGUMENT, GRANTING, AND REFUSING, ETC.

458. A motion for a new trial, upon a statement settled in accordance with the provisions of the practice act in force before the code took effect, was not a right within the intent of the latter clause of section 18 of the code of civil procedure, but merely a remedy. Kelly v. Larkin, 47 Cal. 58.

459. When the notice of a motion for a new trial was served in 1872, the proceedings upon the motion must be determined by the practice act then in force, and not by the code of civil procedure.

Macy v. Davila, 48 Cal. 646.

460. The proceedings to obtain a new trial must be conducted in accordance with the code of civil procedure, when the notice of the motion is served and filed after the code went into effect.

Kelly v. Larkin, 47 Cal. 58.

461. Questions respecting the sufficiency of the complaint can not be presented upon a motion for a new trial, nor considered on an appeal from an order denying a new trial.

Jacks v. Buell, 47 Cal. 162.

462. If a judgment is other than that

resulting from the conclusions of law arrived at by the court it can not be corrected by an appeal from an order granting or denying a new trial, but must be reached by an appeal from the judgment.

Martin v. Matfield, 49 Cal. 42.

463. If the plaintiff in ejectment obtains a verdict for a quantity of land in excess of what the evidence entitles him to, the court may, if the defendant moves for a new trial, make an order granting a new trial, unless the plaintiff **remits** the excess of land, and dismisses the action with respect to it.

Gillespie v. Jones, 47 Cal. 259.

464. Perhaps, in actions *ex contractu*, when it is clear that the plaintiff is entitled to only **nominal damages**, the court will not grant a new trial at his instance, but, in an action for a **libel**, this rule does not prevail, for the question of damages is for the jury, and the court can not assume, as a matter of law, that the plaintiff is entitled to only nominal damages.

Lick v. Owen, 47 Cal. 252.

465. If, on the trial of an action for the value of **services** rendered the defendant, the plaintiff fails to prove the services and their value, and there has been no surprise or misapprehension, a new trial should not be granted to enable him to prove the services and their value.

Griffith v. Moss, 47 Cal. 567.

466. The defendant who applies for a new trial after a verdict assessing damages against him, can not complain that the court required the plaintiff to **remit** a portion of the damages as a condition on which a new trial would be denied.

Dreyfous v. Adams, 48 Cal. 131.

467. If the court, in its charge to the jury, lays down an erroneous principle of law, based on a supposed fact in the case which was not proved, and which the jury could not have found, the other **party is not injured** by the instruction, and a new trial will not be granted.

Robinson v. W. P. R. Co., 48 Cal. 409.

Motion to be Made without Delay.

468. If a motion for a new trial is not prosecuted with due **diligence**, it should be dismissed on the application of the opposite party. Eckstein v. Calderwood, 27 Cal. 413.

469. If the judge who tried a cause goes to a county in his district, not adjoining the one in which the case was tried, to hold court, before the time for filing amendments to the statement on motion for new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the judge returns or first holds court in a county adjoining the one in which the case was tried.

Warden v. Mendocino Co., 32 Cal. 655.

470. A failure to prosecute a motion for a new trial for the space of three months does not constitute such laches as will warrant an interference with the discretion which, in such cases, is properly exercised by the court below.

Chabot v. Tucker, 39 Cal. 434.

471. An order denying and dismissing a motion for a new trial, for want of due diligence in bringing the same to a hearing, as required by the practice act, section 196, rests in the sound **discretion** of the court.

Boggs v. Clark, 37 Cal. 236.

472. An order made upon a motion to dismiss an application for a new trial, on the ground that the same has not been prosecuted with due diligence, is very much in the discretion of the court or judge making it; and unless it is apparent that such discretion has been abused, the order will not be reversed.

Hopkins v. W. P. R., 44 Cal. 389.

473. In an action by B. against C., pending in the seventh district court for Napa county, in which B. recovered judgment, in said county, on the eighth of June, 1867, an order of court was entered on the same day, by consent, that C. have sixty days in which to prepare and file statement on motion for new trial. On the nineteenth of June, notice of said motion was duly filed and served; and on the sixth day of August following, C. filed his statement on said motion, and gave plaintiff's attorney notice thereof. On the first of October following, B.'s attorney duly filed notice, and served the same on C.'s attorney, that on the seventh of October he would move the court to dismiss said motion, on the ground that C. had not presented the same within a reasonable time after the filing of said statement. On the day following (October 2), C.'s attorney served B.'s attorney with notice that he would proceed with his motion for a new trial on said seventh day of October. On the eighth day of October (both of said motions having been continued from the previous day), the court granted B.'s said motion to dismiss. The term of said court commenced in Solano county, which is in the same judicial district and adjoins Napa county, on the sixteenth day of September, 1867: *Held*, that the court did not so **abuse** its **discretion** in making said order as to justify its reversal. Boggs v. Clark, 37 Cal. 236.

474. If a judicial district is composed of several counties, and a statement on motion for a new trial is made and settled in one of these at the same term the judgment was rendered, the motion is prosecuted with diligence if brought to a hearing at the next term held in the county where judgment was rendered, although two terms may have intervened in other counties in the same district.

Simmons v. Goin, 45 Cal. 669.

475. Diligence, or the want of it, in dis-

covering testimony in a particular case, depends in so great a degree upon the various circumstances surrounding the parties, and the conduct of the cause, which are peculiarly within the knowledge of the trial court, that its determination on the matter of granting a new trial, made in view of them, will rarely be disturbed.

Jones v. Singleton, 45 Cal. 92.

Argument of Motion.

476. The pleadings, depositions, documentary evidence on file, and the minutes of the court, may be read on the hearing of the motion.

Wetherbee v. Carroll, 33 Cal. 549.

477. A motion for a new trial can be heard only on the record made and settled before the motion is made.

Quivey v. Gambert, 32 Cal. 304.

Cosgrove v. Johnson, 30 Id. 509.

478. The supreme court can only look to the statement as settled by the court below, to determine the character and point of the objection made on the trial to the introduction of proposed evidence. They can not consult the opinion of the judge in passing upon the motion for a new trial, to discover the real point of objection.

Cochran v. O'Keefe, 34 Cal. 557.

479. The party must lay his finger on the point of his objection.

Kiler v. Kimbal, 10 Cal. 267.

Martin v. Travers, 7 Id. 253.

480. Even if the statement has been settled, engrossed, and certified, and filed as correct, the court should not pass on the motion for a new trial until it has been submitted for decision, and the parties afforded an opportunity to be heard if desired.

Morris v. De Celia, 41 Cal. 331.

481. Where a motion for a new trial, made by defendant, was granted by the court without any formal or actual submission of the motion, and without any notice, so as to give the plaintiff an opportunity to be heard: *Held*, error.

De Gaze v. Lynch, 42 Cal. 363.

482. On a motion for a new trial no questions can be entertained except those which affect the verdict or finding on the issues.

Spanagel v. Dellinger, 38 Cal. 279.

483. No question as to the sufficiency of a complaint can be entertained in any proceeding to obtain a new trial.

Id.

484. Under the provisions of the practice act prior to the adoption of the code of civil procedure, either party could notice for argument a motion for a new trial, and if the party opposing the motion neglect to bring up the motion for argument, he could not complain of the neglect of the other party, and could not claim that the motion

be dismissed because the moving party failed to bring on the argument.

Griffith v. Gruner, 47 Cal. 644.

May be Abandoned.

485. Plaintiff recovered judgment, and defendants gave notice of the intention to move for a new trial, and filed a statement of the grounds. Plaintiff filed a counter statement, but afterwards, at a meeting of the parties before the judge at chambers to settle the statement, informed the judge and defendants that the statement need not be settled, as he would consent to a new trial; whereupon, defendants gave notice of a motion to withdraw their motion or proceedings for new trial. Refused, and a new trial granted: *Held*, that the court erred; that the defendants had a right to move or not to move for a new trial upon the notice given, and if they chose to abandon their proceedings, whether before or after the motion for new trial was made, they had the right so to do.

Stoyell v. Cole, 19 Cal. 602.

486. If the statement on motion for a new trial sets forth the grounds of the motion, and the motion is made and submitted, a refusal to argue the motion by the moving party is not an abandonment of the same.

Carder v. Baxter, 28 Cal. 99.

As to Motion, there is no Term.

487. The proceedings for a new trial, under our practice, must be considered, in the sense of the common law rule, to be "in paper," or in the "breast of the judge," and within the judge's control as to amendment of record thereof, and in respect to such proceeding and record there is no term of court, or if there is, it begins and ends with the motion. Castro v. Richardson, 25 Cal. 49, so far as holding a different rule, is overruled.

Spangel v. Dellinger, 34 Cal. 476.

488. At common law, the judgment was not entered or signed until after the motion for a new trial had been heard and determined, while under our practice the motion proceeds independent of the judgment, mainly upon a record of its own, and may be made before or after the entry of judgment and on making up of the roll, or may not be made at the term at which the judgment was entered, and may likewise be made out of the term.

Id.

Effect of Stipulation that Motion be Denied.

489. Where the parties in the court below stipulated that a motion for a new trial should be denied, they can not question in this court the correctness of an order denying such motion.

Brotherton v. Hart, 11 Cal. 405.

490. Where the evidence is conflicting, the granting or refusing a new trial rests in

the discretion of the court below, and this court will not interfere, whether the new trial be granted or refused.

Weddle v. Stark, 10 Cal. 301.

491. Where on trial of ejectment suit, certain evidence offered by defendant was rejected on the ground that the averment in the answer that the original location of the lot in dispute was according to "the actual plan, then used and recognized, of the town of San Francisco or Yerba Buena," meant the map of the survey, and not the actual survey or plan on the ground, and the court refused the defendant permission then to amend his answer in this respect, but subsequently granted him a new trial for that purpose: *Hell*, that the court below had the power to grant the new trial of this cause, and that this court will not interfere.

Lestrade v. Barth, 17 Cal. 285.

492. The court below may refuse a new trial, even though both parties consent to it. Where a case has been once fully tried, parties have not an arbitrary discretion to renew the litigation. *Phelan v. Ruiz*, 15 Cal. 90.

Dismissal of Motion Amounts to Denial.

493. An order dismissing a motion for a new trial is in effect denying a new trial.

Warder v. Mendocino Co., 32 Cal. 655.

Motion not Acted on.

494. Where the motion for a new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict.

Myers v. Casey, 14 Cal. 542.

New Trial will be Granted when Justice Requires.

495. Where, from the record, it appears highly probable that the judgment of the court below is founded neither upon law nor equity, the supreme court should reverse the judgment or grant a new trial.

Reed v. Jourdain, 1 Cal. 102.

496. It is error to refuse a new trial when justice requires that it should be granted.

Ross v. Austill, 2 Cal. 183.

497. Injury is presumed from evidence erroneously admitted; and the adverse party must show clearly that no injury accrued, or the judgment can not stand.

Grimes v. Fall, 15 Cal. 63.

498. If the statement shows that too high a rate of interest was allowed by the jury, upon an account sued on for a part of the time, a new trial will be granted unconditionally, unless it appears that plaintiff had not kept his account for the residue of the time upon the erroneous basis of interest, and he will consent to remit the excess.

Clark v. Godley, 35 Cal. 398.

499. It is error for the court which tried a cause without a jury, to deny a motion for a new trial when it admits that **improper evidence was received** on the trial, even though, in its opinion, the finding and judgment would have been the same if the improper testimony had not been received.

Spanagel v. Dellinger, 38 Cal. 278.

500. The granting of a new trial on the ground that the verdict of the jury was against the **admissions of the defendant**, who was called as a witness, is a decision of the court that the evidence was insufficient to justify the verdict.

Lorenzana v. Camarillo, 41 Cal. 467.

501. Although the court excludes all evidence on the part of the plaintiff and renders a judgment for the defendant, yet a **trial is had**, in the sense in which the court may grant a new trial, on application of the plaintiff.

Moore v. Bates, 46 Cal. 29.

502. A new trial is not necessary where all the **necessary facts are found** upon which to base a judgment, and a mere **computation** is required to ascertain the amount for which judgment shall be entered.

People v. S. B. Q. Co., 39 Cal. 511.

503. Motion for new trial is addressed to the sound **discretion** of the court, and the supreme court can interfere only in cases of plain abuse of such discretion.

Peters v. Foss, 16 Cal. 357.

Drake v. Palmer, 2 Id. 181.

Watson v. McClay, 4 Id. 288.

Hastings v. Uncle Sam, 10 Id. 341.

O'Brien v. Brady, 23 Id. 243.

504. Refusal to grant new trial not reviewed in the supreme court, unless such refusal was an abuse of the discretion of the court below.

Burnett v. Whitesides, 15 Cal. 35.

505. The power to grant new trials is one of legal discretion, and the abuse of that discretion only will justify an interference with such order by the appellate court.

Quinn v. Kenyon, 22 Cal. 82.

506. A motion for new trial, upon the ground of **insufficiency of the evidence**, is addressed to the discretion of the court, and an order granting a new trial on such ground will not be reversed unless there has been a manifest abuse of discretion.

Pierce v. Schaden, 55 Cal. 406.

Bronner v. Wetsler, Id. 419.

The Court may Impose Terms.

507. The district court may impose terms upon granting a new trial.

Battelle v. Connor, 6 Cal. 140.

508. Where, on appeal from an order of the court below granting a new trial, except upon condition of the acceptance by the plaintiff of a judgment of four hundred dollars, instead of eight hundred dollars, for

which latter sum a jury had given a verdict, made upon the ground that the verdict was excessive in amount, and where, on appeal from said order, it appeared that the evidence was conflicting to the extent of the difference between said two sums as to the amount of recovery to which plaintiff was entitled, and where the evidence tending to establish the less sum to have been the just measure of recovery, was at least entitled to as much consideration as the residue; *Held*, that this was no abuse of discretion by the court below, and the order should be affirmed.

Harrison v. Peabody, 34 Cal. 179.

509. Where a party complies with the terms imposed, and avails himself of the advantage of the order, he can not afterwards question its correctness.

Battelle v. Connor, 6 Cal. 140.

510. The terms of new trials are peculiarly within the discretion of the court, with the exercise of which the appellate court will not interfere, except on a clear showing of abuse or grossly unreasonable terms.

Rice v. Gashirie, 13 Cal. 53.

511. The court may impose terms in granting or refusing a new trial. In requiring a remittor of a portion of the judgment, as terms for refusing the motion for a new trial, the court used a sound and admitted discretion.

Benedict v. Cozzens, 4 Cal. 381.

512. Courts may impose, as a condition of allowing a verdict to stand in other respects, the remission of damages in cases where there was no evidence on the subject of damages, or where the evidence was entirely incompetent, or where the court differs from the jury as to the effect of the evidence. But where, as in this case, the verdict for the damages was based entirely upon an admission by the record, it must stand. The admission, if good for anything, is good for the entire amount specified.

Patterson v. Ely, 19 Cal. 28.

513. When a new trial was to be had on payment of costs: *Held*, that the acceptance of costs did not waive the right to appeal from the order granting a new trial.

Tyson v. Wells, 1 Cal. 378.

514. It is not error in the court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin v. Bourne*, 8 Cal. 296.

515. If the findings are not sustained by the evidence on a question of damages, the court may require the plaintiff to remit the damages, or submit to a new trial.

Carpentier v. Gardiner, 29 Cal. 160.

Court can not Reverse Former Judgment.

516. On motion for a new trial, it is irregular for the court to reverse its first judgment, and render a contrary one, without hearing or notice.

Mitchell v. Hackett, 14 Cal. 681.

Directions to Court below to Enter Judgment.

517. Where the action is brought to recover judgment upon several demands, and the court below renders judgment for plaintiff upon all the demands, and the appellate court, in its opinion, holds that plaintiff's recovery should have been limited to a portion of the demands sued on, and directs the court below, upon a return of the cause, to render judgment in accordance with the opinion, and reverses the judgment, the judgment of the appellate court does not direct a new trial of the issues, but directs the court below to enter judgment upon the findings for the amount due.

Argenti v. San Francisco, 30 Cal. 458.

Stipulations as to Statement on Appeal.

518. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the supreme court," includes an appeal from the judgment, as well as an appeal upon the decision for the motion for a new trial.

Hastings v. Halleck, 13 Cal. 207.

519. Any statement agreed to by the parties, or duly settled and certified by the court, becomes a part of the record, the same as a bill of exceptions, demurrer to the evidence, or any other mode by which questions of law or matters of evidence were made part of the record by the old system of practice. And where an appeal was taken from a judgment, and also from an order overruling a motion for a new trial, and the appeal from the order was dismissed, for the reason that the notice was not served in time, and the transcript contained a statement on motion for a new trial, but no statement on appeal or bill of exceptions: *Held*, that on the appeal from the judgment, the statement on motion for a new trial properly formed part of the record, and might therefore be used in the court, and that any alleged errors appearing therefrom, affecting the judgment, might be considered and passed on.

Towdy v. Ellis, 22 Cal. 650.

520. Where a statement is made and settled on motion for a new trial, and an appeal is taken, both from the judgment and from the order denying a new trial, the statement can be used in reviewing the order appealed from, but can not be used in determining the appeal from the judgment.

Casgrave v. Howland, 24 Cal. 457.

521. If a statement is made on a motion for a new trial, and an appeal is taken from the judgment, under a stipulation that the statement on motion for a new trial may be used as the statement on appeal, the statement may be used so far as it presents any question that can be reviewed on appeal from the judgment, but no further.

Carpentier v. Williamson, 25 Cal. 159.

Where Attorney Appears without Authority.

522. Where an attorney appears without authority, and conducts the defense, the remedy of defendants is by motion for a new trial, not by motion for relief from the judgment under section 68 of the practice act.

McKinley v. Tuttle, 34 Cal. 235.

Law of the Case.

523. Where the supreme court, in reversing a judgment and remanding the cause for a new trial, consider and pass upon a point of law, with a view to the new trial for the purposes of which it is important, the ruling upon such point, though not essential to the decision, becomes the law of the case in all its future stages.

Table Mt. T. Co. v. Stranahan, 21 Cal. 548.

The following cases relate to the same subject: Hubbard v. Sullivan, 18 Cal. 508; Soule v. Ritter, 20 Id. 522; Leese v. Clark, Id. 387; Heirs of Nieto v. Carpenter, 21 Id. 455; Mitchell v. Davis, 23 Id. 381; Moore v. Murdock, 26 Id. 524; Lucas v. San Francisco, 28 Id. 591; Estate of Pacheco, 29 Id. 224; Mulford v. Estudillo, 32 Id. 131; Kile v. Tubbs, Id. 332; Argenti v. Sawyer, Id. 414.

County Court may Grant New Trial.

524. The appellate power of the supreme court over the county court could not be properly or efficiently exercised, unless the power to grant a new trial existed in the county court. The county court certainly has power to grant a new trial.

Dickinson v. Van Horn, 9 Cal. 207.

Errors Occurring at the Trial must be Specially Excepted to at the Time.

525. When there has been no objection raised or exception taken to the **insufficiency of the evidence**, this court would presume that sufficient evidence of a proper character was given to warrant the verdict.

Bunting v. Beideman, 1 Cal. 182.

526. Courts will require an **objection** to the sufficiency of evidence to be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence.

Goodale v. West, 5 Cal. 341.

Mott v. Smith, 16 Id. 533.

527. An objection to a **form of a verdict** should be made **on motion for a new trial**. It is too late to raise it in this court for the first time.

Douglass v. Kraft, 9 Cal. 562.

528. Where a defendant's objection to the admission of testimony on the trial is **general**, he can not be permitted to make it **special** for the first time in this court.

People v. Glenn, 10 Cal. 32.

529. Where the objection to the introduc-

tion of testimony was in general terms that it was irrelevant, the objection will not be considered in the supreme court, if the testimony could, under any possible circumstances, have been relevant.

Dreux v. Domec, 18 Cal. 83.

530. Where an objection is taken to the admission of evidence, **without a specification** of the grounds of the objection, it does not merit consideration.

Kiler v. Kimbal, 10 Cal. 267.

531. Where **instructions** to the jury are not excepted to at the time they are given, or refused, and motion for a new trial is made for error in giving or refusing such instructions, they can not be considered on appeal from the order denying the motion.

Collier v. Corbett, 15 Cal. 183.

532. A refusal to give an instruction can not be urged as error for the first time, on a petition for a rehearing on appeal.

Payne v. Treadwell, 16 Cal. 247.

533. A party can not take his chances for a verdict on instructions given and refused, without exceptions taken, and then, after verdict, except to the action of the court upon motion for a new trial.

Letter v. Putney, 7 Cal. 423.

See St. John v. Kidd, 26 Cal. 263.

534. An exception to the **admissibility** of a deed in evidence must be taken on the trial of the cause, *at nisi prius*. The point can not be considered on appeal.

Pearson v. Snodgrass, 5 Cal. 478.

Posten v. Rasette, Id. 467.

535. A party can not, by consenting to admit evidence "**subject to all legal exceptions**," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the court below, and after fishing for a verdict, for the first time assign his objection in the supreme court.

Covillaud v. Tanner, 7 Cal. 38.

536. Where the motion for a new trial, though made, does not appear to have been acted on, the appellate court will not consider the **sufficiency of the evidence** to sustain the verdict.

Myers v. Casey, 14 Cal. 542.

537. On appeal by a plaintiff from an order overruling a motion for new trial, made by him upon the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff, will not be considered.

Pierce v. Jackson, 21 Cal. 636.

New Trial in Equity Cases.

538. The practice act applies as well to legal as to equitable actions, so far as its provisions are consistent with the rights and

remedies administered in courts of equity. And the only way in which the verdict of a jury on issues submitted can be reviewed is by motion for new trial—except, probably, that the court, whether sitting in equity or on the trial of a common law action, may, of its own motion, set aside the verdict of a jury when clearly and palpably against the evidence. *Duff v. Fisher*, 15 Cal. 375.

539. There is no substantial difference between a rehearing in an equity case, which opens the decree and places the case before the court for trial anew, and a new trial in a case at law, tried and decided by the court. *Riddle v. Baker*, 13 Cal. 295.

540. The court below may refuse a new trial, even though both parties consent to it. Such refusal to grant a new trial is no ground of error, particularly in an equity case where there may have been no necessity for a new trial; as upon application to the court upon the pleadings and facts before it, the proper decree might have been rendered, notwithstanding the verdict; or, if refused, the error corrected by appeal.

Phelan v. Ruiz, 15 Cal. 90.

541. If no appeal is taken from an order denying a new trial, the appellate court can not review the evidence to determine whether the verdict or findings are sustained by it. The practice is the same in all cases, whether at law or in equity.

Green v. Butler, 26 Cal. 599.

542. Where a party moves for a new trial and fails, he can not, on the same facts, go into equity and enjoin the judgment rendered.

Collins v. Butler, 14 Cal. 226.

Bolan v. Thornton, 12 Id. 441.

Special Cases, Judgments Modified, etc.

543. Where the merits of the case were not investigated in the lower courts, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the practice act relating to **interventions**, the supreme court awarded a new trial, although the decision of the court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgments. *Speyer v. Ihmels*, 21 Cal. 280.

544. Where the question of law was adverse to the verdict, and the court might well have granted a nonsuit, or instructed the jury to find for the other party, a new trial should have been granted; and the refusal to do so was such an improper use of its discretion as calls for the exercise of the revisory power of this court.

Speck v. Hoyt, 3 Cal. 413.

545. If any errors intervened on the trial of a cause, an order of the court below granting a new trial ought not to be disturbed.

Hastings v. Uncle Sam, 10 Cal. 341.

546. When the complaint, evidence as admitted, the verdict and judgment are in harmony, but the judgment is erroneous by reason of a **wrong construction** given to the **description of land in a deed** in evidence, the supreme court can not modify the judgment, but will reverse it and grant a new trial. *Hicks v. Coleman*, 25 Cal. 145.

547. Where there is some evidence to support the verdict, and a motion for a new trial is overruled, the supreme court will not interfere. *Baxter v. McKinlay*, 16 Cal. 76.

548. If the statement on motion for a new trial does not show that it embodies all the evidence given on the trial, a new trial will not be granted on the ground that the **verdict is contrary to the evidence**, even if there is no conflict in the evidence contained in the statement.

Dawley v. Hovious, 23 Cal. 103.

549. Where the jury, without particular instruction from the court, return a verdict payable in **gold coin**, though there was no evidence that either on or after striking a balance between the parties the defendant promised in writing to pay in gold coin, a new trial will be granted.

Howard v. Roeben, 33 Cal. 399.

550. New trial not granted on **affidavit of the attorney of record** that he, as well as his client and witnesses, were absent on the trial of the case, because of a verbal agreement by opposing counsel to give notice of day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial.

McDonald v. Beaver River Co., 13 Cal. 220.

551. Where **several defenses** are pleaded, any of which is good in law, and the verdict is for the defendants, and the court errs in its instructions to the jury as to one of the defenses, the judgment will be reversed, unless it is made to appear that the verdict was rendered on one of the defenses in relation to which no error was committed.

Wiseman v. McNulty, 25 Cal. 234.

552. If a defense should be **specially pleaded**, the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the finding of the fact in relation to it by the court.

McComb v. Reed, 28 Cal. 281.

Smith v. Owens, 21 Id. 11.

553. If, on the trial, the court finds from the evidence all the facts necessary to entitle the plaintiff to recover, and renders a judgment for plaintiff, and upon a re-examination of the case on motion for a new trial, finds that a **fact essential** to plaintiff's recovery is **not proved**, it is the duty of the court to grant a new trial.

Hawkins v. Reichert, 28 Cal. 534.

554. The court, if the evidence is con-

ficting, may, on a re-examination of the same on motion for a new trial, find the facts differently from what they were found on the trial, and on an appeal from an order granting or refusing a new trial, the latter finding will be conclusive of the facts of the case. *Id.*

555. Where certain findings are unsupported by any evidence, as contained in the settled statement on a motion for new trial on the ground that said findings are against the evidence: *Hell*, that such findings should be set aside. *Smith v. Athern*, 34 Cal. 506.

556. If the findings of fact follow the issues raised by the pleadings, and a demurrer would not be sustained to the complaint, the judgment will not be arrested upon the findings.

Millard v. Hathaway, 27 Cal. 119.

557. A new trial will not be ordered because of inaccuracy in the language of a finding of fact when it is sufficiently distinct as to the material question involved in the action. *McKinney v. Smith*, 21 Cal. 374.

558. A judgment will not be reversed on account of the reception of testimony which has no bearing upon the verdict or findings of fact, even if technically irrelevant.

Harper v. Lamping, 33 Cal. 641.

559. If the grounds upon which a party relies for a new trial are not designated, either in the notice or statement, a new trial should be denied.

Walls v. Preston, 25 Cal. 59.

560. The appellate court will not disturb the order of an inferior court in granting or refusing a new trial, unless manifest error shall appear. *Bartlett v. Hogden*, 3 Cal. 55.

561. Where it is manifest, from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the court below has refused a new trial, this court will reverse the judgment, and order a new trial.

People v. Acosta, 10 Cal. 195.

562. A new trial will not be granted except on a statement or affidavits.

Jenkins v. Frink, 30 Cal. 586.

563. Although plaintiff takes a cross appeal from the refusal to allow his damages as claimed, yet as defendant may have been taken by surprise, this court will remand the case for trial *de novo* upon the question of damages, with privilege of amending the pleadings so as fairly to present the issue on this point. *Jungerman v. Boree*, 19 Cal. 355.

564. Upon the entry of a judgment in a contested election case under the statute, the power of the court over the cause ceases, and it can not grant a new trial or re-examine the issues of law or fact.

Dorsey v. Barry, 24 Cal. 449.

565. The provisions of the practice act in relation to new trials have no application to a motion to set aside the report of commissioners appointed to assess damages for taking land for public uses.

C. P. R. v. Pearson, 35 Cal. 247.

566. In a suit for mandamus brought in the supreme court, where questions of fact are referred to a district court, a motion for a new trial must be made in the supreme court. *People v. Holloway*, 41 Cal. 409.

567. An action for a partition of real estate is as completely within the operation of the practice act as any other civil action for the conduct of which rules of procedure are therein prescribed. Sections 193 and 195 of that act apply to a motion for a new trial in proceedings on partition.

Tormey v. Allen, 45 Cal. 119.

568. The one hundred and ninety-sixth section of the code, providing that "the court or judge granting or refusing a new trial shall state, in writing, the grounds upon which the same is granted or refused," is directory only, and his failure to comply with it does not render his order void.

Borkheim v. F. F. Ins. Co., 38 Cal. 505.

569. Where, upon defendant's motion for new trial, the statement was settled (though not engrossed), and defendant gave notice of hearing, but nothing further was done until afterward, upon the overruling of a like motion in a similar case, plaintiff asked that this motion, also, should be overruled, to which defendants objected, and insisted upon being heard; afterward, the court, without notice to either party, or any formal or actual submission of the motion, granted a new trial: *Held*, that the order was prematurely and improvidently made.

De Gaze v. Lynch, 42 Cal. 363.

570. Parties may stipulate that the court pass on a motion for a new trial before the statement is engrossed, and the engrossed statement agreed to or certified as correct.

Thompson v. Connolly, 43 Cal. 436.

571. If a motion for a new trial is decided by the court before it has been submitted, the order denying or granting the new trial should be set aside as improvidently made, if application is made therefor.

Morris v. De Celis, 41 Cal. 331.

572. Where a court, through its own inadvertence, has prematurely made an order granting a motion for a new trial before the final submission of the motion, it is the duty of the court, upon its own motion, to vacate the order so made.

Hall v. Polack, 42 Cal. 219.

573. When an application for a new trial has been made in due form, upon a settled statement, and the court has passed on the motion, the order made is conclusive, so far as the court making it is concerned. The

court can not afterwards vacate the order and decide again on the motion.

Coombs v. Hibbard, 43 Cal. 452.

574. When an order is made granting a new trial to several defendants, on condition that the defendants pay the costs of the action up to date, a payment by the defendants to the plaintiff of the costs of the action made prior to the date of the order is a compliance with the condition, and a payment made by one of the defendants, and not by all, is also a compliance.

Sherman v. Mitchell, 46 Cal. 576.

575. If an order is made granting a new trial to the defendants, on the compliance by them with certain conditions, and the conditions are complied with, the court can not, on a motion to vacate the order, look beyond the question as to whether the conditions have been complied with, and undertake to investigate arrangements concerning the action made between the defendants themselves.

Id.

Evidence on New Trial.

576. On a new trial of an action for the partition of lands ordered by this court on appeal, the parties are entitled to use the documentary evidence, maps, exhibits, etc., used at the former trial and remaining on file in the court below, including the report of the testimony as taken by the referees before whom such trial was had, subject, however, to objection as when first offered.

Gates v. Salmon, 35 Cal. 576.

577. Parties to an action on a new trial are not precluded by the decision of this court on a former appeal from proving facts which were not before the court, and upon whose legal effect there was no adjudication on that appeal, nor from introducing new proofs in support of the complaint or defense, as the case may be.

Ryan v. Tomlinson, 39 Cal. 639.

578. On the second trial of a cause the plaintiff may introduce the testimony of the defendant given on a former trial, even if the defendant is present in court.

Lorenzana v. Camarillo, 45 Cal. 125.

579. The prosecution, on a second trial for a crime, may prove what a witness, since deceased testified to on a former trial.

People v. Murphy, 45 Cal. 137.

580. The only regular way for the court to review its former action is on a motion for a new trial. Prince v. Lynch, 33 Cal. 528.

581. The question whether the evidence is sufficient to sustain the verdict, or finding, or decision, can be presented only on a motion for a new trial.

Yates v. Smith, 40 Cal. 662.

582. If a defendant, against whom judgment by default has been rendered, moves, on affidavits, for a new trial, because the court has acquired no jurisdiction over his

person, and the court finds that there has been no service on him, and grants a new trial, plaintiff, on his appeal from the order, can not complain of the order because it grants the defendant relief less advantageous to him than that to which he was entitled.

Carpentier v. Small, 35 Cal. 346.

583. The affidavits in support of a motion for a new trial, on the ground of newly discovered evidence in a criminal case, must set forth such evidence as would be received on the trial. People v. Voll, 43 Cal. 166.

584. When an application for a new trial is made on affidavits, the affidavits used in the hearing of the motion must be identified, by the indorsement of the judge or clerk, made at the time of the hearing, as having been read or referred to on the argument. The ordinary indorsement of filing by the clerk is not sufficient.

Johnson v. Muir, 43 Cal. 542.

585. Affidavits used on a motion for a new trial will not be considered on appeal, unless they are made a part of the record, by being identified as having been used on the hearing of the motion, or are made a part of the statement.

Leszinsky v. White, 45 Cal. 278.

Miscellaneous Decisions.

586. Where a judgment was entered in May, and a new trial granted in September following, it was held that after the expiration of a term of the district court, no power remains in it to set aside a judgment or grant a new trial.

Robb v. Robb, 6 Cal. 21.

Baldwin v. Kramer, 2 Id. 582.

587. Pending a motion for new trial taken under advisement, for decision in vacation by consent of parties, another term of court intervenes, when upon some incidental motion the cause was continued and the court adjourned: Held, that the continuance was only a continuance of the motion for new trial, and did not affect the power of the court to act on the motion at its convenience.

Hutchinson v. Bours, 13 Cal. 50.

588. The court has no power to set aside an order denying a new trial, after the adjournment of a term at which it was made.

Willson v. McEvoy, 25 Cal. 169.

589. A court has no power, after the adjournment of a term, to direct the clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, where there is nothing in the record to show that such order was made.

Hegeler v. Henckell, 27 Cal. 491.

590. If the appellant allow the twenty days to expire after taking the appeal, without framing a case, he waives his right to have a case stated; and a subsequent order of the court, made without notice to the

respondent, allowing further time to make up the statement, is a nullity.

Leech v. Allen, 2 Cal. 95.

591. Where the statement embodied in the record is filed on motion for a new trial, this court will only examine the action of the court below in denying the motion.

Meerholz v. Sessions, 9 Cal. 277.

592. One of several parties against whom a judgment is rendered, who does not join in a motion for a new trial, can not complain of alleged error in denying a new trial.

Calderwood v. Brooks, 23 Cal. 151.

593. An order vacating a verdict or finding and granting a new trial necessarily vacates the judgment in the case resting on such verdict or finding.

Thompson v. Smith, 23 Cal. 527.

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NONSUIT.

1. WHEN ACTION MAY BE DISMISSED OR NONSUIT ENTERED.

1. *Nonsuit on Motion of Plaintiff.*
17. *Nonsuit by Written Consent.*
22. *Nonsuit on Motion of Defendant—Failure to Appear.*
23. *Nonsuit by Court—Failure to Prove Case.*
64. *WHAT OPERATES AS A DISCONTINUANCE.*
66. *MOTION, WHEN WAIVED.*
72. *REFEREE MAY GRANT.*
74. *MISCELLANEOUS.*

WHEN ACTION MAY BE DISMISSED OR NONSUIT ENTERED.

Nonsuit on Motion of Plaintiff.

1. Plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such

right does exist at any time before such final submission and retirement.

Brown v. Harter, 18 Cal. 76.

2. After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the court then any authority to enter an order of dismissal without the consent of the defendant.

Heimlin v. Castro, 22 Cal. 100.

3. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter claim.

Hancock D. Co. v. Bradford, 13 Cal. 637.

4. In an action of ejectment against several defendants, the plaintiff may at any time before trial dismiss the action as to some of the defendants, and proceed against the others alone.

Reed v. Calderwood, 22 Cal. 463.

5. The plaintiff in ejectment, if no counter claim is made in the answer, has a right to dismiss the action as to one or all of the defendants. Dimick v. Deringer, 32 Cal. 488.

6. If one of several defendants in ejectment answers and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others. Id.

7. C. being one of four defendants in ejectment, moved to transfer the action to a United States court on the ground of his alienage, and an order was made staying all proceedings until the motion could be heard. Before the hearing of the motion plaintiffs dismissed the action as to C. and one other defendant, and took judgment against the other two who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C., having appealed from that order and from the judgment: *Held*, that the denial of the motion was proper, as after C.'s dismissal it could not properly be entertained.

Reed v. Calderwood, 22 Cal. 463.

8. In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others.

People v. Evans, 29 Cal. 429.

9. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership, or the authority of the party making the note, to bind all, and one of the parties is nonsuited and judgment taken against the other two: *Held*, that there is no error in such judgment. Stoddart v. Van Dyke, 12 Cal. 437.

10. In an action on a promissory note by an indorsee, neither of the questions, whether plaintiff is a holder as an agent, or for value, can be considered on a motion for nonsuit. *Poorman v. Mills*, 35 Cal. 118.

11. Where several persons were sued as members of a joint stock company, and the suit was discontinued as to B., one of the defendants, and judgment was taken against all the others, upon which execution was subsequently issued, and the property of one M., who was not a party to the suit, taken to satisfy the same: *Held*, that M. can not, by a bill in equity against the plaintiff in the judgment, set it aside upon the ground that the discontinuance of the suit as to B. was a discontinuance as to all of the defendants. The judgment can not be attacked in this collateral manner.

Markley v. Rand, 12 Cal. 275.

12. Where several persons conspire to obtain the land of plaintiff, and in suit against them to recover the property two of the defendants disclaim all interest therein: *Held*, to be no ground for dismissing the suit as to them, as they were proper parties and are liable for costs.

Dupuy v. Leavenworth, 17 Cal. 262.

13. In an action for the recovery of land, possession gives the better right against a mere intruder, and when the possession is shown in the plaintiff a nonsuit should not be ordered.

Wolfskill v. Malajowich, 39 Cal. 276.

14. The defendant in his answer to the complaint set up a cross demand, which he insisted was a proper counter claim, and prayed affirmative relief. Afterwards a stipulation, signed by the attorneys of the respective parties, was filed, whereby it was provided that upon the trial of the cause an account might be taken of the matter thus set up; that if a balance might be entered, that the stipulation should be regarded as a compromise of the counter claim, and that the counter claim should be deemed stricken from the answer: *Held*, that on this state of the record the clerk was not required or authorized by section 143 of the practice act, in the absence of any direction from the court or counsel of the defendant, to enter an order upon request of plaintiff dismissing the action. *People v. Loewy*, 29 Cal. 264.

15. The construction of the pleadings and stipulation, and determination of the rights of the parties with respect to the counter claim under them, required the exercise of judicial functions not conferred upon the clerk. *Id.*

Nonsuit by Written Consent.

17. After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the court any authority to

enter an order of dismissal without the consent of the defendant.

Heinlin v. Castro, 22 Cal. 100.

18. A nonsuit granted on motion of the defendant is equivalent in its operation on the action to a dismissal with the consent of the defendant, even if the defendant has set up new matter, and asked for affirmative relief in his answer.

Wood v. Ramond, 42 Cal. 643.

19. A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action. *Leese v. Sherwood*, 21 Cal. 151.

20. On a sale of land by L. and wife to S., a portion of the purchase money was paid, and a balance of fourteen thousand dollars was, by the terms of the deed, to be paid when an action then pending by one Rico against the vendors, to recover a portion of the property, should be "finally decided" in favor of the defendants therein (plaintiffs here), "as against all claims made by said Rico." By a contemporaneous agreement, it was stipulated that a dismissal of the action of Rico should not be considered a final decision, provided a new suit for the same subject-matter should be commenced by Rico on or before the eleventh day of April next succeeding the date of the agreement. The action of Rico was, on motion of the defendants therein, dismissed, after the eleventh day of April, and thereupon L. and wife brought suit for the fourteen thousand dollars: *Held*, that as the express stipulation about a dismissal evidently had reference to one procured before the eleventh day of April, a dismissal after that day was not affected by the stipulation, but was to have such force as should result from the other terms of the agreement; that under those terms a dismissal at any time was a final determination of the action, and that plaintiffs were entitled to recover. *Id.*

21. If a plaintiff who has appeared by attorney afterwards stipulates in writing that the action be dismissed, the court should not make an order of dismissal unless the attorney of record assents to the same.

San Jose v. Younger, 29 Cal. 147.

Nonsuit on Motion of Defendant—Failure to Appear on the Trial.

22. Where the plaintiff fails to appear and prosecute his suit, and the defendant moves for a nonsuit, the court has no alternative but to grant it.

Peralta v. Marica, 3 Cal. 185.

Dismissal by Court of Defendant on Failure of Plaintiff to Prove Case.

23. In considering the correctness of the

ruling of the court below, in granting a nonsuit, the supreme court will consider as proven every **fact which the evidence tended to prove**, and which was essential to be proven, to entitle the plaintiff to recover.

Dow v. G. & C. M. Co., 31 Cal. 629.

24. Where four persons were sued as co-defendants on a joint contract, and the plaintiff adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground, but refused by the court, and judgment was rendered against all the defendants, jointly: *Held*, that the judgment was erroneous; but *held, further*, that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just.

Acquital v. Crowell, 1 Cal. 191.

25. If there be some evidence which tends or conduces to prove all the **material allegations of the complaint**, the sufficiency thereof is a question for the jury; but where there is no evidence on some material point necessary to be proved in order to make out a cause of action, it becomes the duty of the court, on motion of the defendant, to order a nonsuit.

Ringgold v. Haven, 1 Cal. 108.

26. Where the evidence would not authorize a jury to find a verdict for the plaintiff, or if the court would set it aside, if so found, as contrary the evidence, in such case it is the duty of the court to nonsuit the plaintiff. *Id.*

27. The court may order the plaintiff to be nonsuited against his consent. *Id.*

28. A court is justified in granting defendant's motion for nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by, but **contrary to, the evidence**.

Geary v. Simmons, 39 Cal. 224.

29. A defendant moving for a nonsuit on the plaintiff's **opening statement** upon a specified ground, on which ground alone the motion is granted, will not be allowed to raise the point for the first time in the supreme court that the statement was otherwise insufficient.

Raimond v. Eldridge, 43 Cal. 506.

30. An action was brought against the defendants to recover damages for injuries to goods in being carried from New York to San Francisco, founded not upon contract, but upon the common law duty of carriers: *Held*, that it was necessary for the plaintiff to establish, not only the delivery of the goods to the defendants, but that they were engaged in the business of transporting goods

as common carriers; and there being **no evidence** whatever that the defendants were common carriers, *held, also*, that a motion for a nonsuit should have been granted by the court below. *Id.*

31. The decision in *Ringgold v. Haven*, that the power of **compulsory nonsuit** exists, approved.

Mateer v. Brown, 1 Cal. 221.

Dalrymple v. Hanson, 1 Cal. 125.

33. Where there is no evidence to make out a cause of action, the court should nonsuit the plaintiff. *Id.*

34. A nonsuit is proper if the plaintiff's evidence does not tend to prove the cause of action set up in the complaint.

Masten v. Grifing, 33 Cal. 111.

35. If the alleged cause of action is for **services** for having found a purchaser who agreed to buy defendant's land at a certain price, evidence that plaintiff found a person who would agree to buy if defendant would first take a lease for three years and give security for the rent, and that defendant did not take the lease but merely agreed to do so and give security, and that the purchaser did not accept of such agreement, does not show that the plaintiff found a purchaser who agreed to buy at any price. *Id.*

36. If the complaint states the cause of action to be an agreement of the defendant to pay the plaintiff a certain sum if the plaintiff procures a purchaser who will agree to buy defendant's land at a price named, evidence that the plaintiff found a purchaser who agreed to buy if defendant would lease the land and pay a stipulated rent therefor for three years ensuing the conveyance, does not tend to make out the cause of action stated in the complaint, and the defendant is entitled to a nonsuit. *Id.*

37. If the evidence of the plaintiff will not authorize a jury to find a **verdict** for him, or if the court would set it aside, if so found, as **contrary to evidence**, it is the duty of the court to nonsuit the plaintiff.

Mateer v. Brown, 1 Cal. 221.

38. When the plaintiff closes his evidence, if the court is of opinion that it would not sustain a **verdict in favor of plaintiff** upon the testimony, a nonsuit should be granted. *Enslinger v. McIntire*, 23 Cal. 593.

39. The objection that M. & B. have no common interest in the mill, etc., but claim title from V. under different rights, should have been taken by motion for nonsuit or upon instructions, the **want of common interest** appearing from plaintiff's evidence.

Donald v. Bear River Co., 13 Cal. 220.

40. The defendant is not precluded from moving for a nonsuit because he permitted the **testimony** to be introduced **without objection**, when the testimony of the plaintiff

iff proves a contract different from that declared on. *Johnson v. Moss*, 45 Cal. 515.

41. Nor, under the one hundred and forty-eighth section of the practice act, is he bound to tender costs before the nonsuit. The provision as to costs is simply that, by the nonsuit, plaintiff becomes subject to costs. *Id.*

42. When the evidence, and the presumption reasonably arising therefrom, tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury.

De Ro v. Cordes, 4 Cal. 117.

43. Nonsuit not proper where there is any evidence tending to prove the indebtedness. *Cravens v. Dewey*, 13 Cal. 40.

44. A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint.

McKee v. Greene, 31 Cal. 418.

45. The testimony offered in this case would have proved compliance with the contract on the part of the plaintiff, and premeditated design to evade it, on the part of the defendant. The court erred in refusing to let it go to the jury, and in ordering a nonsuit. *Folger v. Buckelew*, 2 Cal. 313.

46. It is not error to nonsuit plaintiffs upon the opening statement of their counsel.

Hoffman v. Felt, 39 Cal. 109.

47. Where the complaint in an action on a bill of exchange describes it as payable to the order of A., whereas the bill offered in evidence is drawn payable to B., it is a variance to be taken advantage of by objecting to the evidence, or by motion of nonsuit.

Farmer v. Cram, 7 Cal. 135.

48. Where, in an action for breach of verbal contract, there was a slight difference between the statement in the complaint and that in the answer of the promises, on the part of the plaintiff, which were the consideration of defendant's promise, but no issue was raised by the answer as to the performance by plaintiff of his promises, and on the trial plaintiff rested without proof as to the consideration: *Held*, that under the pleadings, the absence of proof on this point was not ground for a nonsuit.

Peters v. Foss, 20 Cal. 586.

49. Courts should, of their own motion, dismiss a case based upon a consideration which contravenes a public policy, whether the parties to the suit take the objection or not.

Valentine v. Stewart, 15 Cal. 387.

50. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action.

Garner v. Marshall, 9 Cal. 268.

51. In ejectment, upon disclaimer of

possession or interest in the property, a judgment for the plaintiff can not be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit.

Noe v. Card, 14 Cal. 576.

52. In an action of ejectment, one of several defendants, who in his answer disclaims all right, title, and interest in the premises, but also denies all the allegations of the complaint, and avers that "he was and still is lawfully seised and in possession" of the land claimed, is a proper party, and is not entitled to have the action dismissed as to to himself.

Pioche v. Paul, 22 Cal. 105.

53. If the defendant in ejectment moves for a nonsuit, and intends to rely on the point that a deed offered in evidence by the plaintiff, and which was admitted without objection, does not include the demanded premises, he should distinctly so state in his motion.

Sanchez v. Neary, 41 Cal. 485.

54. In a proceeding by an elector to contest the right to an office of a party returned as elected thereto at a general election, the defendant first moved to dismiss the proceedings; his motion being overruled, he declined to answer the statement filed by the contestant, and the court, without proof of either party, annulled the election: *Held*, that this was error, and that the proceedings should have been dismissed.

Searcy v. Grow, 15 Cal. 117.

55. If the complaint avers that the defendant brought a false charge against the plaintiff, and threatened to publish the same and injure his credit unless he paid a false account, and that by reason of the false charge and threats he paid the same without other consideration, and prays judgment for the money thus paid, the payment of the money without consideration is the gist of the plaintiff's cause of action, and upon that issue he holds the affirmative. If he fails to offer any evidence of the facts tending to show a want of consideration, a nonsuit should be granted.

Kohler v. Wells, 26 Cal. 606.

56. Where a bill disclosed that the same subject-matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed.

Barnett v. Kilbourne, 3 Cal. 327.

57. Where, in an action on a verbal contract, the complaint alleged several distinct promises on the part of defendants, which were denied by the answer, and on the trial the plaintiff introduced no proof except as to one of the promises: *Held*, that this was not ground for nonsuit; that the provisions of the practice act above referred to require a relaxation of the common law rule respecting a variance, and that it being apparent that defendants were not surprised or prejudiced

by the failure of proof, the error in stating the agreement should have been disregarded.

Peters v. Foss, 20 Cal. 586.

58. A defendant in **partition** is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer.

De Uprey v. De Uprey, 27 Cal. 329.

59. When the plaintiff proves a contract essentially different from the one declared on, the defendant is entitled to a nonsuit on the ground of **variance**.

Johnson v. Moss, 45 Cal. 515.

60. In an action for **damages** for injury caused by **negligence**, a nonsuit upon the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside.

Schierhold v. N. B. & M. Co., 40 Cal. 447.

61. A motion for nonsuit must distinctly point out the **grounds** on which it is asked, and it is not error to refuse it, even if there is ground for it, and it is not asked on such ground.

Gardiner v. Schmaelzle, 47 Cal. 588.

62. If a nonsuit is asked for defect of proof on some point, the court will permit the plaintiff to **supply the defect** if he can do so.

Id.

63. The court may permit the plaintiff to introduce **further evidence** after a motion for a nonsuit is made; and unless the court in doing so abuses its **discretion**, its action will not be disturbed.

Abbey H. Ass. v. Willard, 48 Cal. 614.

WHAT OPERATES AS A DISCONTINUANCE.

64. The plaintiff commenced an action of forcible entry and detainer against the defendant in a justice's court. The justice instead of trying the case certified it to the district court: *Held*, that the transfer was illegal and could not defeat the plaintiff's right by operating as a discontinuance.

Larue v. Gaskins, 5 Cal. 507.

65. The submission of a cause in court to arbitration operates as a discontinuance of the suit.

Gunter v. Sanchez, 1 Cal. 45.

MOTION FOR, WHEN WAIVED.

66. Where a defendant moved for a nonsuit, and afterwards introduced **evidence supplying the defect** in the plaintiff's testimony, on which the motion for nonsuit was founded: *Held*, that the defendant had thereby waived his motion, and could not insist upon it in this court.

Ringgold v. Haven, 1 Cal. 108.

67. Where a motion for nonsuit was im-

properly denied, but the defendant then introduced testimony enabling the plaintiff to supply the defect in the case: *Held*, that defendant thereby waived the objection.

Smith v. Compton, 6 Cal. 24.

Perkins v. Thornburgh, 10 Id. 189.

68. A failure on the part of a plaintiff to make out his case, and error in the court in refusing to instruct the jury as in case of nonsuit, can be cured by the **testimony of the defense**.

Winans v. Hardenburgh, 8 Cal. 291.

69. Where proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant can not afterwards claim a nonsuit on the general ground that no **power of attorney** from the principal was shown, and that, therefore, his possession was not sufficiently proven.

Minturn v. Burr, 16 Cal. 107.

70. A defendant, conceiving that the plaintiff has failed to prove his case, may waive a motion for a nonsuit, and proceed to prove his own case, and have judgment on the merits.

Wood v. Ramond, 42 Cal. 643.

71. If a defendant move for a nonsuit, and it be granted, he can not have **judgment on the merits**.

Id.

REFEREE MAY GRANT.

72. Under our statute the referee takes the place of the judge in the trial of all cases referred to him, and may grant a nonsuit.

Plant v. Fleming, 20 Cal. 92.

73. A plaintiff can voluntarily submit to a nonsuit before a referee in a case where no counter claim is set up by the defendant.

Id.

MISCELLANEOUS DECISIONS.

74. The **grounds** of a motion for a nonsuit must appear in the record, otherwise this court will not consider such motion.

McGarrity v. Byington, 12 Cal. 426.

75. Where a motion is made for a nonsuit, without stating the grounds upon which it is made, it is not error to overrule the motion.

Kiler v. Kimbal, 10 Cal. 267.

76. A party moving for a nonsuit should state in his motion precisely the ground upon which he relies, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.

People v. Banvard, 27 Cal. 470.

77. Where an **exception** is taken to the decision of a court refusing a nonsuit, it devolves upon the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decision complained of, is inserted in the **bill of exceptions**.

Ringgold v. Haven, 1 Cal. 108.

78. Where the court below granted a non-

suit, the case being submitted on complaint on an undertaking and answer, the supreme court, while reversing the judgment below, refused to enter judgment for plaintiff, although the answer presented no defense, holding, that as there was no trial below, the court could not know what course defendants would have taken, by amendments or otherwise, by way of defense to the action.

McMillan v. Dana, 18 Cal. 339.

79. A judgment of dismissal, upon the ground that it did not appear that the defendants had notice of the trial in the court below, is erroneous, and will be set aside.

Coyle v. Baldwin, 5 Cal. 75.

80. In an action against a ferryman, it was no error to allow the plaintiff to introduce the ferry license, after a motion for nonsuit, as this is a matter within the discretion of the court. May v. Hanson, 5 Cal. 360.

81. Where plaintiffs, having excepted to the ruling of the court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exception taken. Objections to the introduction of evidence confined in the appellate court, to the grounds taken below. Natoma W. Co. v. Clarkin, 14 Cal. 544.

82. In an action tried by a court without a jury, the parties, at the September term, introduced their proofs and submitted the case, which was taken under advisement by the court. On the first day of the succeeding term, and before the decision was rendered, the plaintiff moved, *ex parte*, for a dismissal without prejudice, which was granted; subsequently, at the same term, on motion of defendants, the order of dismissal was vacated, and a finding filed in favor of defendants, upon which judgment was entered: *Held*, that the order dismissing the action was unauthorized, and that the subsequent order vacating the dismissal was therefore proper.

Heinlin v. Castro, 22 Cal. 100.

83. The district court can not review an order granting a nonsuit upon a motion to set aside the nonsuit.

Levy v. Getleson, 27 Cal. 685.

84. This court has the power, under its rules, to reinstate cases which have been dismissed at a previous term.

Haight v. Gay, 8 Cal. 297.

85. Section 177 of the practice act applies only where the issues of the case have been submitted and passed on by the jury, and not to a case of judgment of nonsuit.

Ginaca v. Atwood, 8 Cal. 446.

86. Findings of fact and conclusions of law are not required nor proper in case of nonsuit.

Gilson M. Co. v. Gilson, 47 Cal. 597.

87. A nonsuit suffered for any cause is not

a bar to an action subsequently brought upon the same cause of action.

Merritt v. Campbell, 47 Cal. 542.

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NOTARY PUBLIC.

1. APPOINTMENT OF.
3. POWERS OF.
7. DUTIES OF.
9. ACTS OF AS EVIDENCE.
13. LIABILITY OF.

APPOINTMENT OF.

1. Where the condition of the bond of a notary public is that he will "well and truly perform and discharge the duties of a notary public, according to law:" *Held*, that this clause embraces every act which he is authorized or required by law to do in virtue of his office. Fogarty v. Finlay, 10 Cal. 239.

2. An instrument not under seal is not the character of security which is required by the statute to be given by notaries public.

Castele v. Cornwall, 5 Cal. 419.

POWERS OF.

3. By the fifth section of the act concerning notaries public, notes are made protestable, and by the tenth section the protest of a notary is expressly made evidence of demand, and non-payment of notes as well as bills.

Connolly v. Goodwin, 5 Cal. 220.

4. The attorney of plaintiff, being a notary public, may take the affidavit verifying the complaint.

Kuhland v. Sedgwick, 17 Cal. 123.

5. A notary public has no authority under the statutes of this state to take the depositions of witnesses in any action pending within their own county; that power is delegated to commissioners.

McCann v. Beach, 2 Cal. 32.

6. See former case between the same parties.

Id., 2 Cal. 25.

DUTIES OF.

7. It is the duty of a notary public to give notice of protest to the indorsees of a promissory note protested by him. He is allowed by law a fee for so doing, and the recital of "notice given" in the protest is made evidence of the fact.

Tevis v. Randall, 6 Cal. 632.

8. If the notary is ignorant of the residence of the indorser, he must make diligent inquiry of those most likely to know it; having done so, he may safely act upon the information so obtained.

Garver v. Downie, 33 Cal. 176.

ACTS OF, AS EVIDENCE.

9. A notarial certificate of presentment and demand, and of protest for non-payment, of a promissory note, taken from the record of a notary, is admissible, and is *prima facie* evidence of the facts contained therein, in like manner as the original protest.

McFarland v. Pico, 8 Cal. 626.

10. A notarial certificate of protest of a note is of it itself presumptive evidence that the notary had authority from the proper parties to make the protest.

Gillespie v. Neville, 14 Cal. 408.

11. It need not state that the persons requesting him to protest are the holders of the note, or the agents of the holders. Id.

12. Under the act of 1850 (stats. 1850, p. 114), relating to notaries public, the acknowledgment of a notary taken under his private seal was valid, if it was stated in the acknowledgment that the notary had not obtained a public seal.

Fogarty v. Sawyer, 23 Cal. 570.

LIABILITY OF.

13. Neglect on the part of the notary is not excused by the fact that the certificate (which was a printed one, with blanks) had been partially filled by the attorney of the grantee.

Fogarty v. Finlay, 10 Cal. 239.

14. If the notary read the certificate before signing it, the omission must have been known to him; if he did not read it, he is equally guilty of negligence. Id.

15. A notary holds himself out to the world as a person competent to perform the business connected with his office. By accepting the office, and entering upon the discharge of the duties, he contracts with those who employ him that he will perform such duty with integrity, diligence, and skill. Id.

16. A party employing a notary is not obliged to determine upon the validity or legality of his acts. Id.

17. Where a notary public, in taking and certifying an acknowledgment to a mortgage, neglected to state in his certificate that the party acknowledging the same was known to him, or was identified by the testimony of a witness examined by him for that purpose: *Held*, that such notary was guilty of gross and culpable negligence, and is responsible to the party injured for the damage resulting from such negligence. Id.

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NOTICE.

1. GENERALLY.

2. SERVICE OF NOTICE.

GENERALLY.

1. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice.

Mills v. Dunlap, 3 Cal. 94.

2. The doctrine of constructive notice has always been regarded as a harsh necessity; and the statutes which create it have always been subjected to the most rigid construction.

Call v. Hastings, 3 Cal. 179.

3. The law fixing the distances from the different county seats to the capital, state prison, and asylum, refers only to the distances for which mileage shall be allowed to sheriffs, county treasurers, etc., and has no application to the service of legal notices.

Neely v. Naglee, 23 Cal. 152.

4. If there is any ambiguity in the terms of a notice, rendering its meaning doubtful, the construction must be most strongly against the party giving the notice.

Carpentier v. Thurston, 30 Cal. 123.

SERVICE OF NOTICE.

5. An acknowledgment of service indorsed on a notice of appeal as follows: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late.

Towdy v. Ellis, 22 Cal. 650.

6. When a legal notice is served by mail, the distance which it travels is a question of fact to be determined by proof.

Neely v. Naglee, 23 Cal. 152.

7. A party relying upon a service of a notice by mail must show a strict compliance with the provisions of the statute in making service.

People v. Alameda T. Co., 30 Cal. 182.

8. An affidavit of service of a notice of appeal by mail must state that there is a regular communication by mail between the place of residence of the person making the service and the residence of the person upon whom it is to be served. Id.

9. A statement on the back of a notice of motion for a new trial, signed by the attorney of the moving party, stating that the notice was served at a certain time, is not evidence of such service.

Calderwood v. Brooks, 28 Cal. 151.

10. Under the practice act, as it existed before the adoption of the code of civil procedure, a notice to take a deposition was required to be served on the attorney of the other party, even if he lived out of the coun-

ty when the case was pending. A service on the party himself was not sufficient.

Griffith v. Gruner, 47 Cal. 644.

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NOVATION.

1. Defendant purchased land of B., and, as part of the consideration, agreed to pay certain debts of B. Neither plaintiff nor the person to whom the debts were owing were parties to this agreement, nor did they assent to it, or attempt to connect themselves with the transaction prior to this suit. Plaintiff is holder of these debts, and seeks to recover them of defendant: *Held*, that plaintiff can not maintain the action, there being no **privity** between the parties, no novation of the indebtedness, and no assent to the transaction which might make the agreement an equitable assignment.

McLaren v. Hutchinson, 18 Cal. 80.

2. The doctrine of McLaren v. Hutchinson, 18 Cal. 80, that where A. owes B. and the latter owes C., and A. and B., without consulting C., agree that the former shall pay to C. what is owing to B., an action can not be maintained by C. against A. for **want of privity**, commented on and questioned.

Lewis v. Covillaud, 21 Cal. 178.

3. Defendant upon the purchase of certain land from B. agreed with him in writing, as part of the consideration, to pay to plaintiff a debt then due the latter from B. Plaintiff

afterwards assented to the arrangement, and verbally agreed with defendant to look to him for his debt and release B.: *Held*, that this agreement was not within the **statute of frauds**, and gave plaintiff a right of action against defendant for the debt.

McLaren v. Hutchinson, 22 Cal. 187.

4. Whether the assent of plaintiff was necessary in order to enable him to maintain the action, see in connection with former decisions in this case, 18 Cal. 80; Lewis v. Covillaud, 21 Id. 178. Id.

5. When A., by agreement between him and B., assented to by C., becomes liable to pay to the latter a debt originally due to him from B., the assignee of C. may maintain an action for the debt, in his own name, against A. Id.

6. Where the proof was that defendant, having agreed with B., whom he owed, to pay in lieu thereof to the plaintiff, a creditor of B., the amount of his (plaintiff's) demand, afterwards met the plaintiff and stated to him that he (defendant) had agreed with B. to pay his (plaintiff's) claim, and was to pay it, and that plaintiff then stated his "willingness to look to defendant:" *Held*, that this proof authorized a finding that defendant agreed with plaintiff to pay him his demand. Id.

7. Where A., who is indebted to B., promises in consideration of his release by B., to pay the amount to C., who is a party to the arrangement, it is a sufficient **consideration** to support such promise.

Barringer v. Warden, 12 Cal. 311.

8. A. brought an action against B., and averred in his complaint that C. was indebted to A.; that B. promised A. to pay C.'s debt if A. would release C., and that in consideration of the promise A. did release C.: *Held*, that the release of C., being the alleged consideration of the promise of B., was an essential fact to be proved, and that unless proved A. could not recover.

Gyle v. Shoenbar, 23 Cal. 538.

9. Defendant being indebted to E. M. Co., and they to plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the company to plaintiff: *Held*, that this was an **equitable assignment** of the debt, and that the only mode under our practice in which the assignment can be enforced is by action in the name of the assignee to recover the debt.

Wiggins v. McDonald, 18 Cal. 126.

10. If A. sells property to B., for which B. is to pay him a price agreed on, and B. then sells the property to C., who agrees verbally to pay A. what B. owes him, and A., in consideration thereof, releases B., the transaction is not a promise of C. to pay B.'s debt to A., but a **novation**, and C.'s promise is not required to be in writing.

Welch v. Kenny, 49 Cal. 49.

NUISANCE

1. WHAT IS A NUISANCE.
15. JURISDICTION IN ACTIONS OF.
22. ACTIONS TO ABATE NUISANCES.
58. *Judgment in.*

WHAT IS A NUISANCE.

1. It is a public nuisance to erect a **house on a highway**. *Gunter v. Geary*, 1 Cal. 467.

2. The **diversion of a water-course** is a private nuisance.

Tuolumne W. Co. v. Chapman, 8 Cal. 392.

3. To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element.

Parke v. Kilham, 8 Cal. 77.

4. A **ditch** to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Id.*

5. All that part of the bay or river below low water or low tide is a **public highway** common to all citizens; and if any person appropriate it to himself exclusively, the presumption is, that it is a detriment to the public. *Gunter v. Geary*, 1 Cal. 462.

6. It does not follow as a legal conclusion that a **wharf** erected below high-water mark in tide waters, and upon the soil thereunder belonging to the state, is a public nuisance, or an injury to commerce and navigation. Whether such a wharf is a public nuisance is a question of facts.

People v. Davidson, 30 Cal. 379.

7. A **toll gate** erected on a public highway which belongs to the state or people is a nuisance, and may be abated as such.

El Dorado Co. v. Davison, 30 Cal. 520.

8. A **house on fire**, or those in the immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate; and the private rights of the individual yield to considerations of general convenience and the interest of society.

Suroco v. Geary, 3 Cal. 69.

9. The constitutional provision which requires payment for private property taken for public use does not apply to the destruction of a house to check a **conflagration**; nor can he who abates this nuisance be made personally liable for trespass, unless the act is done without actual or apparent necessity. *Id.*

10. The erection of a **steam engine** and machinery and a grist-mill in the cellar under an auction store, held not to be such an injury as to require the restraining power of the court; at least, not until the question of nuisance or not should be determined by a jury. *Middleton v. Franklin*, 3 Cal. 238.

11. The **diversion** of the waters of navigable streams may be both a public and a private nuisance.

Yolo v. Sacramento, 36 Cal. 193.

12. In so far as a **wing-dam** in a navigable river obstructs the navigation, it is a public nuisance; but if it obstructs the reclamation of swamp lands, it is a private nuisance. *Id.*

13. The **obstruction of a public highway** is a common nuisance.

L. T. Co. v. S. & W. Co., 41 Cal. 562.

14. If two men own adjoining lots, and one of them has erected a brick building on his lot, the wall of which leans so as to project over the lot of the other and over a low wooden building thereon, so as to prevent the raising and repairing of the wooden building, the **brick wall** is a nuisance, and its maintenance imports damage to the other party, notwithstanding the fact that the brick wall is safe and secure.

Meyer v. Metzler, 51 Cal. 142.

JURISDICTION IN ACTIONS OF.

15. The **district courts** have constitutional jurisdiction of cases of nuisance. The grant of such jurisdiction by statute to the **county court** can not take away the constitutional jurisdiction of the district courts. *Fitzgerald v. Urton*, 4 Cal. 235.

16. The district courts of this state have jurisdiction of actions to prevent or abate nuisances.

Courtwright v. B. R. & A. Co., 30 Cal. 573.

17. The county courts have original jurisdiction of actions to prevent or abate a nuisance. *People v. Moore*, 29 Cal. 427.

18. The statute of this state defining what are nuisances, and prescribing a remedy by action, does not take away any **common law remedy** in the abatement of nuisances which the statute does not embrace.

Stiles v. Laird, 5 Cal. 120.

19. District courts have jurisdiction in actions to prevent or abate a nuisance.

Yolo v. Sacramento, 36 Cal. 193.

20. In an action to abate a nuisance, and to recover **damages**, the county court has no jurisdiction of the action for damages, except as an incident to its power to abate the nuisance.

Grigsby v. Clear Lake Co., 40 Cal. 396.

21. If the nuisance had been abated prior to the commencement of the action, the county court has no jurisdiction for any purpose. *Id.*

ACTIONS TO ABATE NUISANCE.

22. The action to prevent or abate nuisances is not a "**special case**."

Parsons v. Tuolumne W. Co., 4 Cal. 43.

23. An action to abate a nuisance is "**a case in equity**," and from judgment rendered in it an appeal lies to the supreme court. *People v. Moore*, 29 Cal. 427.

24. In actions of nuisance, the defendant

has no right to inquire into the **good faith** of the plaintiff's possession.

Eberhard v. Tuolumne W. Co., 4 Cal. 308.

25. A common nuisance being deemed an injury to the whole community, every person in the community is supposed to be aggrieved by it, and has the right to abate it, without regard to the question whether it is an immediate obstruction or injury to him.

Gunter v. Geary, 1 Cal. 462.

26. A private nuisance, which only injures a particular individual or class of individuals, can be abated only by him who suffers from it.

Id.

27. To entitle a party to an injunction in a case of nuisance, the injury to be restrained must be such as can not be adequately compensated by damages; or it must be irremediable, or lead to irremediable mischief.

Middleton v. Franklin, 3 Cal. 238.

28. In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs.

Hudson v. Doyle, 6 Cal. 101.

Courtwright v. B. R. & A. Co., 30 Id. 576.

29. While a ditch by which the waters of a stream have been appropriated is out of repair, and not in condition to carry any water, an action will not lie to abate, as a nuisance, a reservoir constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained, and caused to flow unequally.

B. R. & A. Co. v. Boles (No. 2), 24 Cal. 359.

30. The reservoir does not become a nuisance until the ditch has been repaired, and placed in a condition to carry the water.

Id.

31. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action.

Parke v. Kilham, 8 Cal. 77.

32. An action to abate a nuisance erected in a highway by water, obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land.

Blanc v. Klumpke, 29 Cal. 156.

33. If a nuisance in a highway only affect the plaintiff in common with the public at large, in the use of the highway, he can not have his private action; but if the free use of his private property is interfered with by such nuisance he may have his private action to abate the same.

Id.

34. A private individual can not maintain an action to prevent or abate a nuisance, caused by obstructing a public highway, unless he shows some special damage to him, in addition to that received by the public.

Aram v. Shallenberger, 41 Cal. 449.

35. The facts that the parties who bring an action to prevent or abate a nuisance,

caused by obstructing a public road, own land fronting on the road, and have no other means of access to their lands except over and along the road, do not show such special damage to the plaintiffs, in addition to that sustained by the public, as enables them to maintain the action.

Id.

36. A private person has no cause of action by reason of such obstruction, unless he has suffered some **special damage**. In order to maintain an action for such damage, it must be such as might legitimately flow from the nuisance.

L. T. Co. v. S. W. Co., 41 Cal. 562.

37. In an action to abate a nuisance caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in the answer that it was mineral land belonging to the United States, and that the ditch was for mining purposes, which allegations were stricken out on motion of plaintiff's attorney: *Held*, that they were properly **stricken out as irrelevant**; for, if true, they constituted no defense to the action. Weimer v. Lowery, 11 Cal. 104.

38. Plaintiffs owned certain mining claims and quartz loce on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: *Held*, that the action was **premature**, and that the demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained.

Harvey v. Chilton, 11 Cal. 114.

39. A party who continues a nuisance, but is not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of its hurtful character; where the extent of the nuisance is increased by such party, the rule is otherwise.

Grigsby v. Clear Lake Co., 40 Cal. 396.

40. A public nuisance may also be a **private nuisance**, and if so, the person thereby injured may have his action.

Yolo v. Sacramento, 36 Cal. 193.

41. The plaintiff, in an action for nuisance, can not recover damages for injuries which affect the public generally; but if he has suffered damages peculiar to himself, it becomes, to that extent, a private nuisance for which he may recover.

Grigsby v. Clear Lake Co., 40 Cal. 396.

42. A party can not have an action to abate a public nuisance. The remedy is by

indictment, or, if this is too tardy, equity may interpose upon the information of the attorney-general.

Yolo v. Sacramento, 36 Cal. 193.

43. Where the acts complained of amount to nuisance, for which the person injured may have his action to abate the nuisance, he is not limited to that **remedy**, but may sue to recover damages sustained by the **wrongful acts** of the defendant.

Will v. Sinkwitz, 41 Cal. 588.

44. A party is not liable for damages done to another's land, by an **overflow of water** from his own land, if the overflow is caused by a heavy fall of rain, increased by the additional momentum given to the water before it reaches the defendant's land by ditches dug by a third person.

Mathews v. Kinsell, 41 Cal. 512.

45. Where a person has no control over the property lying on a declivity above and adjoining his lot, nor over the persons who occupy it, and without any fault of his, offensive water thrown upon the upper lot flows naturally across his premises on to a lot lying below, he is not amenable to the owner of such lower lot for the damage which ensues. *Brown v. McAllister*, 39 Cal. 573.

46. A private person has no cause of action by reason of an obstruction to a public road, unless he has suffered some **special damage**. In order to maintain an action for such damage, it must be such as might legitimately flow from the nuisance.

L. T. Co. v. S. & W. Co., 41 Cal. 562.

48. In an action to abate, as a nuisance, a boom across a navigable river, made to intercept saw logs floated down in time of high water, and for damages, it is incumbent on the plaintiff to prove that the **obstruction** was **unreasonable**.

Brown v. Kentfield, 50 Cal. 129.

49. Until a **street** in the city of San Francisco, covered by the waters of the bay, is filled in or planked, or otherwise made capable of being used by the public as a street, the owner of a lot fronting on the same can not maintain an action for damages caused by placing an **obstruction** in the street, and for an abatement of the obstruction as a nuisance.

George v. N. P. T. Co., 50 Cal. 589.

50. If, in front of a lot in a city, there is a public street in a condition to be used as such, and an obstruction is placed on the street by which its use as a highway is impeded, and which prevents the owner of the lot from having free access to the street therefrom, he may maintain an action in his own name against the person maintaining the obstruction to abate it as a nuisance and to recover damages.

Schulte v. N. P. T. Co., 50 Cal. 592.

51. In such case it is not material by whom

the street was **improved**, whether by the public or by private persons. *Id.*

52. If the owner of lots fronting on a street in a city does not own the street in front of his lots subject to a public easement, he can not maintain an action for damages for building a **railroad** on the street, except for special damages by reason of a nuisance caused by the obstruction of a public street.

Severy v. C. P. R., 51 Cal. 194.

53. In an action by the owner and occupant of a lot fronting on a street for **special damages** by reason of a nuisance caused by the obstruction of the public street in front of the lot, testimony as to the market value of the lot and the effect of the nuisance as to such market value is not admissible. *Id.*

54. The title to the **bed of the ocean** below low-water mark, along the shore, is in the state, and if obstructions are placed in it which obstruct navigation and fishery, they may be abated as public nuisances at the suit of the state.

Coburn v. Ames, 52 Cal. 385.

55. A private person can not maintain an action for the abatement of a nuisance caused by interrupting the navigation of a **navigable stream** unless he suffers damage peculiar to himself, and differing from that suffered by the public who have occasion to use the stream.

Jarvis v. S. C. V. Co., 52 Cal. 438.

56. To maintain an action for special damages caused by an obstruction of a **highway**, constituting a public nuisance, a plaintiff must have suffered injury different in kind from that sustained by the public at large.

Bigley v. Nunan, 53 Cal. 403.

57. To entitle a party to maintain an action to **enjoin** the construction of a public nuisance, the complaint must show **special damage** to the plaintiff; and facts must be stated to show that the apprehension of injury is well founded.

Payne v. McKinley, 54 Cal. 532.

Judgment in.

58. Where a nuisance by overflowing plaintiffs' mining claim by means of a dam erected by defendants was found, the decree should have ordered such a reduction of the dam as would have prevented any overflow, from that cause, of the plaintiffs' ground; or if necessary, an entire abatement.

Ramsay v. Chandler, 3 Cal. 90.

59. In an action to abate a nuisance, where the jury render a general verdict in favor of plaintiff, and also return special findings not inconsistent with the general verdict, a judgment abating the nuisance will be sustained.

Blood v. Light, 31 Cal. 115.

60. In an action to abate a nuisance, a

general verdict in favor of the plaintiff is sufficient to sustain a judgment abating the same. *Id.*

ACTION, 61.	MINERAL LANDS, 212.
CONFLAGRATION, 5.	PLEADING, 111, 195,
DAMAGES, 166.	624, 1314-1317.
DEDICATION, 6.	RAILROAD, 31, 32.
EVIDENCE, 588-590,	TRIAL, 105-112.
778.	SUPERVISORS, 56.
JURISDICTION, 61,	WATER RIGHTS, 99.
183, 184, 235.	

NUNC PRO TUNC.

JUDGMENT, 177-182.

OAKLAND.

1. CORPORATE POWERS, HOW VESTED.
4. VOID GRANT BY.
6. POWER OVER TAXATION.
8. STREET IMPROVEMENTS IN.

CORPORATE POWERS, HOW VESTED.

1. Under the act of 1852, incorporating the town of Oakland, the corporate and municipal powers were lodged in a board of trustees. The board had power "to lay out, make, open, widen, regulate, and keep in repair, all streets, bridges, ferries, public places, and grounds, wharves, docks, piers, slips, sewers, and alleys, and to authorize the construction of the same." Under this clause, the board, by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing, and regulating, wharves, etc., within the city, for thirty-seven years: *Held*, that the ordinance was void, as being a transfer of the corporate powers of the board; and that the present city of Oakland, being the successor in law of the town of Oakland, can come into equity to have the ordinance declared void, and the wharves, etc., held by defendants thereunder, delivered up. *Oakland v. Carpentier*, 13 Cal. 540.

2. Where the charter of a city vests the corporate powers in a "board of trustees to consist of five members, who shall be elected," etc., and the law provides, that "at all meetings of the board a majority of the trustees shall constitute a quorum to do business," etc., a majority of those elected can organize and act at the first meeting, as well as at any subsequent meeting. *Id.*

3. Where the southern line of a creek was the dividing line between the city of Oakland and the remainder of Contra Costa

county, both the city and county have jurisdiction to build a bridge over the creek.

Gilman v. Contra Costa, 5 Cal. 426.

VOID GRANT BY.

4. A municipal corporation can not invoke the aid of a court of equity to set aside a grant made by its authorities when the grant is void. Such a grant, being a nullity, casts no cloud upon the title of the corporation, and offers no embarrassment to the exercise of its legitimate functions.

Oakland v. Carpentier, 21 Cal. 642.

5. The trustees of the town of Oakland, in 1852, by ordinance, granted to the defendant, H. W. Carpentier, certain franchises and lands, on condition that the grantee should erect certain wharves and other improvements, and pay to the town a certain percentage of the wharfage received. In 1853, the board of trustees ratified and confirmed the ordinance. In 1857, and after Carpentier, supposing the grant to be valid, had made expenditures in erecting the wharves and improvements required by the ordinance, the city of Oakland, the corporation which had succeeded to the rights and interests of the town of Oakland, commenced suit for the purpose of having the grant set aside, on the ground that it was obtained by fraud, and constituted a cloud on the city's title: *Held*, that if the ordinances granting the franchises and lands were void, there was no occasion for the interference of equity; that if they were only voidable, its interference could not be invoked until equity was done by the city, by placing, or offering to place, the grantee, who had relied upon the acts of the agents of the town, in the same position which he would have occupied but for his reliance upon their validity. *Id.*

POWER OVER TAXATION.

6. The act of May 4, 1852, "to incorporate the town of Oakland," confers no power of taxation directly, but leaves it to be derived from the general act of March 27, 1850, under which the trustees of towns have power to levy and collect a tax annually not exceeding fifty cents on every one hundred dollars of the assessed value of the property, and providing, further, that unpaid taxes should be recovered by a suit in the name of the corporation: *Held*, that an assessment of two and three-fourths per cent. was wholly unauthorized by law and void.

Hays v. Hogan, 5 Cal. 241.

7. The collector of taxes in Oakland had no right to summarily sell the property on which the taxes were unpaid, at public sale, as the taxes could only be recovered by suit. The plaintiff having protested against the sale, purchased the property in order to protect it from a clouded title, made the pay-

ments under protest, and in a few days after commenced suit for the recovery of the money: *Held*, that this was sufficient notice to the officer to hold the fund, and fixes his liability. Id.

STREET IMPROVEMENTS IN.

8. The resolutions of the city council of Oakland to improve the public streets and to accept bids to perform the work need not be approved by the mayor.

Beaudry v. Valdez, 32 Cal. 269.

9. Macadamizing the streets and curbing the sidewalks are made by statute distinct kinds of improvement in Oakland, and the former does not include the latter. Id.

10. A contract in Oakland to improve a public street is valid only for such improvements as are named in the resolution of intention to improve, passed by the common council. If such resolution declares only an intention to macadamize, the contract should not be let for both macadamizing and curbing the sidewalk. Id.

11. If the contract to improve a street in Oakland includes a kind of work not named in the resolution of intention, the contractor can recover for such work as is named in the resolution, if it can be separated from the other and estimated. Id.

12. The fact that the mayor of Oakland before his election, had become the assignee of a contract for the improvement of a street, as security for a debt due him by the contractor, does not affect the validity of the contract or the assessment for the work, nor incapacitate him from countersigning the warrant for the collection of the assessment. Id.

13. The act of the mayor of Oakland in countersigning a warrant for the collection of an assessment for street improvements is purely ministerial. Id.

14. If there is any irregularity in the act of the mayor of Oakland in countersigning a warrant for the collection of an assessment for a street improvement, such irregularity is waived by a failure to appeal from the act of the mayor to the common council. Id.

15. If there is any irregularity in the demand for the amount of an assessment for a street improvement in Oakland, or any defect in the assessment roll, the same is waived by a failure to appeal to the common council. Id.

16. A personal judgment for the amount of an assessment for a street improvement in Oakland should not be rendered against the defendant for a deficiency which may remain due after the enforcement of a lien on the lot. Id.

SPECIFIC CONTRACT, | STREET, 8, 60, 90, 91,
21. | 213, 736.

OATHS.

1. When a statute does not designate the particular officer by whom a required oath may be administered and certified, it may be taken before any officer having general authority to administer and certify oaths.

Dunn v. Ketchum, 38 Cal. 93.

ELECTION, 65, 66.
OFFICER.

TAXATION, 485.

OFFICE AND OFFICER.

1. OFFICE.

1. *Eligibility.*
6. *Appointment.*
19. *Term of.*
34. *Qualification, Official Bonds.*
43. *Contesting Title to.*
52. *Removal from.*
54. *Vacancy in.*
72. *Power of Legislature over.*
81. OFFICERS.
81. *Duties of.*
101. *Compensation.*
106. *Liabilities.*

OFFICE.

Eligibility and Election to.

1. It is not essential to the right of entry on the discharge of the duties of an *ex officio* office that the incumbent should receive a separate certificate of election thereto, or take therefor a separate oath of office, when not specially so required by the act creating or regulating such office.

People v. Kelsey, 34 Cal. 470.

2. On the sixteenth day of August, 1857, A. received from the president of the United States a commission of surveyor-general for the state of California. At a general election, held on the third day of September, 1857, A. and B. were candidates for the office of state controller of the state of California; A. received the highest number of votes, but never qualified or claimed the office. On the sixth day of September, 1857, A. gave bond and took the oath of office under the commission as attorney-general, and on the ninth day of the same month entered upon the duties of such office, and on the fifteenth notified the president of his acceptance of the same: *Held*, that A. was eligible to the state office when the votes were cast for him, and was duly elected thereto.

People v. Whitman, 10 Cal. 38.

3. The code has not materially changed the common law rule, that from the undisturbed exercise of a public office a presumption arises that the appointment of it is valid. This presumption, unless overcome

by other evidence, will support a finding that the incumbent of an office is *de jure* such officer.

Delphi Sch. Dist. v. Murray, 53 Cal. 29.

4. If the **secretary of state** refuses to estimate the votes given for members of congress, as shown in the records of the counties transmitted to him by clerks, and to issue a **certificate** to the person having the highest number of votes, he will be compelled to do so by **writ of mandate**.

Pacheco v. Beck, 52 Cal. 3.

5. The candidate for an office who does not receive a **majority** or a **plurality** of the votes, is not elected because the opposing candidate who did receive a majority or plurality of the votes was ineligible.

Crawford v. Dunbar, 52 Cal. 36.

Appointment to.

6. To constitute the "**holding**" of an office, within the meaning of the constitution, there must be the concurrence of two wills—that of the appointing power, and that of the person appointed.

People v. Whitman, 10 Cal. 38.

7. As regards the appointing **power**, the appointment is complete when the commission is duly issued by the president; but the person appointed is required to give bond and take the oath of office before he can possess the office. These acts constitute a **condition precedent** to the holding the office.

Id.

8. The legislature having created the tenth judicial district, and not having appointed a judge therefor, the governor, on May 1, 1851, appointed the respondent, who was duly qualified. The relator, on October 10 thereafter, received a **commission from the governor**, as judge of said district, having been elected by the people at the September general election of the same year, and was duly qualified. The relator appeared in court at the October term, and the respondent being on the bench, claimed his right to exercise the duties of judge of the court. The court decided that he had no such right, the respondent claiming to hold under his appointment and commission from the governor until the election and qualification of a district judge in September, 1852: *Held*, that the relator is rightfully entitled to the said office.

People v. Mott, 3 Cal. 502.

9. The legislature failing to elect successors to the board, the power of appointment vested in the **governor**.

People v. Baine, 6 Cal. 509.

10. The boards of supervisors, in filling vacancies in office, appoint to office; they do not elect.

Conger v. Gilmer, 32 Cal. 75.

11. The appointment to office by the

board of supervisors is not complete until the person appointed has received a **certificate of his election** under the seal of the board, signed by the proper officers of the board. An appointment made by a majority of the board may be revoked at any time before such certificate is issued, and another person may be appointed.

Id.

12. An ordinance was passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided that the board should appoint a person to superintend the cemetery, "annually, in October, who shall hold office for the term of one year;" and, further, that the board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor is appointed and qualified." Defendant was so appointed July 8, 1858, and held the office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: *Held*, that relator is entitled to the office; that the failure to appoint in October, 1858, and 1859, did not exhaust the power of the electoral body, the time named being **directory**, and not of the essence of the power.

Jacobs v. Murray, 15 Cal. 221.

13. Even if the charter provides for a city attorney to attend to the business of the city, other counsel may be employed when necessary.

Smith v. Mayor Sacramento, 13 Cal. 531.

14. The legislature may confer the power of electing a **fire commissioner** in a city upon a board of fire underwriters, which is a voluntary association of persons, and not a corporation.

In re Bolger, 45 Cal. 553.

In re Merrill, Id.

15. A change in the membership of such association does not take away its power of appointment, and the appointment may be made by a majority vote.

Id.

16. A person who held an office in this state by appointment of the **governor** before the codes took effect, which office was continued by the political code, is entitled, even if the term of the office has expired, to continue to discharge its duties until his successor has qualified.

People v. Bissell, 49 Cal. 407.

17. If an office is filled *de facto*, a **writ of mandate** does not lie for the purpose of trying the title to it.

Meredith v. Supervisors, 50 Cal. 433.

18. A person does not become the **successor** of another in an office filled by the appointment of the governor, which requires the confirmation of the senate under section 368 of the political code, until his **appointment** has been thus confirmed.

People v. Bissell, 49 Cal. 407.

Term of.

19. Official terms should not be extended beyond the time clearly defined, but rather shortened by implication, if necessary.

People v. Brenham, 3 Cal. 477.

20. But when the office has been filled by an election, the legislature may extend the term of the incumbent; provided the whole term, when extended, does not exceed the time limited by the constitution.

Christy v. Sacramento, 39 Cal. 3.

21. Where the act organizing a county provides for the term of office of the officers first elected, but makes no provision as to their successors, the duration of the term of the latter is governed by the general law.

People v. Colton, 6 Cal. 84.

22. The term of the office of governor is fixed at two years certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years.

People v. Whitman, 10 Cal. 38.

23. The state librarian holds over his office, after the expiration of his term, and until the election and qualification of his successor, by title, notwithstanding the law creating the office contains no provision authorizing him to do so.

Stratton v. Oulton, 28 Cal. 44.

24. The above rule applies to civil functionaries whose duties consist in the safe keeping and current management of public property committed to their care and custody.

Id.

25. The duration of the term of an appointee commissioned to fill a vacancy in the office of superintendent of immigration, is controlled by the provisions of the forty-first section of the act concerning officers, passed April 28, 1851.

Wetherbee v. Cazneau, 20 Cal. 503.

26. The legislature can abolish or change an office created by it, and it may extend or abridge the terms of its incumbents at pleasure. In re Bulger, In re Merrill, 45 Cal. 553.

27. The legislature having failed to classify the trustees of the insane asylum, extended the term of all the trustees to five years, and the appointments to fill vacancies could not extend beyond the original term.

People v. Baine, 6 Cal. 509.

28. The term of the office of the resident physician of the asylum never runs apart from the officer, and commences running only from the date of his election, the act only fixing the duration of his term, but not the exact time of its commencement.

People v. Langdon, 8 Cal. 1.

29. The words extending the incumbent's tenure "until his successor is appointed and qualified," were intended only to prevent a hiatus or *interregnum* occurring between

the last day of the incumbent's term and the day on which his successor enters into office, during which time the incumbent is a mere *locum tenens*. People v. Reid, 6 Cal. 288.

30. Any other rule would continue the incumbent of any elective office for another full term, where there was a failure to elect his successor; for if there is no vacancy caused thereby, there is no authority for an election, except to fill a vacancy, until the expiration of another term. Id.

31. Clear distinction between an office constituted by legislative act, and a contract made with a party, to render for a stated period certain services, though these services are to be rendered in a capacity in the nature of a public office or employment.

McDaniel v. Yuba, 14 Cal. 444.

32. By the provisions of the constitution, the manner of electing and the term of the office of controller are the same as that of governor, and consequently, if the controller elect fails to qualify, the incumbent holds over until his successor is elected and qualified. People v. Whitman, 10 Cal. 38.

33. When an office becomes vacant and is filled by appointment, the term of the officer appointed continues until the next election by the people authorized by law.

People v. Mathewson, 47 Cal. 442.

Qualification.

34. The neglect of a person to qualify for the office within the ten days stipulated by law, after his election, was a refusal on his part to serve, and vacated the office, so far as he had any right thereto.

Payne v. San Francisco, 3 Cal. 122.

35. It devolves upon an officer to see that proper bonds are filed, and the state has no right to visit upon a party the laches of her own officer. People v. Aikenhead, 5 Cal. 106.

36. When an officer is elected to a new term, he should give a new bond. Id.

37. Where it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact, together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office.

People v. Clingan, 5 Cal. 389.

38. The limitation as to time applied only to the action of the incumbent. The board had a reasonable time allowed them in which to reject or approve the bonds presented. Doane v. Scannell, 7 Cal. 393.

39. The incumbent having tendered his bond on the eleventh, and the board then refusing to act upon it, left them in default, and not him. Id.

40. Where the board of examiners, authorized to approve the new bonds required by law of the officers then in office, refuse to

act, an officer already in office is not compelled to sue out a mandamus to compel such action; and he may set up such failure to act, in defending his right to the office.

People v. Scannell, 7 Cal. 432.

41. The refusal to act by a board of officers, when required by law to act, is not the exercise of a discretion, and is conclusive upon no one. The failure to approve of an official bond is not the fault of the officer; it does not release his sureties, nor can it work a forfeiture of his office. Id.

42. It is not held in this case that a person appointed to a vacancy may delay to qualify as long as he chooses, after his regular election, and then fix his regular term from the act of qualification; nor that the governor could defer signing the commission for as long a term as he choose, but simply that, in cases like this, the new term commences with the qualification, provided the qualification be within a reasonable time.

Brodie v. Campbell, 17 Cal. 11.

Contesting Title to.

43. An information in the nature of a *quo warranto*, is the proper proceeding to try the title to an office.

People v. Scannell, 7 Cal. 432.

44. In an action by one claiming to have been elected to an office against his predecessor, to compel the surrender of the books, papers, etc., belonging to the office, plaintiff must show *prima facie* that a vacancy existed in the office, and that he was elected to fill it.

Doane v. Scannell, 7 Cal. 393.

45. In a proceeding against an officer *de facto*, to compel him to deliver the books and papers of his office to a party claiming the office, the plaintiff must show *prima facie*, first, that a vacancy existed, and, second, that he is entitled to fill it.

People v. Scannell, 7 Cal. 432.

46. One claiming by action an office or the incidents to the office, can only recover upon proof of title. Dorsey v. Smyth, 28 Cal. 21.

47. When the question as to who is the legal successor of an officer is in litigation upon a point of law, the officer is bound to know who his successor is, and if the legal successor qualifies and demands the office, and the incumbent refuses to deliver it up upon the termination of the litigation, he becomes a trespasser *ab initio*. Id.

48. One entering into the possession of the office of judge of a district court by color of right becomes a judge *de facto*, and his title to the office can be questioned only by an action brought directly for that purpose. People v. Sassovich, 29 Cal. 480.

49. The seventy-fourth section of the general revenue act of 1860, as to the election of county auditor in certain counties, and separating his duties from those of county

clerk, etc., does not repeal the special act of 1858, entitled "an act to separate the offices of county recorder, county auditor, clerk of the board of supervisors, clerk of the board of equalization, from the office of county clerk in the county of Placer;" and a person elected in the fall of 1860 as county recorder for Placer county, under the act of 1858, will hold in preference to a person elected at the same time as county auditor under the revenue act of 1860.

Dunham v. Placer, 17 Cal. 411.

50. Where, pending an application for a writ of mandate to a county treasurer, his term of office ceases, but judgment is afterward rendered against him, and the writ issued, the judgment and writ have no force against his successor; and proceedings against his successor for contempt for refusing to obey the writ are void for lack of jurisdiction. Ex parte Tinkum, 54 Cal. 201.

51. In an action against a public officer, upon his going out of office, his successor does not become a party to the suit, and is not affected by the proceedings, until made a party under the provisions of section 385 of the code of civil procedure. Id.

Removal.

52. The governor of this state can not remove from office a notary duly appointed before his full term of office has expired.

People v. Jewett, 6 Cal. 291.

53. The sheriff being *ex officio* tax collector of foreign miners' licenses, by an act of the legislature, may be deprived of the office of tax collector before the expiration of his term.

Attorney-general v. Squires, 14 Cal. 12.

Vacancy in.

54. Under the provisions of law requiring certain officers to file their official bonds with the secretary of state, within a specified period, with the approval of the governor indorsed thereon and signed by him (stats. 1850, p. 74, secs. 1, 2, 3), and declaring an office to be vacated by the neglect of the officer to give the bond required by law within a specified period ("act concerning ing offices," passed April 28, 1851, sec. 39), the failure of the governor to indorse his approval on the bond, does not vacate an office where an incumbent has, within the time fixed by law, given a sufficient bond, presented it to the governor for his approval and deposited it in the office of the secretary of state. People v. Fitch, 1 Cal. 519.

55. Under section 996, political code, an office becomes vacant, *ipso facto*, upon the incumbent ceasing to be an inhabitant of the district (if the office be local) for which he was elected, or within which the duties of the office are required to be discharged;

and a successor may be appointed without a previous adjudication that the office is vacant. So *held*, in an action for usurpation of office brought by the people upon the relation of one who had been duly appointed and qualified as supervisor of a certain district, against a subsequent appointee of the county judge to the same office.

People v. Brito, 55 Cal. 79.

56. *Held, further*, in the same action, that it was error to admit in evidence a petition of numerous persons for the appointment of the defendant, wherein it was stated that the relator had ceased to be an inhabitant of the state, and the judgment reversed on that account. Id.

57. If the term of the incumbent of an office, filled by an appointment of the governor, which requires the confirmation of the senate, has expired, but he still continues to discharge its duties, there is no such vacancy in the office as will authorize the governor to fill it by the appointment of a successor, without the consent of the senate first had.

People v. Bissell, 49 Cal. 407.

58. If an office filled by appointment of the governor requires the confirmation of the senate, such a vacancy therein as will authorize the governor to fill the same, without the consent of the senate, can be caused only by the death or resignation of the incumbent, or by the happening of some other event, by reason of which the duties of the office are no longer discharged. Id.

59. A resignation is effectual without its acceptance by the appointing power.

People v. Porter, 6 Cal. 26.

60. One who has been elected to an office can not resign the same until the time has arrived when he is entitled by law to possess the same, and he has taken the oath and given the required bond, and entered upon the discharge of his duties.

Miller v. Sacramento, 25 Cal. 93.

61. An attempt by one elected to an office to resign the same before he has qualified and entered upon the discharge of its duties is abortive and ineffectual. Id.

62. The office of county judge is not a "county office" within the meaning of the act entitled "an act to amend 'an act to regulate elections,' passed March 23, 1850;" consequently the board of supervisors can not order a special election to fill a vacancy in that office. People v. Martin, 12 Cal. 409.

63. The power to elect includes the power to fill vacancies.

Gorham v. Campbell, 2 Cal. 135.

64. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during the recess of the senate, the governor has the right to fill

the vacancy, and his appointment vests in the appointee the right to hold and discharge the duties of such office for the full term, subject only to be defeated by the non-concurrence of the senate.

People v. Addison, 10 Cal. 1.

65. If an act creating an office provides that the incumbent of another office (naming it) shall, *ex officio*, fill the office created, and the incumbent of the other office is by the constitution prohibited from holding the office created, there is no vacancy to be filled by the governor, and an appointment by him is without authority and void.

People v. Sanderson, 30 Cal. 160.

66. An act creating a board of five trustees to govern the state library, and making the chief justice of the supreme court one of the five, is as to the chief justice, and as to the place to be filled by him, void, and there is no vacancy which the governor can fill by appointment. Id.

67. At the general election held in Yuba county in September, 1855, W. was elected county treasurer of that county for two years from the date of his election, and until his successor was chosen and qualified. On the twenty-eighth day of April, 1857, a special act was passed, extending the term of this officer to the first Monday in January, 1858. On the seventh of May, 1857, W. resigned, and S. P. W. was appointed by the board of supervisors in his stead. At the general election in September, 1857, F. received the majority of votes for that office, for the unexpired term of W., and claimed the office: *Held*, that the appointee held for the balance of the extended term, and that there was no vacancy to be filled at the election in September, 1857. People v. Wells, 11 Cal. 329.

68. The absence of a judge from the state, is not such a vacancy as can be supplied by the executive, under legislative authority. People v. Wells, 2 Cal. 610.

69. When a mode of filling a vacancy in an office is provided by law, other than by the appointment of the governor, the governor has no power to fill such vacancy by his appointment.

People v. Stratton, 28 Cal. 382.

70. An appointment to fill a vacancy in the office of state printer made by the governor during the session of the legislature, is irregular and void.

People v. Fitch, 1 Cal. 519.

71. The legislature having elected a state printer, and the state printer previously appointed by the governor having resigned after the adjournment and during the recess, whereupon the governor appointed a person to fill the vacancy supposed to exist: *Held*, that this second appointment, as well as the former one, was irregular and void. Id.

Power of Legislature over.

72. The legislature possesses the power to alter or abridge the term of office of purely legislative creation.

People v. Haskell, 5 Cal. 357.

73. Where the legislature appointed a **board of examiners**, consisting of three executive state officers, to perform the duty of auditing certain accounts, which theretofore had been performed by the controller of state, but which is not prescribed by the constitution as the peculiar duty of that officer: *Hehl*, that the act is valid and binding, the power of the legislature being supreme, except where expressly restricted.

Ross v. Whitman, 6 Cal. 361.

74. **Power to appoint for the full term** of the office is vested in the legislature, and the governor has no right to exercise it.

People v. Langdon, 8 Cal. 1.

75. It is competent for the legislature to provide for filling the office of **district judge** during the interval between the day of election and the qualification of his successor, by authorizing him to hold until such successor be elected and qualified.

Brodie v. Campbell, 17 Cal. 11.

76. Although the right to an office is derived by election from the people, it is competent for the legislature to render the **enjoyment of the right dependent** upon various conditions, as to the ascertaining of the result of the election, the issuing of the commission, and the qualification of the officer. *Id.*

77. The incumbent of an administrative office, created by the legislature, may be **legislated out of office** pending the term for which he was elected.

People v. Banvard, 27 Cal. 470.

78. If a **general act** creates an office in all the counties of the state, to be filled by election once in two years, and a special act, passed afterwards, takes one county away from the provisions of the act, and this **special act** is afterwards repealed by an act which restores the office as to that county, the provisions of the general act are revived as to the office.

Trout v. Gardiner, 39 Cal. 386.

Affirmed, *People v. Hunt*, 41 Cal. 435.

79. The legislature has the authority to provide that **assessors** may appoint **deputies** with power to perform official acts in the names of their principals, and an assessment made by such deputies is valid.

Meek v. McClure, 49 Cal. 623.

80. A **collector of internal revenue**, for a district, must appoint his deputies by an instrument in writing, but need not assign a deputy to a portion of the revenue district by an instrument in writing.

Tidball v. Halley, 48 Cal. 610.

OFFICERS.

Duties of.

81. Where the statute confers on an officer power to appoint a **deputy**, but does not prescribe the duties of the deputy, the deputy has full power to do any and all acts which his principal may perform by virtue of his office. *Muller v. Boggs*, 25 Cal. 175.

82. The **auditor of a county** is the mere clerk of the board of supervisors; and he has no power or authority to draw his warrant on the county treasurer for the payment of a claim, unless the board of supervisors have made an express order that the claim be paid. *Connor v. Morris*, 23 Cal. 447.

83. In counties where the offices of **county clerk** and **county recorder** are united, the officer performs the functions of auditor as recorder, and not as clerk.

People v. Darrach, 9 Cal. 324.

84. It follows that where the offices have been separated in a county where they had been previously joined, the recorder becomes auditor. *Id.*

85. The offices of **county clerk** and **county recorder** are **distinct offices**, though they may be held by the same person; and it makes no difference in the character of the office whether the law declares in terms that the clerk shall also be recorder, or declares that the clerk shall be *ex officio* recorder.

People v. Durick, 20 Cal. 94.

86. The offices of **sheriff** and **tax collector**, although held by the same person, are separate and distinct offices.

People v. Ross, 38 Cal. 76.

87. In 1858 a law was passed separating the office of county recorder of Shasta county from that of county clerk, and making the **recorder ex officio clerk** of the probate court. In 1860, by the general revenue act, the county clerk was made *ex officio* recorder. By the revenue act of 1861, county recorders were again required to be elected separately. Each of the revenue acts contained a clause repealing all laws and parts of laws in conflict with its provisions, but neither contained any provisions inconsistent with that of the law of 1858, which made the recorder *ex officio* clerk of the probate court: *Hehl*, that a recorder elected in 1861 was clerk of the probate court, the office of probate clerk having remained attached to that of recorder during the whole period. *Id.*

88. The legislature, having vested certain duties in a public officer, for whose services **compensation** is allowed, may take those duties and fees from the office before the expiration of the term, and confer them upon another officer.

Attorney-general v. Squires, 14 Cal. 12.

89. It seems the office of **sheriff** and **tax collector** are constitutional offices. *Id.*

90. The fact that after the election and qualification of a **county treasurer** a law is passed by which his duties are changed or his salary is reduced does not impair his official bond, or discharge his sureties from responsibility for his acts after the change is made. *Sacramento v. Bird*, 31 Cal. 66.

91. The treasurer is not an independent officer in respect to his **charge and control of the county funds**; but in his disbursements acts on the warrants of the auditor on claims audited by the board of supervisors. *People v. Fogg*, 11 Cal. 651.

92. In such a case the treasurer is not, in respect to interest money, placed in any direct relation with the creditors; and he is not intrusted with a mere ministerial duty of holding it or paying it to them on demand. *Id.*

93. The treasurer of state could not prior to January 1, 1865, transfer to the general fund any money in the fund created by the act of April 4, 1864, providing for the sale of lands for the relief of the volunteers of this state enlisted in the service of the United States. *People v. Pacheco*, 29 Cal. 210.

94. The general rule that if a party whose duty it is to perform some act bases his refusal to perform it on some defect in the proceedings of his adversary, he will not afterwards be permitted to allege a new or additional defect, does not apply to officers whose duties are governed by law. *Ward v. Flood*, 48 Cal. 36.

95. The **register** of state lands is not a judicial but a ministerial officer. *Middleton v. Low*, 30 Cal. 596.

96. The general rule of the common law is that officers who exercise judicial functions can not act by **deputy**, but those who exercise merely **ministerial functions** may, without express authority to that effect. *Jobson v. Fennell*, 35 Cal. 711.

97. In the absence of statutory provisions as to the appointment of deputy constables, the common law rule applies, and **constables** may act by **deputy** in the exercise of their ministerial functions. *Id.*

98. When a statute prescribes the particular method in which a public officer, acting under a **special authority**, shall perform his duties, the mode is the measure of power. *Cowell v. Martin*, 43 Cal. 605.

99. An officer, either of the state or of a county or city, having public funds under his control, ought not to enter into a **stipulation** in respect to the facts in a suit affecting such funds, without acting under the advice of counsel. *Uhler v. Boyd*, 41 Cal. 60.

100. If an official duty is to be performed by an officer on the happening of an event, he can not capriciously refuse to perform it

on the plea that he is not satisfied that it has happened. If the fact exists and is established by proof, it is his **legal duty to be satisfied** and perform the act, and **mandamus** will lie.

Stockton R. Co. v. Stockton, 51 Cal. 328.

Compensation of.

101. One having the legal right to an office, but not in possession of the same, is entitled to the **salary** for the term for which he was elected; and the payment of the salary to one in possession of the office without title will not prevent the one having the title from recovering the salary. *Dorsey v. Smyth*, 28 Cal. 21.

102. The salary annexed to a public office is **incident to the title** of the office, and not to its occupation and exercise. *Stratton v. Oulton*, 28 Cal. 44.

103. The court can not determine the right to the **fees** and emoluments of an office, until the title to the office is determined. *Meredith v. Supervisors*, 50 Cal. 433.

104. The legislature may devolve on the **secretary of state** the performance of services foreign to the office, and may pay him a salary therefor in addition to his salary as secretary of state. *Melone v. State*, 51 Cal. 549.

105. The act of April 1, 1876, for the appointment of a **state land commissioner**, provides that the officers therein named "shall hold their office for the period of three years from and after appointment by the governor," and that they shall, "within thirty days after their appointment," meet and qualify: *Held*, that the commissioners were entitled to salary from the **date of their appointment**. *Ball v. Kenfield*, 55 Cal. 320.

Liabilities.

106. The act of **drawing a warrant** or paying money out of the treasury is, in most cases, merely ministerial, and not political, and the officer, in such cases, is amenable to the courts and bound by their orders. *Nougues v. Douglass*, 7 Cal. 65.

107. Where political power is vested in a public officer he is responsible only in his political character to the country. Where **discretion** is vested in him he but conforms to the law in exercising that discretion. But where a question of political power is not involved, where no discretion exists, but a specific legal duty is imposed, ministerial in its character, such as the issuance of a patent, the delivery of a commission, the payment of a specific sum, or the drawing of a particular warrant, and in the performance of that duty individuals have a direct pecuniary interest, the officer, like any other citizen, is subject

to the process of the regularly constituted tribunals of the country.

McCauley v. Brooks, 16 Cal. 11.

108. Although public officers should be made to answer in damages to all persons who may have been injured through their **malfeasance, omission, or neglect**, but if the damages would have been sustained notwithstanding the misconduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officer can not be held responsible.

Lick v. Madden, 36 Cal. 208.

109. The act entitled "an act to prevent extortion in office and to enforce official duty," approved March 14, 1853, was designed to afford a remedy of a summary character against office-holders who were guilty of extortion or of neglect in the performance of official duties.

Matter of John J. Marks, 45 Cal. 199.

It has not been repealed.

Id.

110. A state harbor commissioner who corruptly consents to leasing wharves belonging to the state for less than the real value of their rental, and who, in consideration thereof, receives from the lessee a sum of money, or who directs the employees of the board of harbor commissioners to neglect to keep accounts of money collected by them from rent of wharves, and to pay a portion thereof over to him, or to buy silver plate for him with the same, or who appoints wharfingers on the recommendation of a third person, on an agreement that such third person will recommend customers to trade at the commissioner's store, or who votes to contract with a person to dredge the harbor without advertising for bids, in consideration of receiving a portion of the money paid for dredging from the person who performs the same, or who favors employing persons to perform any work on the wharves in consideration of receiving from such persons a portion of the money paid them therefor, or who instructs wharfingers to collect from vessels the full sum for dockage, but to retain and pay over to him a portion thereof and not account to the state therefor, is guilty of **neglect** in the performance of official duty, within the meaning of the act approved March 14, 1853, entitled "an act to prevent extortion in office and to enforce official duty." Id.

111. Wherever the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment.

Downer v. Lent, 6 Cal. 94.

112. A public officer who holds in his hands a fund which rightfully belongs to a private person, but which the officer ought to have paid into the public treasury, will not be permitted, in an action brought

against him by the rightful owner of the fund, to set up as a **defense a breach of his official duty** in not paying the fund into the treasury. Randall v. Austin, 46 Cal. 54.

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25. CONSTRUCTION OF.

GENERALLY.

1. No recovery can be had on a bond purporting to be the **joint bond** of the principal and sureties, but signed by the latter only. Sacramento v. Dunlap, 14 Cal. 421.

2. The **presumption** is, that each signed upon the understanding that the others, named as obligors, would also sign. Id.

3. Otherwise as to **undertakings** under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. Id.

4. Otherwise, also, as to **joint and several bonds**. There, each signer is bound, without the signatures of the others named as obligors, unless at the time executing the bond he declared he would not be bound without such signatures were obtained. Id.

5. If after the principal obligor on an official bond has executed the same, the **penal sum is changed**, and with his knowledge and assent it is then executed by other sureties, he then forwards it for approval and record, he is liable on the bond as approved. *People v. Kneeland*, 31 Cal. 288.

6. If an official bond is **received and acted on** by the county officers as the official bond, the obligors are liable on the same even if it has not been approved. *Id.*

7. The eighth section of the act concerning official bonds, which provides that every such bond shall be obligatory upon the principal and sureties therein, for the faithful discharge of all duties which may be required of the officer by any law enacted subsequently, applies only to the duties properly appertaining to his office as such, and not to **new duties** belonging to a **distinct office**, with the execution of which he may be charged. *People v. Edwards*, 9 Cal. 286.

8. The **defects** in official bonds, which are **cured** upon their suggestion in the complaint, in an action upon such bonds, under the eleventh section of the "act concerning the official bonds of officers," are omissions which, but for the statute, would operate to discharge the obligors. *Id.*

EXECUTION OF OFFICIAL BOND.

9. Where the law requires an officer to file a **new bond** within two days after the meeting of the supervisors, the officer has the whole of the two days succeeding the day of meeting to execute and present his bond.

People v. Scannell, 7 Cal. 432.

10. An official bond made to "the people of the state of California," is sufficient, though the statute required it to be made to "the state of California." All that is requisite is that there should be a **certain obligee**, and either of the above names is descriptive of the **same sovereignty**, and may be indifferently used, as they are in various statutes. *Tevis v. Randall*, 6 Cal. 632.

11. If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, and verdict and judgment are for plaintiff, the **judgment** will not be disturbed on appeal upon the judgment roll, on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the **signature of the principal**.

Mendocino v. Morris, 32 Cal. 145.

12. The **absence of the signature** of the principal obligor to an official bond is not a defect which may be cured by its suggestion in a complaint under the eleventh section of the act concerning official bonds.

People v. Hartley, 21 Cal. 585.

13. An official bond is not vitiated because

the **sureties swear** that "they are worth the amount for which they become liable over and above all their just debts and liabilities," instead of saying "over and above all their debts," etc. *Dorsey v. Smyth*, 28 Cal. 21.

APPROVAL OF OFFICIAL BOND.

14. The **board of supervisors** of a county, after the passage of the act of March 20, 1855, became the body authorized by law to approve of the official bonds of county treasurers. *People v. Evans*, 29 Cal. 429.

15. In the matter of the approval of the bonds of officers, boards of supervisors exercise **judicial functions**.

Miller v. Sacramento, 25 Cal. 93.

16. The act of March 20, 1850, requiring bonds of county treasurers to be approved by the court of sessions, being special and subsequent to the general act of February 9, 1850, imposing the duty of approving the bonds of county officers upon the county judge, supersedes this latter act in this respect; and as the power of approval given by the former act was transferred by the act of March 20, 1855, section 25, from the court of sessions to the board of supervisors, the **power of approval** now rests with them.

People v. Breyfogle, 17 Cal. 504.

17. A county judge in 1861 had no jurisdiction to discharge the sureties on the official bond of a county treasurer, or to approve of a new bond. *People v. Evans*, 29 Cal. 429.

18. Where the board of supervisors accept the bond of a county treasurer, such **acceptance** carries with it an approval of the **penalty** fixed in the bond and of the form and sufficiency of the sureties, and it need not appear otherwise than by such acceptance that the board fixed the amount of the penalty, or that sureties enough executed it to make at least two sureties for the whole sum. *People v. Breyfogle*, 17 Cal. 504.

19. A board of supervisors has no **jurisdiction to reject** an official bond, except for the reasons that it is not in form and substance in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties; and the supreme court will review on certiorari and annul an order of a board rejecting a bond for any other than one or more of said reasons.

Miller v. Sacramento, 25 Cal. 93.

20. The official bond of a **county treasurer** is not invalidated because approved by the county judge instead of the board of supervisors. *Mendocino v. Morris*, 32 Cal. 145.

21. To render the obligors on an official bond liable, it must be approved and **filed** for record. *People v. Kneeland*, 31 Cal. 288.

DELIVERY OF.

22. The filing of an official bond for record

is not a delivery of the same, unless it is preceded by an approval.

People v. Kneeland, 31 Cal. 288.

23. When an official bond, proper in form and substance, is signed and sealed by the obligors, and approved by the proper officer, and filed in the office appointed by law, it is both executed and delivered to the people of the state of California.

Sacramento v. Bird, 31 Cal. 66.

24. In an action on an official bond, the production of the bond in court by the obligee is sufficient evidence of its delivery.

Tidball v. Halley, 48 Cal. 610.

CONSTRUCTION OF.

25. If a statute providing for the organization of a new county contains no provision in relation to official bonds, they must be given in conformity to the general law upon that subject.

People v. Ross, 38 Cal. 76.

26. In the absence of a statute to the contrary expressly, a person holding two separate offices must give two separate official bonds.

Id.

27. The sureties of a county treasurer are liable for public money received by him as treasurer after the expiration of his term, so long as he remains in possession of the office, and until he delivers it over to his successor.

Id.

28. The sureties on a bond of an officer for one term, will not be liable for any act done by him after election to a second term.

People v. Aikenhead, 5 Cal. 106.

29. The receipts of a county treasurer given to a tax collector for public money, after the expiration of his term, but before he has delivered possession of the office to his successor, are *prima facie* evidence to charge the sureties on his official bond.

Placer v. Dickerson, 45 Cal. 12.

30. A bond running thus: "For which sums respectively, unto the said state of California, in the manner and in the proportion hereinbefore set forth, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents," is a joint and several bond.

People v. Love, 25 Cal. 520.

31. Where the law requires a joint and several bond, and the officer filed a bond which was in form joint, and not joint and several: *Held*, that he and his sureties can not complain that their obligation is less burdensome than the law required.

Tevis v. Randall, 6 Cal. 632.

32. A bond in the following form: "Know all men that we, A., as principal, and B. C., and D., as sureties, are bound unto the people in the several sums affixed to our names, viz.: B. in the sum of ten thousand dollars, C. in the sum of five thousand dollars, D. in

the sum of three thousand dollars," etc., "for which payment well and truly to be made we severally bind ourselves, our heirs," etc., and signed and sealed by the obligors, is *held*, to be an instrument embracing several distinct obligations, each of which is a joint obligation of the principal and one surety, and not joint and several.

People v. Harley, 21 Cal. 585.

33. A bond, which in form is the joint obligation of a principal and his sureties, and not joint and several, and signed by the sureties but not by the principal, is invalid and not binding upon the sureties.

Id.

34. A tax collector's bond, in which the principal and sureties bind themselves in the sum of fifty thousand dollars, "to be paid to the state of California in the following manner and proportion," followed by a specification of the several amounts for which each surety respectively binds himself, the aggregate amounting to the sum of fifty thousand dollars, without any specification of the amount for which the principal is bound, is valid, both against the principal and his sureties.

People v. Love, 25 Cal. 520.

35. An act of the legislature which makes the sheriff of a county its tax collector, and also makes the sheriff and his bondsmen responsible for the payment of all taxes collected by him, has the effect of making the bond of the sheriff his bond as tax collector.

Id.

36. The revenue act of 1854 made the sheriff *ex officio* tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miners' licenses: *Held*, that the bond in suit, entered into in 1856, must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes, except foreign miners' licenses, are covered by the bond.

People v. Edwards, 9 Cal. 286.

37. The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other.

Id.

38. A condition in a notary's bond that he shall well and truly discharge the duties of his office according to law, is the only proper condition to be inserted in his bond.

Tevis v. Randall, 6 Cal. 632.

39. In an action upon the official bond of G. as surveyor-general (during the years 1871 to 1875): *Held*, that neither G. nor his

sureties were liable for his **malfeasance** in the office of register.

People v. Gardner, 55 Cal. 304.

40. *Held, further*, that it was the duty of the surveyor, under the political code, and also under the law existing before the adoption of the codes, to collect a fee of five dollars from each applicant for land, and that his failure to do so was a **non-performance of duty**, and a breach of his official bond, for which he and his sureties were liable. *Id.*

JUDGMENT, 91, 92.

PLEADING, 1444.

SAN FRANCISCO, 34.

SEAL, 26.

SHERIFF, 4, 88.

STATUTE, 109.

SURETY, 4, 6, 9, 36-39, 62-66.

OFFSET.

COUNTER CLAIM.

PLEADING.

OPINION.

1. A decision of the court is its judgment, the opinion is the reasons given for that judgment. The former being entered of record immediately, can only be changed upon a petition for rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, until it is transcribed on the record with the consent of the writer, when it ceases to be the subject of change, except through regular proceedings before the court by petition. *Houston v. Williams*, 13 Cal. 24.

2. The practice of giving reasons in writing for judgments is of modern origin. And it is discretionary with the court whether it give an opinion upon pronouncing judgment; and if given, whether it be oral or in writing. *Id.*

ORDERS.

1. An order made **without notice** to the other party may be set aside without notice to the party who procured it.

Coburn v. Pacific L. & M. Co., 46 Cal. 31.

2. The **entry** of an order in a criminal case in vacation, instead of term time, even if irregular, does not work any injustice.

People v. Congleton, 44 Cal. 92.

3. A **motion to set aside** an order entered at a term of the court next preceding the passage of the act of April 2, 1866, amending the sixty-eighth section of the practice act,

and within five months after the adjournment of said term, was made in due time.

Bensley v. Ellis, 39 Cal. 309.

4. The act of April 2, 1866, amending the sixty-eighth section of the practice act, was retrospective in its operation. *Id.*

5. As to **what constitutes** an order, see *Loring v. Illsley*, 1 Cal. 24, and *Belt v. Davis*, *Id.* 134.

6. It may be **defined** to be the judgment or conclusion of the court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief, and cases where relief is denied.

Gilman v. Contra Costa, 8 Cal. 52.

7. The **effect of an order** of court, general in its terms at the close, is to be ascertained by a reference to the motion upon which it was made, and which is recited at its commencement.

McKinley v. Tuttle, 34 Cal. 235.

AMENDMENTS, 6.

ASSIGNMENT, 65, 68.

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"ORDER 800."

JURISDICTION, 294.

LEGISLATURE, 25-36.

LICENSE, 20, 21.

MUNICIPAL CORPORATION, 30-33, 55-60.

OAKLAND, 1-5.

SAN FRANCISCO, 57.

ORDINANCE.

CONTRACT, 304.

PLEADING, 365.

SAN FRANCISCO, 14,

18, 21, 22, 23.

SUPERVISORS, 50-53.

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EJECTMENT.

PLEADING, 1072-1089.

TENANT IN COMMON.

OUTSIDE LAND.

SAN FRANCISCO, 57.

OVERFLOWED LAND.

LAND--SWAMP LAND. | NEGLIGENCE, 32.

OWNERSHIP.

1. A merchant of Baltimore shipped to the plaintiffs at San Francisco certain goods by a bill of lading in which they were named as the consignees, and which required the delivery of the goods to them on their paying freight. On the arrival of the ship at San Francisco, the defendants, who were the general assignees of the vessel, indorsed on the bill of lading an order to the master to deliver the goods to the plaintiffs, and afterwards indorsed on a duplicate bill of lading an order to the master to deliver the same goods to D. & H. The latter bill of lading being first presented, the goods were delivered to D. & H.: *Held*, in an action brought to recover the value of the goods, it appearing the plaintiffs had paid the freight, or tendered payment of it, that the property in the goods was vested in them, and that the defendants were liable for a **conversion**.

Webb v. Winter, 1 Cal. 417.

2. Fuller purchased some yokes of oxen of Helm, the appellant, for one thousand dollars, paid two hundred dollars down, and gave his note, with C. as surety, for the balance; C. signed the note on the express condition that title to the oxen was to remain in Helm till they were fully paid for. Fuller was to have the absolute use of them. The oxen were placed in the hands of a brother of Helm, who was in the employ of Fuller as a driver, with the intention of securing the title in Helm. The defendant, a constable, levied upon and sold the oxen, thus situated, as the property of Fuller: *Held*, that the sale by Helm to Fuller was **absolute**, and that Fuller had such a right of property in them as was subject to execution; that Helm retained no effective lien upon the property. There was no agreement in writing to that effect, nor did Helm, as mortgagee, retain possession; but it was under the control and direction of Fuller. The legal consequences of this condition of things can not be evaded by showing that the property was in the possession of Fuller's hired servant as agent or trustee.

Helm v. Dumars, 3 Cal. 454.

3. The ownership of goods is not changed when the claim to such ownership is based on a **fraudulent contract**.

Butler v. Collins, 12 Cal. 457.

4. **Possession of personal property is prima facie evidence of ownership.** The possession of the servant is the possession of the master.

Goodwin v. Garr, 8 Cal. 615.

5. **Lawful possession of personal property is prima facie evidence of ownership;** and property thus possessed is *prima facie* liable to be seized under a writ of attachment against the party in possession of such property.

Killey v. Scannell, 12 Cal. 73.

6. **Possession of personal property by a**

person engaged in business on his own account is only *prima facie* evidence of ownership, and does not prevail against the true owner except as to **negotiable instruments**, and whatever comes under the general denomination of currency.

Wright v. Solomon, 19 Cal. 64.

7. **An actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is an open, visible, change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased.**

Cahoon v. Marshall, 25 Cal. 197.

8. The doctrine that land may often pass by conveyance as essential to the enjoyment of, or as parcel of buildings, etc., erected thereon, is consistent with the doctrine that the ownership of the land may be in one person and the ownership of the **structures** thereon in another, as in these latter cases the buildings are erected by permission of the owner of the land for the use of the builder, and generally under mutual expectation by the parties of their removal, or of compensation being made for them to the builder, or of the latter ultimately acquiring title to the land. Sparks v. Hess, 15 Cal. 186.

9. **Wood cut by one in possession of land without title is the property of the owner of the fee.**

Kimball v. Lohmas, 31 Cal. 154.

PARDON.

1. The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times.

People v. Bowen, 43 Cal. 439.

2. One of the consequences of an executive pardon is to remove from the offender the disability which follows conviction of a felony.

Id.

3. An offender may be pardoned after he has suffered the punishment adjudged for his crime.

Id.

4. A document signed by the governor, in which, under the provisions of the act approved March 7, 1868, he, on account of the good conduct of a person confined in the state prison under sentence for a crime, releases him from imprisonment before the expiration of his term, and restores him to the rights of citizenship, does not remove the disability to testify, annexed by law to a conviction for a felony.

Blanc v. Rodgers, 49 Cal. 15.

PARENT AND CHILD.

1. A parent may recover the expenses of nursing and healing his minor child, of such tender years that it is incapable of rendering him any service, from one who willfully or negligently injures such child.

Sykes v. Lawler, 49 Cal. 236.

2. If a father sues his infant son residing with him, and the statute requires the summons to be served personally on the infant, and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service.

Brown v. Lawson, 51 Cal. 615.

3. If a judgment against an infant is offered in evidence, and the record shows service on the infant, but does not show with whom he was residing, it will be presumed, for the purpose of sustaining the jurisdiction, that he was residing with his father. Id.

INFANCY, 24.

NEGLIGENCE, 87-89,
103, 104.

PARTIES TO ACTIONS.**2. PLAINTIFF.**

2. *How Designated.*

4. *Who may be Joined as Plaintiffs.*

9. *Real Party in Interest must Sue.*

22. *Assignor and Assignee.*

27. *Counties.*

36. *Executors and Administrators.*

50. *Heir.*

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55. *When they may Join.*

70. *When Husband must Sue Alone.*

75. *When the Wife may Sue, either Alone or Jointly with her Husband.*

90. *Infant to Appear by Guardian.*

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98. *Principal and Agent.*

98. *Agent, When he may Sue.*

102. *Agent, When he can not Sue.*

107. *Principal, When he may Sue on Contracts made with Agents.*

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123. *Sheriff.*

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130. DEFENDANT.

139. *Agent.*

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153. *Executors, Administrators and Trustees.*

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179. IN PARTICULAR ACTIONS AND CAUSES OF ACTION.

179. *Bill of Lading.*

180. *Contracts, Joint and Several.*

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232. *Real Estate, Actions in rem.*

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250. RULES APPLICABLE TO EQUITABLE ACTIONS.

274. *Foreclosure of Mortgages and Mechanics' Liens.*

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299. *Defendants.*

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311. SUBSTITUTION OF PARTIES.**PLAINTIFF.***How Designated.*

2. A corporation is recognized in law only by its corporate name, and must sue and be sued by its corporate name.

Custiss v. Murry, 26 Cal. 633.

3. An action can only be maintained against a company by the name under which it transacts its business, when sued by a company name. The statute authorizing suit to be brought against a company by its name is in derogation of the common law, and will be strictly construed.

King v. Randlett, 33 Cal. 318.

Who may be Joined as Plaintiffs.

4. Where the plaintiff had no knowledge until the trial that a third party was a secret partner of the defendant, the non-joinder of such third party can not be objected to by the defendant.

Tomlinson v. Spencer, 5 Cal. 291.

5. A defendant can not object to non-joinder of another person as co-plaintiff, after forcing the plaintiff to amend by omitting him.

Powell v. Ross, 4 Cal. 197.

6. In a creditor's bill, the plaintiff having discovered fraud by his superior diligence, is not compelled to bring in the other creditors to share its fruits.

Baker v. Bartol, 6 Cal. 483.

7. All the grantees should join as plaintiffs in an action upon either direct or implied covenant in a deed that the grantor has not sold or incumbered the land, or that he is seised of and has a right to convey the same.

A deed of the land by one of the grantees to another does not convey to him the cause of action upon such covenant.

Lawrence v. Montgomery, 37 Cal. 183.

8. An action for **deceit** in the sale of land to which the grantor had no title should be brought by all the grantees jointly, unless there has been a conveyance of the cause of action to the plaintiff. A **conveyance** by one of the grantees to the others, of his interest in the land, **does not assign** the cause of action for **deceit**, so as to enable the assignees to sue for the deceit in their names. Id.

Real Party in Interest must Sue.

9. Under our system there is but one form of action to enforce private rights, whether legal or equitable, and the action must be in the name of the real party in interest, with certain statutory exceptions, within which cases of **assignment** do not come.

Wiggins v. McDonald, 18 Cal. 126.

10. Whatever the rule may be under the old system, under our system the right of action is in the party sustaining the injury; for, on a recovery, the other party, if entitled to receive the money at all, and if judgment were had in the name of both, would hold it by right of, and as trustee for, the other; and our practice act, for convenience, has given the right to sue to the party **beneficially** entitled to the fruits of the action.

Summers v. Farish, 10 Cal. 347.

11. A **stranger** to a transaction has no right to sue. Chenery v. Palmer, 5 Cal. 131.

12. One who is not a party to a proceeding can not make a **motion** therein.

Estate of Aveline, 53 Cal. 259.

13. Actions of **ejectment** must be prosecuted in the name of the real party in interest.

Ritchie v. Dorland, 6 Cal. 33.

14. An application for the **writ of mandate** must be prosecuted in the name of the real party in interest, and if the name of the people is used, and the people have no interest, and the relator alone is interested, the writ will be denied.

People v. Pacheco, 29 Cal. 210.

15. The court can not proceed and determine a controversy between defendants to an action after there has **ceased to be a plaintiff**.

Ryan v. Tomlinson, 31 Cal. 11.

16. When the plaintiff, in a suit in the county court to determine conflicting claims to town lots under the act of 1860, is permitted by the court to withdraw as a party, and the suit is dismissed as to him, the suit is ended, and a subsequent **judgment** determining the rights of the defendants as between themselves, is void, and not admissible in evidence, even though the order of dismissal provides that the suit shall be con-

tinued for the purpose of determining the rights of the other parties. Id.

17. An action for injury to sheep, which was committed during the term for which they had been leased, and while the lessee was entitled to the possession, must be brought by the **lessee**.

Triscony v. Orr, 49 Cal. 612.

18. A person who has not the legal title to the **stock of a corporation** can not maintain an action against the corporation for converting it.

Morrison v. Gold Mt. Co., 52 Cal. 306.

19. The contractor or his assigns are the only persons authorized to maintain an action to enforce the **lien of an assessment** on a lot for the improvement of a **street** in San Francisco. Bays v. Lapidge, 52 Cal. 481.

20. The court can not permit a person to be **substituted** as plaintiff, in place of the then plaintiff, on the ground that the person substituted was the real party in interest at the commencement of the action.

Dubbers v. Goux, 51 Cal. 153.

21. Any private citizen may make complaint to the district court against an officer for **extortion** in or neglect of official duties, under the act approved March 14, 1853. (Stats. 1853, p. 40.)

In re J. J. Marks, 45 Cal. 199.

Assignor and Assignee.

22. Under our system of practice, an action may be brought in the name of the assignee as the party **beneficially** interested.

Wheatley v. Strobe, 12 Cal. 98.

23. An assignment by a **creditor** of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to a suit for its recovery.

Leese v. Sherwood, 51 Cal. 152.

24. In this state the assignee of **part of an entire demand** may recover in his own name, without making the holders of the remainder of the demand parties, if the assignment was made with the knowledge and consent of the debtor; but if not, then the other holders should be made parties, and if they are not, the complaint will be bad on demurrer, for want of parties.

Grain v. Aldrich, 38 Cal. 514.

25. An absolute assignment of a demand enables the assignee to sue for and recover the whole debt, even though by the assignment he acquired only a portion of the demand.

Gradwohl v. Harris, 29 Cal. 150.

26. Where the plaintiff transfers his interest in the subject-matter of the action, it is the right of his successor in interest (under section 385 of the code of civil procedure) to prosecute the case, either in the name of the original plaintiff, or by having himself substituted in the action by an order of the court;

and the original plaintiff is divested of all power to control the action: *Held*, accordingly, where the plaintiff had transferred his interest to others, whose attorneys thenceforth took charge of the case, but without any change of the title of the action, or of the attorney of record, that a **stipulation** signed by the original plaintiff and his attorney, for the dismissal of the action, was a flagrant breach of good faith, and that an order of dismissal entered upon such stipulation should have been promptly vacated on discovering the fraud.

Walker v. Fell, 54 Cal. 386.

Counties.

27. A county is a **corporation**, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail.

Smith v. Myers, 15 Cal. 33.

28. The **people of a county** are not a corporation, nor are they recognized in law as capable of suing or being sued. Id.

29. Under the act of April, 1854, counties have the right of prosecuting and defending actions in the same manner as individuals.

Placer v. Astin, 8 Cal. 305.

30. An action upon a **recognizance** given in a criminal case is properly commenced in the name of the county as plaintiff.

Mendocino v. Lamar, 30 Cal. 627.

31. Counties are **quasi corporations**, and can sue and be sued.

Price v. Sacramento, 6 Cal. 254.

32. An action against a defaulting treasurer and his sureties for money belonging to the county of Sacramento, if the default occurred after the passage of the act of April 25, 1863, providing for the government of the county of Sacramento, is properly brought in the **name of the board of supervisors** of the county of Sacramento, instead of that of the people of the state of California.

Sacramento v. Bird, 31 Cal. 66.

33. If the complaint on the **official bond** of a county treasurer avers that the money for which the treasurer is in default belongs to the county, the action is properly brought in the name of the county.

Mendocino v. Morris, 32 Cal. 145.

34. An action may be brought in the **name of a county** to recover money belonging to the general fund of the county.

Solano v. Nevil, 27 Cal. 468.

Sharp v. Contra Costa, 34 Id. 284.

35. In a proceeding by **mandamus** commenced by a county against its officers, to compel them to hold their offices at the county seat, in which an issue arises as to which of two places voted for as county seat received a majority of the votes, one of the places voted for can not appear as a party to the action. Calaveras v. Brockway, 30 Cal. 325.

Executors, Administrators, and Trustees.

36. An administrator, by our statute, being entitled to possession of the real estate of the deceased, may maintain ejectment.

Curtis v. Herrich, 14 Cal. 117.

37. An administrator who is a party to an action involving the title of his intestate to real estate, represents the title which the deceased had at the time of his death.

Cunningham v. Ashley, 45 Cal. 485.

38. Under our statute, an executor may maintain an action for trespass committed upon the real estate of his testator in his life-time.

Haight v. Green, 19 Cal. 113.

39. Where a patent of land was issued by the United States to executors, and an executrix of the last will and testament of one H., in trust for the heirs and devisees of said H., and the executrix subsequently intermarried with one of the executors: *Held*, that under the statute of this state the authority of the executrix ceased by her marriage, and that **ejectment** based upon the patent was properly brought in the names of the executors.

Teschemacher v. Thompson, 18 Cal. 11.

40. Executors have the right to institute actions under the general authority conferred upon them by the statute. No **special authorization from the probate court** is necessary in such cases.

Halleck v. Mixer, 16 Cal. 579.

41. A suit in the name of an executor or an administrator is properly brought at any time before administration is had, or a decree of distribution is made by the probate court.

Curtis v. Sutter, 15 Cal. 259.

Teschemacher v. Thompson, 18 Cal. 20.

42. The **Mexican nation** made a grant of land to P., which, after the **cession of California** to the United States, was confirmed by decree of the board of land commissioners, from which an appeal was taken to the United States district court. Pending the appeal, P. died, leaving a will. An order was made in the United States court, on petition of the heirs of P., and the executors of the estate, substituting the heirs in the proceedings in place of P., and the court then confirmed the land to the heirs, and it was surveyed, and the survey approved. Subsequently E. was appointed administrator, with the will annexed: *Held*, that the legal title was in the heirs, and that the administrator could not maintain an action to recover possession of the same.

Emeric v. Penniman, 26 Cal. 122.

Salmon v. Symonds, 30 Id. 301.

43. A debt due to the intestate is a personality, and does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions to collect the same, and it is error to join the

heir as plaintiff with the administrator in an action to enforce its collection.

Grattan v. Wiggins, 23 Cal. 16.

44. If a party brings suit on a note made payable to him as administrator, and is at the time in possession of the same, evidence is not admissible on behalf of the defendant to prove that the plaintiff is not the real party in interest, even if the money loaned for which the note was given belonged to the estate of the deceased.

Corcoran v. Doll, 32 Cal. 82.

45. The action for the foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the sheriff's or master's deed, but to subject to sale the title which the mortgagor had at the time of executing the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators to not possess the title, but only a temporary right to the possession.

Burton v. Lies, 21 Cal. 87.

46. In this state a civil action for damages for the death of a person can be maintained only by the administrator or executor of the deceased.

Kramer v. Market St. Co., 25 Cal. 435.

47. In this state, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is, therefore, a necessary party to all suits affecting it.

Harwood v. Marye, 8 Cal. 580.

48. The statute which gives the possession and control of real property belonging to intestates to their administrators, until administration of the estate and distribution of the property are had, only applies to cases arising since the statute was passed.

Soto v. Kroder, 19 Cal. 87.

49. The trustee of an express trust is entitled to bring an action in his own name for the benefit of his *cestui que trust*.

Winters v. Rush, 34 Cal. 136.

See EJECTMENT; EVIDENCE; WRIT OF RESTITUTION.

Heir.

50. At the time the practice act was passed, the death of a person constituted no cause of action, and the eleventh section of that act, so far as it designates the parties by whom an action for the death of a person may be brought, is repealed by the act of 1862, which provides that "every such action shall be brought by and in the names of the personal representatives of such deceased person."

Kramer v. Market St. Co., 25 Cal. 435.

51. A civil action for damages for the death of a person *per se*, can not be maintained by any one at common law, and in

this state it can be maintained only by the administrator or executor of the deceased. Id.

52. The heir has a right of entry upon the real estate left by his ancestor, subject only to the statutory right of the administrator, and where there is no administrator the heir can maintain ejectment.

Updegraff v. Trask, 18 Cal. 458.

Estate of Woodworth, 31 Id. 604.

53. No entry upon the premises after the death of his ancestor is necessary. It is sufficient that he show his title as heir to the premises demanded.

Soto v. Kroder, 19 Cal. 87.

54. Where the plaintiff brought suit in replevin as the mother of the real parties in interest, asserting no right in herself, and subsequently the children, by their guardian *ad litem*, filed a complaint setting up the same cause of action, the subsequent appearance was not an intervention, but merely a substitution, and a stipulation made by the first plaintiff will bind the second.

Temple v. Alexander, 53 Cal. 3.

Husband and Wife.

When they may Join.

55. The law which deprived a married woman of the right to make contracts is not altered by the statute, unless in respect to the property specified by it, and she can not bring suit in her own name upon a contract which she was not authorized by the statute to make. Snyder v. Webb, 3 Cal. 83.

56. A wife can not sue alone to recover the homestead; it is a joint estate, with right of survivorship, and both husband and wife must join in the action.

Poole v. Gerrard, 6 Cal. 71.

57. Where the homestead was claimed by the husband in an action in which he was alone defendant, to foreclose a mortgage made by him alone since his marriage, neither the rights of the husband nor wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both.

Revalk v. Kraemer, 8 Cal. 66.

58. In an action against the husband alone, the homestead right can not be determined. Both parties must be before the court.

Kraemer v. Revalk, 8 Cal. 74.

59. The homestead right can not be individually asserted; both parties must join.

Cook v. Klink, 8 Cal. 347.

60. In an action to foreclose a mortgage against a husband, where the defendant sets up the right of the homestead, the court should order the wife of defendant to be brought in as a party, as no decision upon the question of homestead can be conclusive,

either upon the husband or the wife, unless both are parties. *Marks v. Marsh*, 9 Cal. 96.
Sargent v. Wilson, 5 Id. 504.

61. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party she may intervene, or, by permission of the court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner*, 10 Cal. 296.

62. The wife has no right in the homestead independent of the husband, which she can enforce against his consent. She can not maintain a suit for it in her individual name. *Guio d. v. Guio d.*, 14 Cal. 506.

63. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterward defendant executes an undertaking on appeal to the husband and wife, and suit is afterward brought on the undertaking in the name of the husband and wife: *Held*, that the defendants are concluded by the acts of the appellant, and that the wife is properly joined in the suit on the undertaking.

Tissot v. Darling, 9 Cal. 278.

64. An action brought by the husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama and causing her detention there and consequent illness, and other injuries, though based on a contract, sounds in tort, and the wife is a proper and necessary plaintiff.

Warner v. Uncle Sam, 9 Cal. 697.

65. Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife as plaintiff was mere surplusage, and not a defect of parties under the code, and might have been stricken out on notice, if insisted on. *Id.*

66. In an action by the wife for money, which, when recovered, will be her separate property, subject to the management and control of the husband, he is properly joined with her as plaintiff.

Kays v. Phelan, 19 Cal. 128.

Van Maren v. Johnson, 15 Id. 308.

67. In a suit to foreclose a mortgage executed by the husband to plaintiff, the wife may be made defendant if she claim the premises as her separate property, by virtue of a previous conveyance from the husband to her. *Kohner v. Ashenauer*, 17 Cal. 578.

68. Husband and wife must join in an action for an injury done to the person of the latter, and it is immaterial that the injury

is charged to have been committed in violation of a contract.

Sheldon v. Uncle Sam, 18 Cal. 526.

69. If pending an action brought in the joint names of husband and wife to recover the wife's separate estate, the plaintiffs are divorced, the action may be prosecuted to a judgment in the names of the same plaintiffs, there being no objection taken to the joinder of the plaintiffs by a supplemental answer.

Calderwood v. Pyser, 31 Cal. 333.

When Husband must Sue Alone.

70. In a suit for damages to the common property, the wife should not be a party, and if so made, the complaint is demurrable. *Sheldon v. Uncle Sam*, 18 Cal. 526.

71. For injury effected by deceit or otherwise, to the common property, or business carried on by means of the common property, the remedy is by the husband alone, without the wife.

Barrett v. Tewksbury, 18 Cal. 334.

72. Husband and wife can not recover jointly in an action by them *ex contractu* for the breach of a contract made with defendant for the transportation of the wife from San Francisco to New York.

Sheldon v. Steamer Uncle Sam, 18 Cal. 526.

73. But if, in such action, no demurrer be interposed, and if the facts stated and proven show that plaintiffs are entitled to relief for fraud practiced by defendant, or for personal injury to the wife, then the action, to that extent, is well brought; and relief will not be denied on the ground that the same facts would support an action on the contract, in which the husband alone can recover. *Id.*

74. So, where plaintiffs, husband and wife, bring an action for damages for deceit, the complaint averring, in effect, that defendant's wife executed a deed of a certain lot to plaintiffs, who paid therefor three thousand dollars, the purchase being induced by the fraudulent representations of defendant that his wife's title was perfect, etc., and also that in consequence of this title proving worthless, plaintiffs lost the lot, with valuable improvements by them placed thereon, and that their business of hotel keeping conducted thereon, and of street grading connected therewith, was destroyed, etc.: *Held*, that demurrer for misjoinder of plaintiffs lies; that the money paid for the lot, the lot itself, and the business, are, on the face of the complaint, common property, there being no averment that the wife had any separate interest in the money or in the business.

Barrett v. Tewksbury, 18 Cal. 334.

When the Wife may Sue, either Alone or Jointly with her Husband.

75. A wife may maintain an action against

the husband to recover money due upon a **promissory note** executed by the husband to the wife before marriage, and which is the separate property of the wife.

Wilson v. Wilson, 36 Cal. 447.

76. There is no **statutory limitation** as to the kind of actions that may be maintained by the wife, when they concern her **separate property**, or are against her husband. Id.

77. The practice act gives to a married woman the right to sue without her husband, where the action concerns her **separate estate**. Snyder v. Webb, 3 Cal. 83.

78. The practice act permits the wife to sue alone when the action is **between herself and her husband**. If it is necessary to introduce other parties, their introduction can not affect her right.

Kashaw v. Kashaw, 3 Cal. 312.

79. In the exceptional cases mentioned in section 7 of the practice act, the statute is not obligatory on the wife to sue or defend alone; it confers only a privilege which in many cases it may be important for her to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded her. When the action concerns her separate property, and is not between herself and her husband, she may sue with or without him.

Van Maren v. Johnson, 15 Cal. 308.

80. When the action concerns the separate property, she may seek the aid of the court with or without the aid of her husband. Id.

81. Where the wife executed and delivered to defendant a deed of her **separate property**, in consideration of his promise to pay her five hundred dollars, and sues for the money, alleging that it has not been paid, and that she has never consented, orally or in writing, that her husband might receive or use it: *Held*, that although his misjoinder as plaintiff is not ground of demurrer, still, if the money has been paid to him, that fact may constitute a defense to the action. Kays v. Phelan, 19 Cal. 128.

82. In an action brought to recover the purchase money of a lot belonging to a married woman as her separate property, the husband may join with her, but his **misjoinder** is not a ground for demurrer. Id.

83. The husband of a married woman is properly joined with her as a party defendant in an action upon a **partnership obligation** contracted by the wife and third persons as partners previous to the marriage and while she was a *feme-sole*.

Keller v. Hicks, 22 Cal. 457.

84. The wife may join with her husband as co-plaintiff in an action to recover pos-

session of her **separate estate**, but is not required to do so. She may sue alone.

Calderwood v. Pyser, 31 Cal. 333.

85. If the **promissory note** is the separate property of the wife, suit may be brought on it in her name alone, or the husband and wife may sue jointly.

Corcoran v. Doll, 32 Cal. 82.

86. In an action brought by a married woman concerning property belonging to her as **sole trader**, under the act of 1852, the husband need not be joined.

Guttman v. Scannell, 7 Cal. 455.

87. In an action under the thirteenth section of the forcible entry and unlawful detainer act, the tenant in possession and from whom restitution and damages were sought, was a married woman and a sole trader, and her husband was made a co-defendant with her, but no relief was asked against him, except for restitution of the premises: *Held*, that there was no **misjoinder** of parties of which either of defendants could complain.

Howard v. Valentine, 20 Cal. 282.

88. The seventh section of the practice act places married women, in respect to the cases therein mentioned, upon a common level with all other parties to actions, and imposes on them the responsibilities it imposes on other parties. Leonard v. Townsend, 26 Cal. 435.

See the case of Wilson v. Wilson, 36 Cal. 447.

89. It is no longer necessary, under section 7 of the practice act, for the wife to sue by **procchein ami**.

Kashaw v. Kashaw, 3 Cal. 312.

Infant to Appear by Guardian.

90. A general guardian of an infant has authority to institute an action on behalf of his ward; and where the body of the complaint shows the general guardianship of the plaintiff, a mistake in the designation of the plaintiff as guardian *ad litem* in the title of the action is one of no importance.

Spear v. Ward, 20 Cal. 659.

91. A guardian of an infant can not sue in his own name to recover money due the infant. Such action must be brought in the name of the infant by his guardian.

Fox v. Minor, 32 Cal. 111.

Partners.

92. Partners can not sue one another for any of the business or undertakings of the partnership. This can only be done in chancery by asking for a dissolution and an account.

Stone v. Fouse, 3 Cal. 292.

Barnstead v. Empire Co., Id. 299.

Russell v. Ford, 2 Id. 80.

93. One partner can not sustain an action against his copartner for the delivery of personal property belonging to the partnership.

Buckley v. Carlisle, 2 Cal. 420.

94. When one partner sues for an injury to the partnership property, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury.

Nightingale v. Scannell, 6 Cal. 506.

95. The law will not tolerate a division of a joint right of action into several actions.

Id.

96. A. and B. were in partnership. B. took forcible possession of the partnership property, and sold it to C. and D.: *Held*, that A. can not maintain an action for the partnership property and profits against B., C., and D. Mason v. Hatfield, 4 Cal. 276.

Priest.

97. The position of a priest who appears to have charge of church property, coupled with an interest, seems to be nearly analogous to that of a sole corporation in England, and has power to sue as an inseparable incident to such corporation.

Santillan v. Moses, 1 Cal. 92.

Principal and Agent.

Agent, When he may Sue.

98. The note sued on, payable to the plaintiff, although it describes him as an agent for another, does not take away the right of the agent to sue in his own name at law.

Ord v. McKee, 5 Cal. 515.

99. If the plaintiff have the legal interest in the money sued for, the court will not entertain an objection that other persons for whom he is agent or trustee ought to sue.

Salmon v. Hoffman, 2 Cal. 138.

100. An attorney in fact does not hold the character of trustee, and is not a necessary party to a suit to represent the interest of the principal.

Powell v. Ross, 4 Cal. 197.

101. Where two persons were employed by the claimants of a tract of land under a Mexican grant, as agents to procure a confirmation of the grant in the United States, and services are thus rendered, it is individual in its character, and separate actions may be maintained by such agent for his expenses thus incurred.

Conner v. Hutchinson, 12 Cal. 127.

Agent, When he can not Sue.

102. An agent, ordinarily, can not sue in his own name in respect to the **subject-matter of his agency**, and this rule applies to consignees and indorsees of bills of lading, when they are in truth but the agents of the shippers. Lincker v. Ayeshford, 1 Cal. 75.

103. When S., as the agent of R., loans the money of R., an **action against the borrower** to recover it must be brought in the name of R. S. can not sue for the money.

Swift v. Swift, 46 Cal. 267.

104. H. purchased goods of P. and M., which were consigned to P., an agent; H. failing to pay for the goods upon delivery, P. brought an action to recover the purchase money: *Held*, that P. had no right of action in his own name. It seems that if the purchase had been made directly from P., although the goods belonged to another, the rule would be different.

Phillips v. Henshaw, 5 Cal. 509.

105. A., of Liverpool, shipped certain goods to San Francisco, and indorsed the bills of lading to the plaintiff, his agent, and became a bankrupt before the arrival of the goods: *Held*, it appearing on the face of the complaint that the plaintiff was a mere naked agent of the shippers, that he could not recover the goods in his own name of the master of the ship, who claimed to hold the goods for the assignees in bankruptcy of A.

Lincker v. Ayeshford, 1 Cal. 75.

106. The **indorsement of a bill of lading, prima facie**, vests the property in the goods mentioned therein in the indorsee, but a bill of lading is not a negotiable instrument, so far as to enable an indorsee who has no property, either general or special, in the goods, and no lien thereon for advance or otherwise, to sue the master of the ship in his own name for non-delivery of the goods, when it appears on the face of the complaint that the plaintiff, the indorsee, is a mere naked agent of the shippers. Id.

When the Principal may Sue.

107. A principal may sue in his own name on a **contract in writing**, made and signed by his agent without disclosing his principal; but, in order to maintain the action, the principal must show the agency, and the power of the agent to bind him at the time. But, in such a case, the defendant may make the same defenses against the newly discovered principal as he could against the agent with whom he dealt as principal.

Ruiz v. Norton, 4 Cal. 358.

108. Under the one hundred and fifty-fourth section of the act of 1856 (370) the person entitled to recover the penalty is the party who contracts, or offers to contract, for the transmission of the dispatch. He may, probably, do this by his agent or servant. But when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown.

Thurn v. Alta Tel. Co., 15 Cal. 472.

109. A principal has a right to **waive a tort** against his factor, and bring an action to compel him to account, and for the net proceeds arising from the sales, when the plaintiff can only recover the net proceeds of sales effected by him, after deducting necessary charges and commissions.

Lubert v. Chauviteau, 3 Cal. 462.

110. The **owner of a ship**, chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by **extrinsic evidence** to be the principal in the contract, and will be allowed to avail himself of its provisions.

Brooks v. Miuturn, 1 Cal. 482.

111. A **surety** paying a debt, for which several persons are liable in distinct proportions as principals, can not maintain a joint action against the principals for the amount thus paid, but his remedy is by a several action against each upon the implied assumption of each to reimburse what was thus paid for him.

Chipman v. Morrill, 20 Cal. 130.

Tenant in Common, Joint Tenants, Coparceners, and Copartners.

112. Joint tenants must join in an action for possession of land jointly held. The failure to do so is fatal to a recovery.

Dewey v. Lambier, 7 Cal. 347.

113. A tenant in common of lands, employed as agent by **special agreement** between himself and co-tenant to take charge of the land, make sales thereof at certain prices, receiving a commission of five per cent. on sales, may sue his co-tenant for the services rendered in respect to the land, outside of selling it.

Thompson v. Salmon, 18 Cal. 632.

114. One tenant in common of real property, in the **actual possession** thereof, may maintain an action, under the two hundred and fifty-fourth section of the practice act, to determine the validity of an adverse claim of title thereto by a co-tenant.

Ross v. Heintzen, 36 Cal. 313.

115. Tenants in common may join as plaintiffs in an action for damages for the sale of land under an **erroneous judgment**, which is afterwards reversed, and if one of the tenants in common is dead, his executor or administrator may join as plaintiff with the other tenants.

Reynolds v. Hosmer, 45 Cal. 617.

116. Actions for the **diversion** of the waters of ditches are in the nature of actions for the abatement of nuisance, and may be maintained by tenants in common in a joint action.

De Johnson v. Sepulveda, 5 Cal. 149.
Parke v. Kilham, 8 Id. 79.

117. One of several tenants in common has a right to sue alone for his **moiety**.

Covillaud v. Tanner, 7 Cal. 38.

118. Tenants in common in a **mine**, each owning undivided interests, acquired at different times, may sue jointly to recover possession of all of their several undivided interests.

Goller v. Fett, 30 Cal. 481.

119. Tenants in common can unite in this state by statute in an action for the **possession of real property**, and the executor

of a deceased tenant in common can unite with the co-tenants of his testator in such actions.

Touchard v. Keyes, 21 Cal. 202.

120. One tenant in common may sue a **party in possession by adverse claim**, and recover the premises, if plaintiff represents the better title.

Collier v. Corbett, 15 Cal. 183.

121. Such grantee, though scised in fee of only an undivided interest in the particular parcel of land, may recover in **ejectment** the whole of that parcel, as against all persons except the original co-tenant and his grantee. He is entitled to the possession of the entire premises as against all other parties.

Stark v. Barrett, 15 Cal. 361.

122. A tenant in common with other locators of a **mining claim** can maintain an action for the recovery of the land without joining his co-tenants; and if he improperly join any other person, objection to this **misjoinder** must be taken in the answer.

Morenhaut v. Wilson, 52 Cal. 263.

Sheriff.

123. The sheriff who levies an attachment by virtue of the process of the court has not the right of property in the debt, and can not maintain an action in his own name for the recovery of the debt.

Sublette v. Melhado, 1 Cal. 105.

State.

124. An action upon a duty due by an **auctioneer** to the state under a special statute, not being a prosecution, but a civil action for the recovery of money due the state, is properly brought in the name of the state.

State v. Poulterer, 16 Cal. 532.

In the absence of any statute the **state can not be sued**, and a judgment against her is erroneous.

People v. Talmage, 6 Cal. 256.

125. In an action brought to **annul a patent** for land sold without authority of law, the state, and persons who have a right to mine on the land under the mining laws of this state, may be joined as plaintiffs.

People v. Morrill, 26 Cal. 352.

Wilson v. Castro, 31 Id. 420.

126. The **attorney-general** is the only person authorized to appear for the people in the supreme court, and a private person can not at his election use the name of the people to obtain redress for private wrongs.

People v. Pacheco, 29 Cal. 210.

127. If the state has no interest in the subject-matter an information on the relation of the attorney-general, on behalf of the state, to annul a patent, can not be sustained.

People v. Stratton, 25 Cal. 244.

128. The people of the state, without a relator, may bring an action to compel, by **writ of mandate**, the board of super-

visors of a county to issue bonds to raise money to improve roads, when there is an act of the legislature requiring the bonds to be issued. *People v. Supervisors*, 50 Cal. 561.

129. The question whether the act establishing the court is constitutional and valid can not be litigated in an action of this character brought by a private person for the reason that the **people are interested**, and are entitled to be heard in the matter.

Fraser v. Freelon, 53 Cal. 644.

DEFENDANTS.

130. There is no error in permitting the purchasers of the defendant's title at a **sheriff's sale** to defend the action, if they rely wholly on defendant's title, and do not deny his possession.

McFadden v. Wallace, 38 Cal. 51.

131. In an action to enforce a **lien** on property in the adverse possession of a third person, the person in possession must be made a party defendant; otherwise the judgment, as to him, is void.

Wingard v. Banning, 39 Cal. 543.

132. Where the plaintiff's cause of action consists of **several items**, parties who are separately, and not jointly, affected by the different items can not be joined as defendants.

Miller v. Curry, 53 Cal. 665.

133. If the acts and threats of a person taken by themselves do not make a case which would support an action against him, his mere joinder in an action as a defendant with others who have severally, and without concert or collusion with him, done similar acts or made similar threats, will not create a liability on his part.

Keyes v. Little York Co., 53 Cal. 724.

134. The cases governing the joinder of parties considered, and *held*, that where an action for a **tort** is brought against several co-defendants, it is essential that the wrong complained of be joint.

Id.

See PLEADINGS.

135. If the plaintiff moves on the nineteenth of April for an order to bring in an **additional party** as a defendant, and the order is made, and on the thirteenth of May stipulates that such party may file an answer *nunc pro tunc*, as of the nineteenth of April, the plaintiff is estopped from saying that such defendant was not a party, and in court from the nineteenth of April.

Lawrence v. Ballou, 50 Cal. 258.

136. A judgment rendered against a party who is brought in by motion as a defendant after the trial is concluded is **erroneous** as to such party.

Id.

137. Where the answer discloses the fact that persons not parties to the action have succeeded to the defendant's interest, in

whole or in part, it is the duty of the plaintiff to **amend and bring in** those parties, and if he neglects to do so, the court, of its own motion, should order it to be done at the proper time in order that the whole controversy may be settled in one action.

Robinson v. Gleason, 53 Cal. 38.

138. A party can not occupy the **double character** of debtor and creditor. And where the plaintiff was himself the subscriber to paper upon which his claim was founded, his liability and that of the defendant was of the same character, and would not constitute the defendant a debtor of the plaintiff.

Smith v. Truebody, 2 Cal. 341.

Agent.

139. A **public officer** who stands in relation of agent of the government, or of the public, is not personally liable upon contracts made by him as such officer, and within the scope of his legitimate duties; but this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer.

Dwinelle v. Henriquez, 1 Cal. 392.

140. Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: *Held*, that no legal right of complaint will lie against the agent.

Engels v. Heatly, 5 Cal. 136.

141. If, on the face of an instrument not under seal, executed by an agent, with competent authority, by signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal, and not the agent, is bound.

Haskill v. Cornish, 13 Cal. 45; *Id.* 221.

See also 21 Cal. 45; *Love v. Serra Nevada Co.*, 32 Id. 654.

142. If an agent, in executing a contract, use terms which charge himself, he may be sued upon the instrument itself as the contracting party; but it is otherwise if the contract contains terms which bind the principal only.

Hall v. Crandall, 29 Cal. 568.

Attorney at Law.

143. Where an attorney is charged with being a party to a fraud in obtaining a judgment for his client, in a suit brought to set aside the judgment he may be properly joined with his client as defendant.

Crane v. Hirshfelder, 17 Cal. 467.

Bondholders.

144. When should be made parties.

Hutchinson v. Burr, 12 Cal. 103.

Patterson v. Yuba, Id. 105.

Counties.

145. Counties are quasi corporations, and can sue and be sued.

Price v. Sacramento, 6 Cal. 254.

146. The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account, after presentation to, and rejection by the board of supervisors. Id.

147. The statute providing that no person shall sue a county for any demand, unless the claim has first been presented to the board of supervisors, and been by them rejected, applies as well to actions arising out of tort as upon contract.

McCann v. Sierra, 7 Cal. 121.

148. Suits brought for or against a county shall be by or in the name of such county. (Stats. 1854, 194.) So where the grounds of relief are based upon the abuse of power by the city corporation, its agents or servants, the parties whose action is impeached are necessary parties. Id.

149. At common law an action did not lie against a county, and this was the law of this state until the eighteenth of May, 1854. The law passed May 1, 1854, exempting the property of counties from a forced sale under execution, did not affect the obligation of plaintiff's contract with the county, for it was but an affirmance of the common law.

Gilman v. Contra Costa, 8 Cal. 52.

150. The people of a county are not a corporation, nor can they sue or be sued.

Smith v. Myers, 15 Cal. 33.

151. Boards of supervisors can not be sued in their official character, in ordinary common law actions, for claims against the public, county, or village they represent, without express statutory provision.

Hastings v. San Francisco, 18 Cal. 49.

152. Where a board of supervisors consists of three members, at least two of them should be made defendants in an action brought to enjoin the board from purchasing property for the use of the county.

Trinity v. McCammon, 25 Cal. 119.

Executor and Administrator.

153. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons, and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. Belloc v. Rogers, 9 Cal. 123.

154. An action may be maintained in the district court against an executor or administrator, to foreclose a mortgage upon real estate executed by his testator or intestate, although the debt secured by the mortgage

has been presented as a claim to the executor or administrator, and allowed by him, and also by the probate judge of the county, where the only object of the action is to reach the property mortgaged and subject it to sale, and have the proceeds applied to the payment of the debt secured, and a judgment is not asked against the general estate of the deceased for the debt or any part of it. Fallon v. Butler, 21 Cal. 24.

155. Where one of two partners executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained against his executor, without any showing by the plaintiff that the partnership is insolvent, or that he has pursued his remedy upon the debt against the surviving partner.

S. & L. Soc. v. Gibb, 21 Cal. 595.

156. In such action, where the surviving partner is also the executor of the deceased partner, and claims as his devisee an interest in the mortgaged property, there is no misjoinder in making him, as an individual, a co-defendant with himself as executor. Id.

157. In suit in equity for the dissolution of a copartnership, partition of the partnership property, and an adjustment and payment of the debts of the concern, where the property stands in the name of a deceased partner, the administrator and the heir should be made parties to rebut the presumption of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of the deceased, and the administrator had possession of the personal property. These objects could only be accomplished by proceedings in the district court, as the probate court did not possess the judicial means of giving relief. Gray v. Palmer, 9 Cal. 616.

158. Where several persons have been jointly concerned in a series of fraudulent acts, they may be united as defendants in a suit to annul the fraudulent acts, although the gains they realize by such acts are several. Andrews v. Pratt, 44 Cal. 309.

159. The statute makes official bonds joint and several, and the administrator of a deceased officer need not be joined in suit against the sureties on such bonds.

People v. Jenkins, 17 Cal. 500.

160. In case of joint and several contracts, an administrator can not be joined with the survivor.

Humphreys v. Crane, 5 Cal. 173.

161. In actions upon joint and several contracts or obligations, an administrator can not be joined with the survivor, because the one is joined de bonis testatoris, and the other de bonis propriis.

May v. Hanson, 6 Cal. 642.

162. In this state, all the property, both

real and personal, belonging to the estate of a deceased person goes into the possession of the administrator, who is, therefore, a necessary party to all suits affecting it.

Harwood v. Marye, 8 Cal. 580; 9 Id. 123.

163. The general right to sue an administrator was taken away by the statute. The claimant must present his claim, otherwise he can maintain no action thereon against an administrator or executor. (Laws 1851, p. 465, sec. 136.) **Mortgages and liens of record** form no exception to the rule.

Ellisen v. Halleck, 6 Cal. 393.

Falkner v. Folsom, Id. 412.

Hentsch v. Porter, 10 Id. 559; 27 Id. 354.

Husband and Wife.

164. In this state, the wife can appear in, and defend an action, separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of *feme-sole*, and be able to make as binding **admissions in writing**, in the action, as other parties.

Alderson v. Bell, 9 Cal. 315.

165. Where, in suit against husband and wife to foreclose a mortgage given by the husband, and also to set aside a conveyance of the property from him to her, for fraud, the inference from the language of the complaint is that the conveyance was made in the ordinary form of conveyance on purchase, and during marriage; and the wife demurs, on the ground that there is a misjoinder of parties, in making her a defendant: **Held**, that if she claimed the premises as her **separate property** by virtue of the conveyance from her husband, that circumstance was sufficient to justify plaintiff in making her a defendant. Kohner v. Ashenauer, 17 Cal. 578.

166. Where the **homestead** was claimed by the husband, in an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband nor wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both.

Revalk v. Kraemer, 8 Cal. 66.

Marks v. Marsh, 9 Id. 96.

167. The fact that a wife executes a **mortgage** with her husband is a sufficient reason for making her a party defendant along with her husband in an action to foreclose the same, without any allegation as to her interest in the property mortgaged.

Anthony v. Nye, 30 Cal. 401.

168. Where the wife is made a party defendant with her husband, it is no objection to the right of the plaintiff to recover that the wife was denied the benefit of a **separate trial**.

Deuprez v. Deuprez, 5 Cal. 387.

169. A married woman whose husband is sued in partition is a necessary party if she

claims a homestead right to or an interest in the property in dispute.

De Uprey v. De Uprey, 27 Cal. 329.

170. Where the **defense of the wife** is a **special** one, she can defend for her own right, as well when sued jointly with her husband, as if the trial was separate.

Deuprez v. Deuprez, 5 Cal. 387.

Partners.

171. Where two or three partners in a mine make a contract with a person not interested in the same, by which he becomes entitled to a share of their interests, and a like share of the profits of their interests, the two are the only necessary parties defendant in an action brought by the person they contract with, to determine his right to a share in the mine and a corresponding share of the profits on their interest.

Settembre v. Putnam, 30 Cal. 490.

172. In an action to take an account of a mining partnership and dissolve the same, and sever the interests of the several partners, all those owning interest in the partnership are necessary parties. Id.

State.

173. In the absence of any statute to that effect, the state can not be sued, and a judgment against her is erroneous.

People v. Talmage, 6 Cal. 256.

174. In a case where a citizen claims to be injured by an alleged failure of a state officer to do his duty, the state is not a formal party to the record, nor responsible for costs in any event. Nor if the officer has failed to do his duty, can the state be injured by the decision of the court. Neither can she be injured if the officer does his duty, and is sustained by the court.

Nougues v. Douglass, 7 Cal. 65.

Sole Trader.

175. In an action against a married woman, alleged to be a sole trader under the act of April, 1852, on a contract executed by her as such, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable.

McKune v. McGarvey, 6 Cal. 497.

176. The effect of the statute is to make such married woman a *feme-sole* as to the particular business in which she is engaged.

Id.

177. A married woman who became a sole trader under the act of 1852, for the purpose of keeping a public-house and farming, could lawfully execute and deliver in her own name a valid promissory note for the purchase money of land conveyed to her for use in said business, and could also execute, in

her own name, a valid mortgage on the same to secure the purchase money.

Camden v. Mullen, 29 Cal. 564.

Sureties.

178. One of four sureties having paid the common debt, two of the sureties being insolvent, may sue the remaining surety for his half of the debt, without joining the insolvents as parties.

Burroughs v. Lott, 19 Cal. 125.

IN PARTICULAR ACTIONS AND CAUSES OF ACTION.

Bill of Lading.

179. Where a suit is brought upon a bill of lading to the plaintiff jointly with another, the plaintiff has no separate cause of action.

Mayo v. Stansbury, 3 Cal. 465.

Contracts, Joint and Several.

Plaintiffs.

180. Where a joint contract was made by M. and C. for the purchase of a quantity of flour of defendants, and the defendants delivered one portion of the flour to M., and another to C. on their respective orders, and received payment for the same from them severally, and settled with C., and then canceled the contract with regard to him, and M. afterwards sued for damages alleged to have been sustained by him alone on the contract: *Held*, that if plaintiff relied upon the original contract between him and C., and the defendants, he could not sue without joining C. in the action.

McGilvery v. Moorehead, 3 Cal. 267.

181. Where T. and C. execute a joint lease to L. to certain premises, and it was specified in the lease that twenty dollars rent should be paid to T. and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. and C., the lessors, brought a joint suit to recover the rent and restitution of the premises: *Held*, that there was no misjoinder of parties plaintiff.

Treat v. Liddell, 10 Cal. 302.

182. An assignment of a contract with B. as a security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name.

Warner v. Wilson, 4 Cal. 310.

183. If A. enters into a contract with B. for the conveyance of a tract of land, whereby B. acquires a right to a conveyance of the entire tract, and B. afterwards assigns to two or more persons, giving to each a separate conveyance of his equitable title to distinct and separate parcels of the land, the assignees of B. may maintain a joint action against A. for a specific performance of the contract.

Owen v. Frink, 24 Cal. 177.

184. A contract to perform work on a street in San Francisco may be assigned, and the assignee, if he fulfills the conditions of the same, can enforce it; and if such contract has been assigned, and the assignee performs the contract, the warrant, when issued for the work, may be delivered to the original contractor, who may make demand for its payment.

Taylor v. Palmer, 31 Cal. 120.

185. If A. owns a lot on a street to be improved, and takes the contract, and then assigns to B., who performs the contract, B. may sue A. for the assessment against his lot.

Id.

Defendants.

186. In an action for damages for a breach of contract, where no other person has acquired an interest in the matter in dispute, only the parties to the contract sued on should be made parties to the action.

Barber v. Cazalis, 30 Cal. 92.

187. Where the contract declared on is joint, and there is no evidence showing that one of the parties sued was party to the contract, he can not be made liable on the contract. His receipt of money on account of the work done is not enough to fix his liability. This is a mere circumstance to be left to a jury, on the question of his being a party to the contract.

Kritzer v. Warner, 4 Cal. 231.

188. This section is in derogation of the old rule of common law, that one or all, and not any intermediate number, may be sued.

Stearns v. Aguirre, 6 Cal. 183; 25 Id. 526.

Lewis v. Clarkin, 18 Id. 399.

189. The common law rule that where defendants are sued on a joint contract, recovery must be had against all or none, is modified by our practice act.

People v. Frisbie, 18 Cal. 402.

189a. In a suit against two on a joint assessment for taxes, judgment may be rendered against one only of the defendants, if the other be not liable.

Id.

190. It is no misjoinder of parties defendant for the plaintiff to sue one, or any number more than one, of all the persons severally liable upon the same obligation or instrument.

People v. Love, 23 Cal. 520.

191. Under this section a plaintiff may, at his election, sue one or more, or all the persons severally liable upon the same obligation or instrument.

Id.

192. Where the obligors in a sheriff's bond bind themselves jointly and severally, in specific sums designated, they may all be joined in the same action, but separate judgments are required.

People v. Edwards, 9 Cal. 286.

193. It seems that the joinder of two persons as co-defendants, who have no

joint interest in the subject-matter of the suit, and are under no joint liability, will, unless the mistake be corrected in the court below, be error.

Sterling v. Hanson, 1 Cal. 478.

Divorce.

194. The wife, in a suit for divorce, may make a party of any one claiming an interest in the common property.

Kashaw v. Kashaw, 3 Cal. 312.

Ejectment.

Plaintiffs.

195. A tract of land was held by several tenants in common, and, on partition, a certain portion was set apart and quitclaimed to plaintiff, representing M., who had conveyed to plaintiff as security for indorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: *Held*, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the indorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 304.

196. A person having an equitable title to land can not maintain an action to recover possession of the same, but such action must be brought in the name of the person in whom the legal title is vested.

Emerie v. Penniman, 26 Cal. 119.

197. In ejectment for common property the action should be in the name of the husband alone. *Mott v. Smith*, 16 Cal. 533.

198. A non-resident alien may doubtless maintain ejectment.

People v. Rogers, 13 Cal. 165.

199. Where, in ejectment, plaintiff and defendant deraigned title from one Bennett, who died in August, 1849, plaintiff claiming by deed from Bennett's heirs, and defendant by deed to his grantors from Bennett himself in March, 1849, which latter conveyance misdescribed the premises, and defendant set up in his answer as an equitable defense this sale by Bennett to defendant's grantors prior to Bennett's death, the mistake in the description and knowledge of the sale, and the mistake on the part of the plaintiff when he purchased from the heirs: *Held*, that the defense was good, and that the necessary parties were before the court; that in a direct suit brought by defendant to have this mistake corrected and a deed made to him, plaintiff only (and not the heirs of Bennett) would be a necessary party.

Lestrade v. Barth, 19 Cal. 660.

Defendants.

200. The thirteenth section of the practice act, concerning parties, has no application to the action of ejectment. It refers to cases in equity. *Garner v. Marshall*, 9 Cal. 268.

201. The action to recover the possession of real estate must be brought against the person who at the commencement of the action is the occupant and withholds possession. *Hawkins v. Reichert*, 23 Cal. 534.

202. The plaintiff may join any number of parties defendant, without regard to the extent or character of their possession, subject only to their right to answer separately and have separate verdicts.

Ritchie v. Dorland, 6 Cal. 33.

Winans v. Christy, 4 Id. 70.

203. Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises.

Garner v. Marshall, 9 Cal. 268.

Burke v. Table Mt. W. Co., 12 Id. 403.

Dutton v. Warschauer, 21 Id. 609.

Fogarty v. Sparks, 22 Id. 148.

Owen v. Fowler, 24 Id. 192.

Lyle v. Rollins, 25 Id. 440.

Hawkins v. Reichert, 28 Id. 534.

Klink v. Cohen, 13 Id. 623.

204. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. *Waring v. Crow*, 11 Cal. 366.

205. It is only necessary, in such a case, for the plaintiff to sue the party who interferes with his rights.

Id.

206. Where the occupant is the mere servant or employee, his occupation may be the occupation of his employer, and if so, the employer should be made the defendant in ejectment. *Hawkins v. Reichert*, 28 Cal. 534.

207. When the demanded premises are in possession of a tenant, the tenant is the proper party defendant in ejectment. The landlord is not a proper party defendant, and if made so the court will, on motion, order a nonsuit as to him.

Dimick v. Derringer, 32 Cal. 488.

208. If a defendant in ejectment conveys the land pending the litigation, and the grantee enters upon the land with or without notice of the pending suit, he is not only liable to be dispossessed by the writ of restitution, if the plaintiff obtains judgment, but is also bound by the judgment as an instrument of evidence, to the same extent as it would have been binding upon his grantor had no conveyance been made.

Watson v. Dowling, 26 Cal. 124.

209. When the premises are unoccupied, parties out of possession claiming title, which claim is accompanied with the exercise of acts of ownership, as inclosure, cultivation, and the like, may be made defendants. *Garner v. Marshall*, 9 Cal. 268.

210. A judgment recovered in ejectment against a portion of several co-tenants will not be reversed because all the co-tenants are not made parties defendant. *Coleman v. Clements*, 23 Cal. 245.

211. If the tenant in possession is sued in ejectment, the landlord may, in cases in which his title is drawn in issue, be permitted to defend the action in the name of the tenant, but not in his own name. *Dimick v. Derringer*, 32 Cal. 488.

212. The appearance or substitution of the landlord should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant can not interfere with any subsequent proceedings to the prejudice of the landlord. *Dutton v. Warschauer*, 21 Cal. 609.

213. Where, without any order of record, the landlord, at the request of the tenant, appeared in fact and conducted the defense to judgment in the lower court: *Held*, that it was too late to object in the appellate court to the want of the order; and that the landlord was entitled to the control of the appeal. *Id.*

214. In an ejectment case for a large tract of land, and in which many fictitious defendants were named: *Held*, that a person, not named nor served as a party, and who had neither appeared, answered, nor demurred, nor asked to be made a party, was a stranger to the proceedings, and could not, though an owner of land embraced within the tract sued for, maintain a motion to dismiss the action as to such land. *Soule v. Billings*, 42 Cal. 285.

See EJECTMENT.

Fraud.

215. An action founded upon a fraud can not be maintained by a party to the fraud. *Dupuy v. Williams*, 26 Cal. 313.

216. A creditor of the estate of a deceased person whose claim has been established, may maintain an action in equity to reach property fraudulently conveyed by the testator in his life-time. *Hills v. Sherwood*, 48 Cal. 386.

Injunction.

217. In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the fund commissioners, created by the act of April 20, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom

the bonds are to be issued should be parties to the action. *Hutchinson v. Burr*, 12 Cal. 103.

218. In an action to restrain the issuance of bonds by an incorporated company, the persons to whom the bonds are to be issued are necessary parties to such action. *Patterson v. Yuba*, 12 Cal. 105.

219. It would also be a fatal objection to a bill in equity by defendant, to set aside the patent in this case for fraud in its procurement, that Fremont, the patentee, is not a party. He would be a necessary party to any proceeding to avoid or set aside his patent, on the ground that it was issued through fraud or misrepresentation. His rights can not be determined or impaired in any side suit between third parties. *Boggs v. Merced M. Co.*, 14 Cal. 279.

Judgment.

220. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 87.

Malicious Prosecution.

221. An action for malicious prosecution lies against several defendants, and the gist of the action is the malicious prosecution, and probably the cause of action is complete before acquittal. *Dreux v. Domec*, 18 Cal. 83.

Promissory Notes and Drafts.

222. The possession of a promissory note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action. *McCann v. Lewis*, 9 Cal. 246.

223. His right to maintain the action can not be questioned on the ground that it belongs to a third party, except the defendant pleads payment to, or offset against that party. *Price v. Dunlap*, 5 Cal. 483.

Gushee v. Leavitt, *Id.* 160.

224. The holder of negotiable paper, indorsed before maturity, is supposed to be the *bona fide* owner of the same, and all indentments are in favor of his right. *Palmer v. Goodwin*, 5 Cal. 458.

225. The presumption of the law is in favor of such holder, to rebut which it is necessary to show by competent testimony that he is not the *bona fide* holder, or that the note was not indorsed until after maturity, or some other fact from which the law will imply a fraud. *Id.*

226. Where a new promise is made to the payee of a promissory note, the indorsee, to whom the note is afterwards transferred, may maintain an action upon it. He succeeds, in such cases, to the rights of the

payee. Same rule holds where a new promise is relied on to obviate a discharge in insolvency. *Smith v. Richmond*, 19 Cal. 476.

227. Under our statute of April, 1850, the holder of a non-negotiable note has a right of action, not only against his immediate assignor, but also against previous assignors; in short, against every person from whom the note has passed by assignment.

Hamilton v. McDonald, 18 Cal. 128.

228. An order in the following words: "Messrs. F. Huth & Co.—Please hold to the order of William Pope & Sons, of Boston, five hundred pounds sterling of insurance effected on cargo of bark *Elvina*, and oblige, etc.," is an equitable assignment of the funds in the hands, or to come into the hands, of the drawees to the payees.

Pope v. Huth, 14 Cal. 403.

229. A contract not to run boats on a certain line of travel, and on failure to comply with such contract, to pay fifteen thousand dollars, is an instrument in writing, and assignable by our laws.

Cal. S. N. Co. v. Wright, 6 Cal. 261.

230. If, in an action on a promissory note, it appears that the legal title is wholly in the plaintiff, it is error for the court to permit another to be joined with him as plaintiff, although such other may have an equitable right to a part of the proceeds of the note when collected.

Curtis v. Sprague, 51 Cal. 239.

231. An order drawn upon defendant for an amount due from the defendant, is a *prima facie* assignment of the debt due. Even if it was only for part of a debt, no one could make the objection but the defendants.

McEwen v. Johnson, 7 Cal. 260.

Wheatly v. Strobe, 12 Id. 97.

Pope v. Huth, 14 Id. 403.

And the drawees having notice of such assignment, are liable to the payees for the amount, without an express promise to pay it.

Real Estate, Actions in Rem.

232. It is not error to make the real estate a party, as in proceedings *in rem*, in an action to collect taxes.

People v. Rains, 23 Cal. 131.

233. The assessor may assess real estate to any person whom he finds in the possession, charge, or control of it, and such person is liable for the taxes, as well as the property assessed.

Id.

234. Several parties can not, in a joint action, recover damages for the use and occupation of two or more tracts of land, which they own in severalty.

Tennant v. Pfister, 51 Cal. 512.

Reward.

235. An agreement, by one who has lost property by fire or theft, to pay a certain

sum to any one who will secure the arrest and conviction of the criminal, is not a nude pact, but may be enforced by a person performing the service.

Ryer v. Stockwell, 14 Cal. 134.

Trover.

236. All the parties in interest should join in an action of trover.

Whitney v. Stark, 8 Cal. 514.

237. A failure to join may be pleaded in abatement.

Id.

Undertakings.

238. Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignee of the defendants can maintain an action upon it.

Wingate v. Brooks, 3 Cal. 112.

239. Formerly, where a bond was given to an officer, state, or corporation, suit had to be brought in the name of the party holding the legal title, for the benefit of the persons interested; but our statute has introduced a new rule, and by the provisions of the practice act, the suit must be prosecuted in the name of the real party in interest.

Baker v. Bartol, 7 Cal. 551.

240. A plaintiff being the real party in interest, has a right to sue upon the bond, though made payable to the people of the state.

Id.

241. If an official bond of a notary be not under seal, though payable to the state, no action can be maintained thereon unless the same is assigned to the plaintiff.

Castele v. Cornwall, 5 Cal. 419.

242. On an injunction bond, given to plaintiff and others as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts.

Browner v. Davis, 15 Cal. 11.

243. Where there are several obligees in such an undertaking, promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery.

Prader v. Purkett, 13 Cal. 588.

244. M., a sheriff, had in his hands money belonging to L., which he had collected on an execution in favor of L. and D., and against S.; W. and C. commenced an action against M. and L. and others, to enjoin M. from paying the money to L., and procured a preliminary injunction, which was served on M. alone, but L. appeared in the action and defended. The injunction bond ran to all of the defendants: *Held*, that L. could maintain an action for damages on the injunction bond.

Lally v. Wise, 23 Cal. 539.

245. Each of the parties to whom an injunction bond is payable may sue on the same for his several damages, even if the bond is made payable to the obligees jointly. *Id.*

246. An undertaking given to a sheriff to procure a release of goods attached is for the benefit of the plaintiff, who may sue on it, and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility. *Curias v. Packard*, 29 Cal. 194.

247. Where the defendant, as sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and, after the expiration of his term of office, another attaching creditor attaches the surplus, and seeks to make the ex-sheriff liable therefor on his official bond: *Held*, that there was no relation between the defendant and plaintiff to render defendant officially liable.

Graham v. Endicott, 7 Cal. 144.

248. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *White v. Fratt*, 13 Cal. 521.

249. In an action upon a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 Cal. 88.

RULES APPLICABLE TO EQUITABLE ACTIONS.

250. Section 14 of the practice act, concerning parties, applies to writs in equity alone.

Andrews v. Mokelumne H. Co., 7 Cal. 330.

251. All the parties having a part interest in the subject-matter should be joined as plaintiffs. *Whitney v. Stark*, 8 Cal. 514.

252. The rule requiring all persons materially interested to be made parties to a suit is dispensed with, when it is impracticable or very inconvenient, as in cases of joint associations, composed of numerous individuals.

Gorman v. Russell, 14 Cal. 531.

Von Schmidt v. Huntington, 1 Id. 55.

253. P. and H. entered into a contract, whereby it was agreed that H. should pay certain obligations of L. to S., on the confirmation of P.'s title to certain lands, then pending before the proper tribunals, and which he had sold to H.; in consideration whereof, and for other considerations, S. agreed with L. that he would not sue on his demands against L. until the decision of the question of the title to the land. P.'s title was rejected: *Held*, that in an action by S.

against L. on those demands, P. and H. were not necessary parties.

Smith v. Lawrence, 38 Cal. 24.

254. If A. makes a verbal contract with B. to sell him a tract of land, and puts him in possession, B. is a necessary party to an action commenced by the judgment creditors against A. to be subrogated to B.'s rights in the land. *Logan v. Hale*, 42 Cal. 645.

255. The general rule is that unconnected parties may join in the bringing a bill in equity, where there is one connected interest among them all, centering in the one point in issue in the cause.

Owen v. Frink, 24 Cal. 177.

256. When four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: *Held*, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties, no objection being taken that all the stockholders were not parties, and the trustees will be compelled to make good any loss occasioned by their gross negligence or willful misconduct.

Neall v. Hill, 16 Cal. 145.

257. As a general rule, all persons materially interested in the subject-matter of a suit ought to be made parties; but where the parties in interest are numerous, a court will allow a suit to be brought by some of them in behalf of themselves and others, taking care that there shall be a due representation of all substantial interests before the court. Thus, where the stock of a joint stock company was divided into money shares and labor shares, and certain holders of the latter description of stock brought suit against certain holders of the former description of stock, without all the persons of either class being made parties: *Held*, the stockholders being numerous, and it being difficult, if not impracticable, to bring them all into court, that the parties before the court were sufficient to authorize it to adjudicate upon their rights, and dissolve the company, and decree a distribution of its effects.

Von Schmidt v. Huntington, 1 Cal. 55.

258. If private citizens have an interest in the lands granted by a patent, and are threatened with injury by the patent, the information should be filed in the name of one or more of such persons, provided they are without adequate remedy at law; and in such case the relator's personal complaint should be joined to and incorporated with the information.

People v. Stratton, 25 Cal. 244.

259. Parties who have a common interest in annulling a patent, although they

have no joint interest in the land adverse to the patentee, may be joined as plaintiffs in action to procure its cancellation.

People v. Morrill, 26 Cal. 337.

260. Material-men and mechanics who are entitled to a **lien** on a building, but whose claims are several, without any community of interest in the claims themselves, may, under the statute, join as plaintiffs in an equitable action to establish and enforce their liens.

Barber v. Reynolds, 33 Cal. 497.

261. When one partner sues for an injury to the **partnership property**, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury.

Nightingale v. Scannell, 6 Cal. 506.

262. A bill in equity is not multifarious if there is a **common liability** in the defendants and a common interest in the plaintiffs, or if the interests of the plaintiffs are the same and the defendants have not a co-extensive common interest, but their interests are acquired under different instruments from the same source of title.

Wilson v. Castro, 31 Cal. 420.

263. The plaintiff filed her **bill to remove a cloud** upon her title to land, created by her husband's deed to one of the defendants, and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property executed by them: *Held*, that the latter were unnecessary parties, as the grantee in the deed, and those claiming under him, were the only parties necessary to the complete adjudication of the case.

Peralta v. Simon, 5 Cal. 313.

264. Where it is clear that two or more defendants are **not jointly liable**, a **joint judgment** against both can not be sustained, although each may be severally liable; so *held*, in an action by a lessor against two sub-tenants of his lessee, when it appeared that the sub-tenants did not occupy any portion of the premises jointly.

Pierce v. Minturn, 1 Cal. 470.

265. A **junior judgment creditor** has no right to join with the defendant in an application to set aside such confessed judgment. He must resort to a court of chancery if he is dissatisfied.

Arrington v. Sherry, 5 Cal. 513.

266. When the plaintiff proceeded, under section 239 of the practice act, to examine his judgment debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding.

Adams v. Hackett, 7 Cal. 187.

267. If a determination of the controversy can not be had without the presence of other

parties, the court may on its own motion, under section 17 of the practice act, **order them to be brought in** before a final disposition of the case.

Settembre v. Putnam, 30 Cal. 490.

268. The omission of the defendant to demur for want of parties does not affect the **power of the court**, under the seventeenth section of the code, from directing other parties to be brought in, if it finds that it can not completely determine the case in their absence. Grain v. Aldrich, 38 Cal. 514.

269. If, in an action brought against two of several mining partners to establish the plaintiff's right to an interest in the mine, under a contract with the defendants, and for a conveyance and an account and a dissolution of the partnership, the plaintiff is content with a judgment establishing his right and directing a conveyance, and **waives an account and dissolution**, the court may grant that relief and give judgment, without making the other partners parties defendant. *Id.*

270. The fact that a **wife** executes a mortgage with her **husband** is a sufficient reason for making her a party defendant along with her husband in an action to foreclose the same, without any allegation as to her interest in the property mortgaged.

Anthony v. Nye, 30 Cal. 401.

271. In an action to **foreclose a mortgage** against a husband, when the defendant sets up a right of homestead, the court should order the wife of the defendant to be brought as a party, as no decision upon the question of homestead can be conclusive, either upon the husband or the wife, unless both are parties. Marks v. Marsh, 9 Cal. 96.

272. A court of equity will not permit **litigation by piecemeal**. The whole subject-matter and all the parties should be before it, and their respective claims determined once and forever.

Wilson v. Lassen, 5 Cal. 114.

273. In said action, the defendants, as **successors in interest** to P., set up their equitable title to the said half league, and the circumstances under which the legal title had been obtained by S. and his co-grantees, and asked that S. be adjudged to convey to said defendants the legal title to said half league, so far as it stood in S.: *Held*, that neither the co-tenants of S. nor H. were necessary parties to said proceeding for affirmative relief.

Salmon v. Symonds, 30 Cal. 301.

Foreclosure of Mortgages and Mechanics' Liens.

Plaintiffs.

274. All persons interested in the estate, at the time a suit is instituted to **foreclose a mortgage, or mechanic's lien**, whether

purchasers, heirs, devisees, remainder-men, reversioners, or incumbrancers, should be made parties.

- Montgomery v. Tutt, 11 Cal. 307.
 Whitney v. Higgins, 10 Id. 551.
 Luning v. Brady, Id. 265.
 De Leon v. Higuera, 15 Id. 483.
 Goodenow v. Ewer, 16 Id. 461.
 Boggs v. Hargrave, Id. 559.
 Burton v. Lies, 21 Id. 87.
 Heyman v. Lowell, 23 Id. 106.
 Carpentier v. Williamson, 25 Id. 129.
 Skinner v. Buck, 29 Id. 253.
 Bludworth v. Lake, 33 Id. 256.
 Wilson v. Castro, 31 Id. 420.

275. The above rule is somewhat of convenience, and will not be rigidly enforced when its observance would be attended with great inconvenience, and answer no substantially beneficial purpose.

Wilson v. Castro, 31 Cal. 420.

276. Persons who acquire interests by conveyance or incumbrance after suit brought need not be made parties.

Whitney v. Higgins, 10 Cal. 547.

277. It is not absolutely essential in all cases to make subsequent incumbrancers, prior to suit of foreclosure, parties to the suit. If not so made, they are not bound by the decree; but they are not necessary parties to a decree as between the mortgagor and mortgagee; and in many cases where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so.

Montgomery v. Tutt, 11 Cal. 307.

278. Their equity of redemption from the foreclosure, if not made parties, continues, and this they can assert at any time within the period allowed by the statute of limitations. Id.

279. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale, under the law, even though no personal claim be asserted against him. If he has parted with the estate his grantee stands in his shoes and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party the purchaser under the decree acquires no title.

- Goodenow v. Ewer, 16 Cal. 461.
 Boggs v. Hargrave, Id. 559.
 Horn v. Jones, 28 Id. 194.

280. The three hundred and ninth section of the practice act of 1850, allowing a creditor to maintain his action to enforce a mortgage against the mortgagor alone, is to be construed as requiring the owner of the mortgaged property, at the time of foreclosure, to be made a defendant.

Skinner v. Buck, 29 Cal. 253.

281. A tenant has no such absolute right from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree.

McDermott v. Burke, 16 Cal. 580.

282. Only those who are beneficially interested in the claim secured, or in the estate mortgaged, are necessary parties to the foreclosure of a mortgage. Id.

283. The interest of a lessee acquired after the execution of a mortgage depends for its duration, except as limited by the terms of the lease, upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this state, against the mortgage; but with its enforcement the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. Id.

284. A subsequent purchaser of land mortgaged is a proper if not necessary party to a foreclosure suit; and if the complaint be faulty in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect can not be reached by demurrer. De Leon v. Higuera, 15 Cal. 483.

285. If the owner of land execute a mortgage on the same, which is duly recorded, and afterwards makes a conveyance of the mortgaged premises to a third party, and the mortgagee, after the conveyance, without actual notice of the deed, and before it is recorded, forecloses his mortgage and obtains a decree for a sale, without making the grantee in the deed a party defendant, and before the sale the deed is recorded, the purchaser of the mortgaged premises at the sheriff's sale under the decree acquires no title. Carpentier v. Williamson, 25 Cal. 154.

286. When the title of a purchaser at a sale in a foreclosure suit fails on account of a defect of parties in such suit, he must seek relief by pursuing the course pointed out in Boggs v. Hargrave, 16 Cal. 566.

Burton v. Lies, 21 Cal. 87.

287. The object of the suit to foreclose a mortgage, under our law, is to obtain the sale of the estate, which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand, for the security of which the mortgage was given. All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit. Id.

287a. This rule, as a general thing, will only embrace the mortgagor and mortgagee, and those who have acquired rights or interests under them. Where prior incumbrancers are made parties, it is only for the purpose of liquidating the amount of their

demands, and paying them out of the proceeds of the sale.

San Francisco v. Lawton, 18 Cal. 465.

288. Where the mortgagor of real property sells and conveys his estate to a married man, and after the death of the grantee (his wife surviving) the mortgagee seeks to foreclose, the **widow** is a necessary party to the action.

Burton v. Lies, 21 Cal. 87.

289. When the mortgagor sells the mortgaged property, after the execution of the mortgage, and before the commencement of a suit to foreclose, his **grantees** are necessary parties to the foreclosure suit.

Heyman v. Lowell, 23 Cal. 106.

290. If the **real holders of the title** are not parties to the decree of foreclosure, a court of equity will allow them to be made such by a **supplemental complaint**, provided application be made within a reasonable time.

Id.

291. A party who has **no interest** in mortgaged property at the time an action is brought to foreclose the mortgage, and who buys, *pendente lite*, and after a **lis pendens** has been filed, is not a necessary party to the foreclosure.

Horn v. Jones, 23 Cal. 194.

292. Where a **vendor** of land contracts with the vendee that he will pay off a mortgage previously executed by him upon the property, the mortgagee is not a necessary party to a suit for the purchase money brought by the vendor before the mortgage is discharged. A judgment, in such case, retaining the purchase money under the control of the court until the mortgage is satisfied, is sufficiently favorable to the defendant.

Leese v. Sherwood, 21 Cal. 151.

293. M., the owner of the land, executes a mortgage to K. to secure a note of B. The holder of the note and mortgage brings suit to foreclose, making M. alone defendant, but asking no personal judgment against him or B.: *Held*, that B. was not a necessary party to the suit, and that a purchaser at sheriff's sale, under the decree, acquires the title.

Kearns v. Kilian, 18 Cal. 491.

294. A **judgment creditor** whose judgment lien is subject to the lien of a prior mortgage is not concluded, nor are his rights affected by a decree of foreclosure of the mortgage, unless he was a party thereto.

Alexander v. Greenwood, 24 Cal. 505.

295. After the execution of a mortgage upon real estate, a judgment was rendered against the mortgagor, which became a lien upon the mortgaged property; the mortgagee then foreclosed the mortgage, making the mortgagor alone a party defendant, had the mortgaged property sold under the decree, became the purchaser, and obtained a sheriff's deed; afterwards, the judgment creditor procured an execution upon his judgment, and had the property advertised for sale; the

holder of the title under the sheriff's deed filed a bill in equity to enjoin the sale: *Held*, that he was not entitled to an **injunction**, and that the judgment creditor had a right to sell any interest in the land held by the judgment debtor at the rendition of the judgment or levy of the execution; *held, further*, that the judgment creditor's equitable **right of redemption** not having been cut off by the foreclosure, he might, during the two years that the judgment was a lien upon the premises, sell under an execution, and purchase the legal title of the mortgagor, not only that he might assert his right of redemption at any time within the period allowed by the statute of limitations, but, also, that he might realize any other benefit or advantage that might accrue to him from the sale.

Id.

296. Where a promissory note and a mortgage to secure the same are executed and delivered to the same person, and the payee of the note and mortgagee indorses the note and assigns the mortgage to a third person, who brings an action on the note and to foreclose the mortgage, it is not a **misjoinder** of parties defendant to join as defendants the indorser and maker of the note.

Eastman v. Turman, 29 Cal. 379.

297. In such case, under the provisions of the practice act, is not an improper joinder of two causes of action to sue the indorser of the note on his liability as such, and to ask a decree against the mortgagor foreclosing the mortgage.

Id.

298. Where property is mortgaged to secure two notes, falling due at different times, and the mortgage is foreclosed on suit upon the first on its maturity, and then, after the period for redemption has passed, but before the sheriff has executed his deed to the purchaser, the judgment on the first note is paid: *Held*, that the **lien of the mortgage** for the second note could not be displaced by a sale under prior incumbrances—mechanics' liens—in proceedings to which the holder of the second note was not a party.

Hocher v. Keas, 18 Cal. 650.

Defendants.

299. The question whether the plaintiff had the right to go into equity and foreclose the mortgage given to the principal to secure the note, depends upon the fact whether he was really interested in the **subject-matter**.

Ord v. McKee, 5 Cal. 515.

300. Where a mortgage is given to secure the **separate debts** of several persons as mortgagees, it is a several security, and may be enforced by each creditor, as in case of a separate mortgage. But when other parties are interested in the property, the court will require them to be brought in before ordering a sale or foreclosure.

Tyler v. Yreka W. Co., 14 Cal. 212.

301. Where thirteen persons made a joint and several promissory note, payable to three of their number, and all joined in the execution of a mortgage secure the payment of the note—the plaintiffs being both payors and payees in the note, and the mortgagors and mortgagees in the mortgage—and, subsequently, the payees of the note brought suit against the other makers, and for a foreclosure of the mortgage: *Held*, that the suit was properly brought, and plaintiffs were entitled to judgment of **foreclosure**.

McDowell v. Jacobs, 10 Cal. 387.

302. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court, to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. Hunter v. Levan, 11 Cal. 11.

303. A mere stranger, who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, can not afterwards come into equity, and in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated, and himself substituted in the place of the mortgagee.

Guy v. Du Uprey, 16 Cal. 195.

304. A note was executed to O., as the agent of M., and the mortgage to secure the note was made to M. O., under contract with M., was entitled to one half of the note: *Held*, that O., having a right to the note, had a right to foreclose the mortgage.

Ord v. McKee, 5 Cal. 515.

305. Persons claiming title adversely to the mortgagor are not proper parties to a foreclosure suit, as they have no interest in the subject-matter of the action.

Grogan v. Spence, 53 Cal. 15.

306. If a mortgagor convey all his interest in the mortgaged premises to a third person, and afterwards die before the commencement of the foreclosure suit, his **personal representative** is not a necessary party to the action, if no judgment for the deficiency be demanded.

Hibernia S. & L.S. v. Herbert, 53 Cal. 375.

Trust, Enforcement of.

307. Where the complaint charged that A. was indebted to plaintiff, and had conveyed his property to B., to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B., who had accepted it, and further charged that B. had subsequently conveyed a portion of the property to A. without consideration, praying that B. be compelled

to execute the trust in favor of plaintiff: *Held*, that A. was a proper and necessary party to the action. Lucas v. Payne, 7 Cal. 92.

308. In an action by one of several *cestuis que trust*, to declare and enforce an implied trust in relation to land, all the persons who are entitled to, or claim to be entitled to a portion of the trust estate, are proper parties defendant. Jenkins v. Frink, 30 Cal. 586.

309. If a debtor assigns his property to trustees, to be by them sold, and the proceeds to be divided *pro rata* among the creditors, one creditor can not, after the property has been converted into money, maintain an action against the trustees for an accounting, and for judgment for his *pro rata* share, without making the other creditors parties, and the assignor a defendant.

McPherson v. Parker, 30 Cal. 455.

310. If a Mexican grant of land is confirmed to a wrong person, and a patent of the United States for the same issued to a person who did not own, or claim to own, the grant, and had no right to the patent, the patentee will be deemed to hold the legal title in trust for the **real parties in interest**.

Salmon v. Symonds, 30 Cal. 301.

SUBSTITUTION.

311. Neither a purchaser at sheriff's sale, as such, nor a redemptioner, either before or after redemption, nor an assignee of the sheriff's certificate of sale, upon his own *ex parte* motion, made in his own name, is entitled to have the judgment upon which the execution or order of sale issued vacated, and himself substituted as plaintiff, in order that he may file a **supplemental complaint** to bring in other parties.

Abadie v. Lobero, 36 Cal. 390.

312. The substitution of one person as plaintiff in place of another, in case of a **transfer of a cause of action**, is a matter which the defendant can not move. It concerns only the plaintiff or the person to whom the transfer is made. If the defendant desires to take advantage of the transfer for any cause, he must do so by supplemental answer. As against a defendant, a plaintiff has a right to stay in court till his case has been tried. Hestres v. Brennan, 37 Cal. 385.

313. On the death of the plaintiff, the court may, by an **ex parte order**, substitute his representative as plaintiff.

Taylor v. W. P. R. Co., 45 Cal. 323.

314. It is regular and proper to **suggest the death of a party** to an action, in any court, and at any stage of the proceedings. And the death of a party occurring before an appeal taken may be shown in the supreme court by affidavit of the fact.

Judson v. Love, 35 Cal. 404.

315. The death of a party **pendente lite** should be made known by suggestion of that

fact to the court, and the action continued by order of the court against the representative of the party deceased, of which he must be duly notified before he can be affected by further proceedings in the action. *Id.*

316. Where a party to an action dies after verdict or other decision therein, judgment in pursuance of such verdict or decision may nevertheless be rendered as provided in section 202 of the practice act, but in no other such case can judgment be rendered so as to affect the interests of the representatives or successors of the party deceased, without the proper substitution of such representatives or successors. *Id.*

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PARTITION. IN GENERAL.

1. IN GENERAL.
27. PROCEEDINGS IN.
39. PARTIES.
44. JUDGMENT OR DECREE IN.
61. NEW TRIAL.
63. APPEAL.

IN GENERAL.

1. The **object** of a partition of the property itself among tenants in common, is to enable each party to obtain the title to and the use for all future time, in severalty, of some definite portion of the property owned in common. *McGillivray v. Evans*, 27 Cal. 92.

2. When parties go into a partition of property upon certain terms and conditions, each to receive a several portion of common estate, the **instrument** of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he can not dispute.

Tewksbury v. Provizzo, 12 Cal. 20.

3. Guardians *ad litem*, appointed to represent an **infant** in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate; and their acts beyond this special limited power are void.

Waterman v. Lawrence, 19 Cal. 210.

4. When a **mining claim** upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property.

Hughes v. Devlin, 23 Cal. 501.

5. The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for partition of real property which are not denied by the answer, are deemed admitted for the purposes of the trial. *Id.*

6. An agreement to establish a partition **line** between the occupants of adjoining tracts of land is of no validity and can not be enforced unless the title to the adjoining tracts has passed from the government and become vested in the parties by whom the agreement was made. In order to render such agreement for a partition line effectual, each party must have the **title** to, and right to dispose of the tract claimed by him, or, in other words, they must be coterminous proprietors. *Carpentier v. Thirston*, 24 Cal. 268.

7. A **parol** partition of land owned by tenants in common could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty.

Elias v. Verdugo, 27 Cal. 418.

8. It is essential to the validity of a parol partition of land that it shall be fully executed and followed up by a several possession by the parties, or their grantees. Accordingly, a parol agreement for partition, held to be void, because of such a character that it could not have been followed by such a possession as the law makes essential to its validity. *Lanternman v. Williams*, 53 Cal. 60.

9. If parties owning adjoining tracts of land agree that a fence shall be erected upon a certain line, and that the same shall be the **dividing line** between their respective tracts, and the agreement is executed, it establishes the partition line, and they are estopped from afterwards contesting it.

Moyle v. Connolly, 50 Cal. 295.

10. A parol agreement for a partition of land does not constitute a legal title. It is only an **equity**, of which a party can not have the benefit in an action of partition without pleading it.

Gates v. Salmon, 46 Cal. 362.

11. Parties who buy undivided interests in land held by tenants in common are not bound by a parol agreement for a partition of the same, made by all the tenants in common before the purchase, and of which agreement the purchasers had no notice when they bought. Id.

12. If a purchaser of a specific parcel of land from one of several tenants in common who own it, takes possession of the parcel thus conveyed to him, this possession does not impart notice to subsequent purchasers from the grantor, of a parol agreement for a partition, made by the tenants in common before the sale of the specific parcel. Id.

13. A contract entered into by several parties owning land in common, for a partition of the same, must bind all the tenants in common, or it binds none. Id.

14. A parol agreement to partition land, made by the tenants in common who own it, does not bind the tenants in common who are married women, and own their undivided interests as separate property. The above rule has its origin under the statute of 1850, requiring the wife's sale of her separate property to be in writing, signed by both her and her husband. Id.

15. Such agreement will not be enforced in equity against the tenants in common who are not married women, for the consideration for the undertaking on their part was the undertaking on the part of all the parties, and the agreement ought not to be enforced against one unless it can be enforced against all. Id.

16. In making a partition the conveyance of such specific tract may be disregarded if it be found necessary to do so in order to make a just allotment of the lands among those who own undivided interests and did not join in the deed. Id.

17. A partition among tenants in common should be made of the entire tract. One tenant in common can not have partition of a part only of the entire common property and have his entire interest located in this part. Sutter v. San Francisco, 38 Cal. 112.

18. On a partition of land held by tenants in common, if one of them has a homestead claim on it, his undivided interest will be set apart to satisfy the homestead claim, not to exceed five thousand dollars in value.

Higgins v. Higgins, 46 Cal. 259.

19. A mere desire of one of the tenants in common is sufficient to authorize the courts

to dissolve the relations existing between them. Bradley v. Harkness, 26 Cal. 69.

20. Where a number of tenants in common were parties to a deed of partition, by the terms of which each party conveyed and released his undivided interest in the whole premises, in consideration of the conveyance to him of the undivided interests of the others in a specified portion, and the deed was signed by a large proportion of the parties, but not by all: Held, that as a conveyance it was void as to those who did not sign, and that they still retained their interests as tenants in common in the whole tract. Tewksbury v. O'Connell, 21 Cal. 60.

21. Where a deed of partition is invalid as a conveyance, by reason of its non-execution by some of those who are parties to it, it may become effectual by the parties taking and holding in severalty in pursuance of its terms and dealing with their respective portions as if owned in severalty, but such acts of ratification do not operate to make the deed a valid conveyance, but only by way of estoppel or as a determination of boundaries, and only upon the interests of those performing them. A party who signed the deed is not estopped from insisting upon its invalidity by reason of any acts of ratification, either of the others who did execute or of those who failed to execute. Id.

22. If a sheriff, on a writ of attachment against one tenant in common, levies on and takes into his possession the personal property of the tenants in common, and puts the tenant who was sued in possession as his keeper, the keeper can not make a partition so as to destroy the tenancy, nor can the sheriff do it without the consent of the plaintiff in the action.

Veach v. Adams, 51 Cal. 609.

23. A contract between A. and B., tenants in common in a tract of land, by which it is agreed that B.'s interest in the land shall be a certain amount in excess of what he otherwise owned, and that B. shall extinguish all claim of title in the land set up by C. by procuring C.'s deed (C. then asserting an interest in the land claimed by A.), and that after certain other events transpire, a division of the land shall take place between the contracting parties, according to the contract, and deeds be exchanged, is not fulfilled by B. by having procured C.'s deed before the contract was made, nor by procuring C.'s deed to himself, unless he then conveys to A.

Porter v. Atherton, 32 Cal. 416.

24. The fact that C. had no valid title to any of the land does not excuse B. from procuring a conveyance from him to A. after the contract was made, before B. can go into equity to enforce a specific performance. Id.

25. Water flowing in a ditch and owned

by tenants in common can not be mechanically partitioned. The only petition which a court can make, which will definitely and permanently end disputes of tenants in common in water used for mining purposes, is to order a sale and a distribution of the proceeds. *McGillivray v. Evans*, 27 Cal. 92.

26. If one of several tenants in common conveys to a party a portion of the land described by metes and bounds, and an amicable partition is afterwards made in which such portion is conveyed by deed to the grantor, such grantor does not acquire any new title to such portion which he can assert against his grantee.

Wade v. Deray, 50 Cal. 376.

PROCEEDINGS IN.

27. Under our practice, any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action.

De Uprey v. De Uprey, 27 Cal. 329.

28. In an action for partition, if the court finds that the parties hold and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them, in the land. *Id.*

29. In an action of partition, a defendant can not claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms. *Id.*

30. An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife, is not a disclaimer. *Id.*

31. It is competent to try title in an action for partition of lands. *De Uprey v. De Uprey*, 27 Cal. 329, and *Morenhout v. Higuera*, 32 *Id.* 289, affirmed.

Bollo v. Navarro, 33 Cal. 459.

32. Plaintiff sues defendants for partition of certain property. The court orders a sale of the property, and distribution of the proceeds. After the sale, G. files a petition, stating that he is a creditor of one F. M. Harris (not plaintiff), and has an attachment lien on the interest of said F. M. Harris in the property sold; that said property, in fact, belonged to F. M. Harris, and that any conveyances of the same from him to plaintiff were merely colorable for the use and benefit of F. M. Harris, and made to hinder, delay,

and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff. Court refused: *Held*, that there was no error; that the petition of G., being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, is insufficient in this, that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud are too general, and do not state the specific facts constituting the fraud.

Harris v. Taylor, 15 Cal. 348.

33. A conveyance in such case, however fraudulent as to creditors, may be good between the parties, and creditors can not impeach it without showing that they have been injured by it; they must show that by the conveyance they have been deprived of their remedy at law, and are compelled to resort to equity. If the debtor have other property which may be reached by ordinary legal remedies, equity will not interfere. It must be affirmatively shown that such remedies have been exhausted, and that a resort to them would have been fruitless. *Id.*

34. In a bill for partition among tenants in common and for injunction against cutting timber trees: *Held*, that defendants, being tenants in common, have the right to the enjoyment of the common estate, and to cut timber and use or dispose of it, at least to an extent corresponding to their share of the estate; and that, as the complaint neither avers the insolvency of defendants, nor that they are exceeding this share, injunction does not lie.

Hihn v. Peck, 18 Cal. 640.

35. The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause can not be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the court has no jurisdiction, except over the matter of partition.

Waterman v. Lawrence, 19 Cal. 210.

36. In an action for partition of a water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interest of his co-tenants, that can be adjusted in the action by an application of the proceeds of the mortgagor's interest towards the payment of the same.

Bradley v. Harkness, 26 Cal. 69.

37. Where such commissioners (see facts), in pursuance of a contract of a portion of the parties executing such deed, allotted to one G., who was not a party to the deed of partition and release, one hundred acres, and where the defendant claimed, through the parties executing such contract, and both contract and deed were upon record at the time of the defendant's purchase: *Held*,

that the defendant, in contemplation of law, had notice of such contract of his predecessors and vendors, and that he is bound by it. *Tewksbury v. Provizzo*, 12 Cal. 20.

38. Where such **commissioners**, in the partition and allotment, failed to divide and allot some marsh land, a part of the tract, and where no proof was offered that this land was of any value, or that the division made was affected in any manner by the failure to divide or allot it, or that the allotments made would in any degree have been affected by the allotment of this, or that any injury resulted to any one interested in consequence of this omission; and where important rights have vested under the partition, this court would not be warranted in holding the action of the commissioners void, because of the failure to divide and allot the marsh land. *Id.*

Parties.

39. If, between the parties to an action for partition, **disputes** exist as to their rights or interest in any respect, such disputes may be litigated and determined.

Morenhout v. Higuera, 32 Cal. 289.

40. A proper construction of the provisions of section 264, taken in connection with sections 268, 278, and 293 of the act, requires that the **holder of such special tract**, as well as the co-tenants of his grantor, should be made a party to such action.

Gates v. Salmon, 35 Cal. 576.

41. In partition, all the **tenants in common** should be made parties. One tenant in common who owns an undivided interest consisting of a certain quantity can not have partition by making the original holder of the whole tract sole defendant, when he has sold divers parts thereof to various persons, but retains more than the quantity to which the plaintiff in the partition suit is entitled. All the **grantees of the original owner** should be joined as parties.

Sutter v. San Francisco, 36 Cal. 112.

42. Section 4 of the practice act, which requires that actions should be brought in the name of the real party in interest, applies to actions for partition; and a proper construction of the provisions of section 264, taken in connection with sections 268, 278, and 293 of the act, requires that the **holder of such special tract**, as well as the co-tenants of his grantor, should be made a party to such action. *Gates v. Salmon*, 35 Cal. 576.

43. The parties to a partition suit are all **actors** or plaintiffs, each against each and all others. *Senter v. Bernal*, 38 Cal. 637.

JUDGMENT OR DECREE IN.

44. In suit against **infants** for partition of a lot, the complaint stated that plaintiff owned an undivided interest in the lot in

common with the infants, etc. The answer, filed by guardians *ad litem* appointed by the court, denied such interest in common, and then averred that one W., held a separate interest in a particular portion of the lot; that his title came through an order of sale made in certain probate proceeding in the estate of the father of the infants, and that defendants were ignorant of any title in plaintiff. The court rendered a decree which, after reciting that plaintiff was shown to be owner "of the one fourth part of the fifty-vara lot No. 75," describing the portion particularly as in the answer, and also the other facts stated in the answer as to the order of sale and proceedings under it in the probate court, concludes: "It is therefore considered that said defendants to this suit and all persons claiming under them, or either of them, the premises described above, be forever barred from all claim to any estate of inheritance or freehold in said premises." *Held*, that the decree is *coram non judge* and void, because it goes beyond the case made in the complaint, to wit, a case of partition of common estate, and foreclosure against the infants all claim to the land; that the guardians *ad litem* had no power to admit away, by their answer, the rights of the infants, and the court had no power to give effect to such admission, as to a matter and for a purpose not within the scope of their appointment or the purview of the complaint.

Waterman v. Lawrence, 19 Cal. 210.

45. The plaintiffs purchased from certain **grantees of the Mexican government** an undivided one half of the San Lorenzo rancho, and received a deed therefor containing a covenant from their grantors, who retained the other moiety, that they, plaintiffs, should have a right to an immediate partition, and might divide the premises by a line running east and west or north and south, and upon such division take the west half in one case and the north half in the other. Before the commencement of the present action the title of the grantees of the Mexican government had been confirmed in the United States courts, but the boundaries were not definitively fixed, the last survey by the surveyor-general having excluded about one thousand five hundred acres on the south side, which had been embraced within the lines as fixed by the decree of the land commissioner, and for the correction of this alleged error in the survey proceedings were pending. The object of the action was to obtain a partition of that portion of the premises embraced within the surveyor-general's survey, the plaintiffs setting up their deed as the basis of their right to the partition, and praying that the northern half of this surveyed portion should be set apart to them, leaving the one thousand five hundred acres subject to future arrangement. The decree adjudged that, by the covenant in the deed, plaintiffs

were entitled to the partition as sought, and awarded to them the northern half of the surveyed portion in accordance with a division made by commissioners appointed for that purpose by an interlocutory order of the court. From this decree the defendants, consisting of the other owners and certain incumbrancers, appealed: *Held*, that the decree was erroneous; that, under the covenants of their deed, plaintiffs could not have set apart to them the northern half of the surveyed portion, and at the same time retain an undivided interest in another portion upon the south side; *held, further*, that the proceedings for a partition should either be delayed until a **final survey** is made, or until a patent issues, or that the partition should be made according to the boundaries, as they might be ascertained in the present proceeding from the description from the original grant; *held, further*, that even with the consent of respondents to release all claims to the unsurveyed one thousand five hundred acres on the south, the decree could not be modified by this court so as to award to plaintiffs the portion set apart to them in the decree in full satisfaction of their claims, inasmuch as the **boundaries** being, by the facts appearing in the record, still undetermined, it was possible that by the final survey the southern boundary might be fixed still north of the line established by the surveyor-general.

Hathaway v. De Soto, 21 Cal. 191.

46. A judgment in an action for partition is **binding and conclusive** as to title upon all the parties who are served with summons or appear, and a bar to a new action.

Morenhout v. Higuera, 32 Cal. 289.

47. The effect of a judgment in partition is to be **determined by our statute**, and not by the common law. *Id.*

48. In an action for partition by one tenant in common of lands granted his co-tenants, where the tenants have severally made **valuable improvements** on distinct portions of the land sought to be partitioned, the court, by way of interlocutory decree, ordered "that there be set off to the several parties such portions of the premises as will include their respective improvements; provided always, that the rights or interests of neither of the other parties be prejudiced thereby;" *Held*, that the order declared the proper rule to govern in such cases, and that the judgment would not be disturbed unless the rule had been departed from.

Seale v. Soto, 35 Cal. 102.

49. If tenants in common own, some in **fee**, others a **life estate**, and the deed creating the life estate gives the remainder to such children, and the lawful issue of deceased children, of the person owning the life estate, as shall be living when the life estate terminates, a judgment of partition,

made before the life estate terminates, should not fix the quantity of interest of those claiming the remainder. Such judgment sufficiently protects those claiming the remainder, if it allots the life estate, subject to the right of those holding in remainder.

Regan v. McMahon, 41 Cal. 679.

50. When it is uncertain to whom, and in what proportions, a remainder may descend, after the termination of a life estate, a judgment in partition, made before the life estate terminates, should not ascertain the interest of those holding in remainder. *Id.*

51. In partition it is erroneous to adjudge that persons who have been made parties to the action own interests in the land, in the absence of any allegations in the pleadings showing such **ownership**.

Gates v. Salmon, 46 Cal. 362.

52. Such error can be remedied on the return of the cause to the court below, by permitting answers to be filed by such parties, setting up their interests, but the answers must set up only the interests the court found they owned. *Id.*

53. A deed of a **specific tract** of land described by metes and bounds, parcel of a larger tract owned by several as tenants in common, which is executed by one of the tenants who owns an undivided interest in the whole, conveys only his undivided interest in the tract described, and, in partition, the grantee of such specific tract is entitled to have his undivided interest in the specific tract set off to him, if it can be done without injury to the original tenants in common who did not unite in the deed. The heirs and assigns of such grantee are entitled to the same relief. *Id.*

54. A judgment in partition is **final and conclusive** on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction.

Id., 35 Cal. 578.

55. A judgment in partition has no other effect than to **sever the unity of possession**, and does not vest in either of the co-tenants any new or additional title in the respective parcels set off to each, and an **amicable partition**, effected by an interchange of deeds, produces the same result.

Wade v. Dera, 50 Cal. 378.

56. If one of several tenants in common gives a **lease** of a portion of the common property, with an agreement to receive a portion of the crop for the rent, and after the lease is made, a suit for partition is commenced, and a decree of partition is entered in which the leased land is assigned to another of the tenants in common, the decree does not pass to the latter the portion of the crop to be received as rent, unless it is harvested before the decree is entered.

Mahoney v. Aurrecochea, 51 Cal. 429.

57. In proceedings by co-tenants for a par-

tion of real property, whether a partition is to be ordered or a sale directed, it is indispensable that a **decree interlocutory** in its character be first entered, definitely ascertaining the rights and interests of the respective parties in the subject-matter.

Lorenz v. Jacobs, 53 Cal. 24.

58. In an action for the partition of a rancho, certain of the defendants alleged in their answer that they were the owners in fee of the whole rancho, and the court having found that allegation to be true, rendered judgment accordingly in favor of those defendants. In an action of **ejectment** for a parcel of the lands of the rancho, brought by one of the defendants in the partition suit, and against persons who were parties to that action, or claimed title under them, the judgment in that action is admissible in evidence to prove title in the plaintiff in the action of ejectment, and is conclusive upon that issue in respect to the title held or claimed by the parties to that action at the time of its commencement. Hancock v. Lopez, 53 Cal. 362.

59. Where, in a judgment of partition, a **boundary line** between two of the parties is described as passing along a visible object, and is also described by courses and distances, the latter must yield to the former.

Mills v. Lusk, 45 Cal. 273.

60. If there is error in an **interlocutory decree** in partition, it must be corrected by motion for new trial, or by an appeal.

Torney v. Allen, 45 Cal. 119.

NEW TRIAL.

61. A motion for a new trial may be resorted to for the purpose of correcting the errors in a preliminary decree of partition; but it must be made within the proper time.

Regan v. McMahon, 43 Cal. 625.

62. Errors in an interlocutory decree must be corrected by motion for new trial, or by an appeal. Torney v. Allen, 45 Cal. 119.

See NEW TRIAL.

APPEAL.

63. The order of a court for a partition of lands, or for a sale in case a partition can not properly be made, is not a **final judgment** in an action for partition. They are to be succeeded by a judgment confirming the partition or sale.

Hastings v. Cunningham, 35 Cal. 549.

64. Appeals may be taken from an **interlocutory judgment** by the parties aggrieved without notice to anybody except those who were parties to the particular issue which they seek to have reviewed.

Senter v. Bernal, 38 Cal. 637.

65. An appeal from a preliminary decree in partition must be taken within **sixty days** from the entry of the decree in the minutes of the court. Regan v. McMahon, 43 Cal. 625.

66. On an appeal from an interlocutory decree in partition, the court will not anticipate difficulties that may present themselves to the **commissioners** in making the partition, and lay down rules for their guidance, until the exigencies of the case require it.

Gates v. Salmon, 46 Cal. 364.

67. Supposed errors in the **preliminary decree** in partition can not be reviewed through an appeal taken from the final decree.

Regan v. McMahon, 43 Cal. 625.

68. Parties to a partition suit who appeal, and who claim under one of several tenants in common, are not injured by an **error** in the **findings or judgment** alleged to have been made in respect to the ownership of the interests of other tenants in common under whom they claim no interest, and therefore are not entitled to have the judgment disturbed as to such alleged errors.

Gates v. Salmon, 46 Cal. 362.

69. A judgment in partition will not be disturbed on appeal, by reason of an **error** which does not prejudice the party appealing.

Id.

ACTION, 52.	NEW TRIAL, 567, 576.
APPEAL, 80, 98, 100,	NONSUIT, 58.
138, 198-201.	PARTIES, 169.
DEFENSES, 42.	PLEADING, 162, 1017,
DIVORCE, 53.	1226, 1321.
EJECTMENT, 240.	POWER OF ATTORNEY,
EQUITY, 76.	20.
ESTOPPEL, 63.	PRINCIPAL AND
EVIDENCE, 191, 437.	AGENT, 86.
FORECLOSURE, 24.	PROBATE, 487-500.
LEASE, 87.	REFERENCE, 20, 21.
MEXICAN LAW, 30,	STATUTES, 14.
31.	

PARTITION FENCE.

JURISDICTION, 185.

PARTNERSHIP.

1. WHAT DOES OR DOES NOT CONSTITUTE A PARTNERSHIP.
25. EVIDENCE OF.
38. POWER OF PARTNERS TO BIND THE FIRM.
49. PARTNERSHIP DEBTS.
67. SURVIVING PARTNER.
75. ACTIONS BETWEEN.
102. DISSOLUTION.
136. IN REAL ESTATE.
147. MINING PARTNERSHIPS.

WHAT CONSTITUTES.

1. A **consignment** of merchandise was made to defendants as partners; after the dissolution of the partnership two sales of a portion of the merchandise were made, one by each partner, who severally received the money: *Held*, that the partnership continued for the purpose of fulfilling engagements, and that the defendants were jointly liable.

Johnson v. Totten, 3 Cal. 343.

2. A partnership may exist in the **purchase and sale of lands**, but such a partnership can only exist where the contract is reduced to writing. It is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the partners are afterwards mingled, but they must be jointly concerned in the future sale.

Gray v. Palmer, 9 Cal. 616.

3. It does not matter in whose name the real estate is held; he is only a trustee for the partnership, and for the purpose of disposal and distribution it is to be treated as **personal estate**. *Id.*

4. In the absence of any special agreement between partners upon the subject the rule of law is that partners are to **share equally** both profits and losses, and the mere fact that partners have put unequal amounts of capital into the common stock, or that one has put in all the capital, and the others only their skill and industry, will make no difference in the rule. Griggs v. Clark, 23 Cal. 427.

5. Where two persons sue, as partners in possession, for a **trespass on firm property**, the judgment in their favor is firm assets. The fact of joint title as partners to the damages is in issue and adjudicated.

Collins v. Butler, 14 Cal. 223.

6. A. and B. entered into an agreement in which it was stipulated that A. should advance twelve thousand dollars for the purpose of putting up a brick house on property of B., held by lease, and B. was to convey to A. one half interest in the leased premises; the balance of the costs of the building was to be borne in equal proportion. When completed B. was to rent the same and pay over to A. one half of the rents. Building was erected at a cost of forty-eight thousand dollars, thirty thousand dollars paid by A. and eighteen thousand dollars by B. B. conveyed one half of premises to A.: *Held*, that A. and B. were partners.

Laffan v. Naglee, 9 Cal. 662.

7. **Voluntary associations** for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, etc., are partnerships, and may be dissolved by a court of equity if they improperly exclude a member.

Gorman v. Russell, 14 Cal. 531.

8. If such an association exclude a member from its meetings because he refuses to take an oath to be administered by the president,

which oath was not required by the constitution or the by-laws, and is foreign to the objects of the association, it is ground for a dissolution. *Id.*

9. An **agreement on the one side to perform certain services** and on the other to convey an interest in the property in relation to which the services were performed, in consideration of such services, does not constitute a partnership.

Barber v. Cazalis, 30 Cal. 92.

10. If A. enters into a partnership with B., and puts into the concern as his share money belonging to a third person, which he holds as agent, that fact does not make such third person a partner of B., nor does it make A. any the less a partner of B., even if A. used the money without the authority of B., the owner; and in an action brought by A. against B. to **wind up** the partnership, such facts have no relevancy.

Harper v. Lamping, 33 Cal. 641.

11. Where a **broker** buys wheat for E. & H., with their funds, and an agreement is made between the three that the broker shall dispose of the wheat, and that the profits shall be equally divided, the broker is neither partner nor joint owner of the wheat.

Hanna v. Flint, 14 Cal. 73.

12. In consideration of the right granted him by plaintiff, to manage, use, and vend at his (the defendant's) own expense, and on his own account, within the British dominions, certain machines, of which the plaintiff was the inventor, and to sell the right to others to make, use and vend the same, the defendant undertook and agreed to procure from the British authorities **letters patent** to the plaintiff for said machines, and to pay over, quarterly, to the plaintiff one half the proceeds of all sales made by him: *Held*, not a contract of partnership.

Wheeler v. Farmer, 38 Cal. 203.

13. **Actual intention** is necessary to constitute a partnership *inter se*. *Id.*

14. Where there is **no community of interest** in capital, stock, profit or loss, there is no partnership. *Id.*

15. A contract between A. and B., by which A. transfers to B. the possession of a flock of sheep, upon the terms that B. should herd and take care of them for three years, at the end of which time he was to return to A. the original number of sheep intrusted to him, and the **increase** be **equally divided** between them, does not constitute a partnership between A. and B. in the sheep.

Robinson v. Haas, 40 Cal. 474.

16. A **joint contract in writing**, entered into by several persons with another, in which they agree to furnish certain materials and perform certain labor for such other, and which does not fix or define the relations of such persons among themselves, or as to

the third persons, and which does not show any **community of interest** between them in the profits to be realized, nor the losses to be sustained, does not of itself, by legal intendment, establish a partnership between them in reference to the work undertaken.

Smith v. Moynihan, 44 Cal. 53.

17. It is the business of one who alleges a partnership to **show it affirmatively**. The burden of proof is on him. Id.

18. If two persons enter into a joint contract, in writing, to perform certain labor, and furnish certain materials for another, which contract does not define the relations of such persons between themselves; and if, by the understanding between themselves, one is to perform one part of the labor, and the other another, and each is to receive a proportional sum of the money paid for the whole, the relation of partners does not exist between them. Id.

19. A partnership or a **joint stock company** is not necessarily the result of an abortive attempt to organize a corporation.

Blanchard v. Kaull, 44 Cal. 440.

20. A mere **joint ownership** in personal property does not constitute a partnership; nor was a partnership created by an agreement to divide the income of a business carried on by a third party with the joint property of the plaintiff and defendant, and paid to the latter for the joint use of himself and the plaintiff.

Quackenbush v. Sawyer, 54 Cal. 439.

21. Hillegass (defendant's intestate), at Philadelphia, in 1849, being about to start for California, entered into a written contract with the plaintiffs, then his partners, under which they were to have a certain proportion of the proceeds of his mining and other business, after first deducting one thousand five hundred dollars advanced by the firm: *Held*, that the contract created a partnership, there being both a **community of interest** in the original capital and in the **profit and loss**.

Harris v. Hillegass, 54 Cal. 463.

22. When two parties, residing in different places, agree, the one to buy and ship wool, and to pay for the same to draw on the other, and the other to pay the drafts and sell the wool in a home or foreign market, charging interest for his advances, the two to share equally the losses, or to divide equally the net profits, the parties are partners in the **venture**.

Clark v. Gridley, 49 Cal. 105.

23. If one partner and part owner in a **mining claim** convey his interest to a stranger, the latter becomes thereby a partner with the other owners, and entitled to all the rights of his grantor.

Nisbet v. Nash, 52 Cal. 540.

EVIDENCE OF.

25. Partnership must be proved like any other fact, and can not be established by mere **surmise or innuendo**.

Hudson v. Simon, 6 Cal. 453.

26. In an action against a partnership, and in order to prove that one of the defendants was a partner, it is incompetent to ask a witness, whether, from what he saw, while working for the firm, and from the acts of the particular defendant during that time, he was partner. It does not amount even to evidence of **common report**.

Turner v. McIlhenny, 8 Cal. 575.

27. Common report can only be admissible to prove a partnership, first, in corroboration, and, second, to prove knowledge of it, on the part of the plaintiff. Id.

28. It is error to admit evidence to prove partnership by **general reputation**.

Sinclair v. Wood, 3 Cal. 98.

29. A. brought an action against B. to recover for the value of services alleged to have been rendered by A. for B., in keeping a hotel. The defense was that A. and B. were partners. On the trial, B., after introducing some evidence which tended to show a partnership, offered in evidence the **books** of the hotel as further evidence of the partnership: *Held*, not to be in error, and that if the books afforded any evidence of a partnership, the entries were admissible.

Hale v. Brennan, 23 Cal. 511.

30. In a controversy between two mining companies, it was competent to prove the execution of certain **receipts** for water purchased by the plaintiffs, as tending to show the existence of the company, and that it had actually located, and was in operation at the time the receipts purport to be signed.

Lone Star Co. v. West Pt. Co., 5 Cal. 447.

31. There may be a **dormant partnership** in the purchase and sale of real estate as between the partners themselves, but as between the partners and third persons, the law in regard to dormant partners will not apply.

Gray v. Palmer, 9 Cal. 616.

32. Parties may form a **universal partnership**, but the same would not be held to exist, unless the intention was clearly expressed. The evidence to establish such a partnership, after the death of one of the alleged partners, should be clear and full, and not subject to doubt. Id.

33. The **law of Louisiana** requires a partnership contract to be in writing; the law of California does not require it to be in writing: *Held*, that a verbal partnership agreement entered into in Louisiana, but which was to be executed in California, was valid.

Young v. Pearson, 1 Cal. 448.

34. If one of two partners own real estate as such, and one of them is indebted to the

other, and the creditor sells his interest in the real estate and **partnership assets**, and his demand against the other to a third person, and such third person brings an action against the partners for an accounting, and to have the amount due the partner from whom he purchased declared a lien on the partnership real estate, and recovers judgment, such **judgment** is evidence tending to show an indebtedness from the debtor partner to the plaintiff, in an action brought by the plaintiff to enforce the lien of the judgment against the real estate, against a fourth person who bought the real estate from the debtor partner during the pendency of the former action. *Harvey v. Ward*, 49 Cal. 124.

35. The **lessor**, after he has leased a hotel to the **lessee**, may enter into a contract of partnership in keeping the hotel with the lessee, with an agreement that the rent reserved shall be a charge upon the firm, and if the latter contract is separate from the first it does not work a surrender of the lease, and in action by the lessor to recover the rent, the lessee may prove the partnership as a defense, if pleaded.

Pico v. Cuyas, 47 Cal. 174.

36. Under such contract of partnership, the lessor remains the lessor, and his claim for **rent** under the lease continues, but the rent must be paid out of the net profits of the partnership, and he can not bring an action at law to recover the rent. *Id.*

37. If the lessor of a hotel, after the lease is made, enters into a contract of partnership with the lessee in keeping the same, the lessor **can not sue at law** for the rent reserved in the lease, but must sue in equity for a partnership accounting. *Id.*

POWER OF PARTNER TO BIND THE FIRM.

38. A **promissory note** made in the firm name of a partnership, but for the private uses of the partner making it, is binding on the firm, in the hands of an innocent holder, though not in the hands of one having knowledge of the fraud. The finding of the district court on the question of knowledge of the fraud, and as to the question of payment, will not be disturbed when the cause comes up a second time for consideration.

Rich v. Davis, 6 Cal. 141.

39. When a partner makes a note in the name of the partnership, it will render all the partners liable to a *bona fide* holder, although it has no relation to the partnership business, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner.

Id., 4 Cal. 22.

40. M. and J. were partners, and in the regular course of their business as storage merchants, of which M. had the management,

received from plaintiff for storage a lot of grain, M. receipting for it in the firm name. Afterwards, the grain having been lost or converted, M. executed to plaintiff a firm note for its value. In an action upon this note J. defended for himself, averring that the note was in effect the individual note of M., and not binding on the firm, and introduced as evidence certain accounts respecting the transaction kept by M., purporting to be between plaintiff and M. individually, and also letters from M. to plaintiff, showing that M. had separate dealings with plaintiff, and had designedly kept J. in ignorance respecting the grain transaction: *Held*, that the note, from the circumstances under which it was made, was the note of the firm, on which J. was liable; that the **onus** was on him to show a **discharge from this liability**, and the evidence introduced was insufficient for this purpose. *Pierce v. Jackson*, 21 Cal. 636.

41. A **release** of the indorser of a note by the indorsee, such indorsee being a secret partner of the maker, will not release the maker. *Tomlinson v. Spencer*, 5 Cal. 291.

42. Where a partnership exists between two persons in the purchase of goods, and they subsequently bring suit to recover their value from a trespasser who seized them: *Held*, that one partner is competent to execute a release in the name of himself and copartner. *Perlberg v. Gorham*, 10 Cal. 120.

43. One partner can not bind his copartner by a submission of partnership matters to **arbitration**, but such a submission would be good against the partner agreeing to it. *Jones v. Bailey*, 5 Cal. 345.

44. A copartner has **authority to convey** the copartnership property in any transaction, within the scope of the partnership, and each copartner has an unlimited power of disposal of his share of the partnership property, subject only to the claims of creditors of the firm and of the other copartners on a settlement of the partnership affairs, unless he be restrained from doing so by the terms of the copartnership; but the claims of such creditors and copartners, being only in the nature of an equitable lien on the partnership property, can only be enforced in a court of equity. *Stokes v. Stevens*, 40 Cal. 391.

45. Where one partner, without the consent of his copartner, conveys his interest in the partnership property to another the latter becomes a tenant in common with the copartner, and the claim of a creditor of the firm can only be asserted to the property as against the third party in possession, in a court of equity. *Id.*

46. Where one partner *bona fide* sold the partnership property to satisfy his individual indebtedness, and in an action of **replevin** by the purchaser against a creditor of the firm who has attached the property, after the sale and delivery as the firm property,

and for a firm debt; the court properly rendered a judgment for the purchaser, and it will be presumed in support of the judgment that the court below found it as a fact that the other partner consented to and authorized the sale. *Id.*

47. The mere fact that a partner, upon being informed that his copartner has given a firm note for his individual debt, does not deny his liability thereon, does not, *per se*, amount in point of law to a ratification or adoption of the note.

Roubin v. Cohen, 48 Cal. 545.

48. One member of a partnership can not bind his copartner by a promissory note for a partnership demand, made after the dissolution of the partnership.

Curry v. White, 51 Cal. 530.

PARTNERSHIP DEBTS.

49. Creditors of a firm can pursue their remedy at law, after a bill for a dissolution is filed by one of the partners, and before a decree of dissolution; any other rule would permit the partners indefinitely to postpone the payment of their debts.

Adams v. Woods, 8 Cal. 152.

50. Creditors can attack the whole proceedings to dissolve and settle a partnership at any time before the distribution of the assets, on the ground that it was instituted to delay, hinder, and defraud creditors. *Id.*

51. Pending proceedings for a dissolution between partners, and until a dissolution is finally declared, and a receiver appointed to make a *pro rata* distribution among creditors, the latter are not prevented from resorting to adverse proceedings; and when a creditor does so, he may gain a preference over other creditors.

Naglee v. Minturn, 8 Cal. 540.

52. A debtor of the partnership is held in payment to the sheriff on an execution held by such a creditor. *Id.*

53. From the same principle it follows that the debtor has a right to purchase cross demands against the partnership, and to set them up as a defense to the debt due by him to the partnership. *Id.*

54. Though the plaintiff knew at the time he commenced suit for the original parties, that he alone composed the firm, yet if he do not appear to have known upon what terms the new firm was formed, he could only be guided by the acts and statements of the new firm.

Buritt v. Dickson, 8 Cal. 113.

55. But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants: *Held*, that plaintiff was bound to know the terms on which the defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability. *Id.*

56. The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners.

Chase v. Steel, 9 Cal. 64.

Burpee v. Bunn, 22 Id. 194.

57. The fact that a partner's interest is mortgaged for his individual debt, for the purchase money of his share in the partnership, is immaterial. He can only mortgage that which he has, viz., a share subject to partnership debts. *Id.*

58. Partners may make a bona fide sale of their property, any time before their creditors acquire a lien; but such sale can not include a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership in the vendee. *Conroy v. Woods*, 13 Cal. 626.

59. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors, who have not yet obtained judgment. *Id.*

60. And, where one partner buys out his copartners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching, must be preferred to the lien of an individual creditor of the remaining partner, attaching first. *Id.*

61. Where one of several partners sells his undivided interest in the partnership property, the purchase money stands in the place of the property, and is liable for the partnership debts, the same as the property for which it was paid.

Burpee v. Bunn, 22 Cal. 194.

62. B. & L. were partners. B. & L. as a partnership, was also a member of two other firms—B., L. & S., and B., L., S. & D. The firms all failed, and their property was attached by creditors. The creditors of B., L. & S., and B., L., S. & D. obtained the first attachments, and placed them in the hands of the sheriff, before the creditors of B. & L. placed theirs in his hands. The sheriff levied all the writs on the property in the order in which they were placed in his hands. The sheriff had in his hands a sum of money received from the sale of the property of B. & L. to apply on the executions issued on judgments rendered in the actions: *Held*, that the creditors of B. & L. were entitled to the money; and that, where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to a preference in the payment of their debts, over the creditors of the whole partnership, out of money the proceeds of the property of that firm.

Bullock v. Hubbard, 23 Cal. 495.

63. The purchaser of partnership property, who pays or becomes liable for partnership

debts, equal in amount to the value of the property, has a valid defense against a suit in equity, brought to foreclose a mortgage executed by one of the partners for his **individual debt** on his interest in the partnership property. *Jones v. Parsons*, 23 Cal. 100.

64. In an action against partners, upon a **promissory note**, signed by their individual names, and not by the firm name, the complaint alleged, and the court found, that the defendants were partners, and that they executed the note: *Held*, there was no sufficient allegation or finding that the note was executed by the makers as partners, or for a consideration which passed to the partnership. *Freeman v. Campbell*, 55 Cal. 197.

65. If the sheriff has an execution against the property of one member of a partnership, it is his duty to levy on the interest of that partner in the partnership effects; and in order to effect a sale of the same, he may take possession of the entire property; and if he only sells the interest of the partner against whom the judgment was rendered, he is not liable to the other partners for damages. *Clark v. Cushing*, 52 Cal. 617.

66. If one of two partners assigns to a third person his interest in a promissory note belonging to the firm, and the other partner collects the full amount due on the note, and is sued by the assignee for half the amount collected, he must, if he has an equitable lien on the same on account of money advanced by him to the partnership, set up such lien in his answer, or he can not enforce it. *Marks v. Sayward*, 50 Cal. 57.

SURVIVING PARTNER.

67. A surviving partner has, under the statute of May, 1850, regulating the settlement of the estates of deceased persons (section 198), the exclusive right of possession, and the absolute **power of disposition of the assets** of the partnership. *Allen v. Hill*, 16 Cal. 113.

68. A surviving partner has a right to vote at an election for officers of a corporation formed under the general incorporation act of this state of 1853, the stock in his hands as assets of the partnership—the business of the firm being unsettled. *Id.*

69. The fact that a portion of the stock voted by such surviving partner stood upon the books of the corporation, at the time of the election, in the name of the deceased partner alone, does not affect the right to vote, if in fact the stock belonged to the partnership. *Id.*

70. As a general rule, it is the duty of each partner, during the partnership, to devote himself to the interests of the concern without compensation, unless there is an express agreement that he receive compensa-

tion. But when the partnership is dissolved by death, and the survivor expends his time and labor in the care and management of the partnership property, by which its value is enhanced, he should receive compensation for the same, to be deducted out of the profits realized from the enhanced value of the property. A surviving partner, however, is not entitled to pay for services rendered for merely winding up the affairs of the concern. *Griggs v. Clark*, 23 Cal. 427.

71. When the partnership is dissolved by the death of one of its members, the surviving partner is to wind up the affairs of the partnership, and pay its debts out of the assets, if sufficient, and divide the residue, if any, among those entitled to it. *Gleason v. White*, 34 Cal. 258.

72. The relation of debtor and creditor between the surviving partner and the representatives of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck; and this balance is to be struck after all the partnership affairs are settled, and not while they are being wound up. *Id.*

73. If the partnership is indebted to the surviving partner, this debt is a **contingent claim** against the estate of the deceased partner, which does not become absolute until the partnership affairs are settled, and it is ascertained that there are no partnership assets to pay the same. *Id.*

74. An action lies against a surviving partner for work and labor performed for the firm during the life of the deceased partner, and after his death, while the surviving partner is winding up the business of the firm. *Friermuth v. Friermuth*, 46 Cal. 42.

ACTIONS BETWEEN.

75. One partner can not sustain an action against his copartner for the **delivery of personal property** belonging to the partnership. *Buckley v. Carlisle*, 2 Cal. 420.

76. There is no principle of equity which forbids a partner from purchasing, with his own funds, and outside of the partnership business, a judgment, or other evidence of indebtedness against his copartner, or prohibits him from enforcing its collection by a levy upon and sale of the interest of the other in the firm assets. *McKenzie v. Dickinson*, 43 Cal. 119.

77. The obligations of copartners **inter sese**, whatever may be their nature and extent, refer only to the conduct of the business in which the firm is engaged; beyond and outside of such business there is no restraint upon the right of either partner to traffic for his own profit. *Id.*

78. Where the plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a certain

sum of money and materials for a saw-mill, which they did, and the defendants removed the materials furnished by plaintiffs, and appropriated the same, including the money, to their own use: *Held*, that the plaintiffs had a right to sue therefor at law, and for damages caused by defendant's violation of the partnership contract.

Crosby v. McDermitt, 7 Cal. 146.

79. The acts of the defendant dissolved the copartnership. Even if this were not so the plaintiff would still be entitled to recover under the peculiar circumstances of the case.

Id.

80. M. and B., the plaintiffs, were partners in a ranch and hotel. The ranch was public land, taken up under the state law, in the name of M. M. sells one half to B., taking a mortgage back, B. agreeing to pay certain firm debts. This sale and agreement were afterward canceled, and B. sold M. one half the ranch. Defendant, Myers, agrees to buy of B. his half of ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At time of this last purchase O. and M. knew of B.'s title: *Held*, that a bill in equity by B. against M., O., and Myers, for an account of the partnership between M. and B., and for a decree establishing plaintiff's right to the ranch, does not lie; that his remedy at law for his half of the ranch, against M. or any one claiming under him, with notice of his title, is clear; and that M. would be estopped from disputing the title.

Brush v. Maydwell, 14 Cal. 208.

81. In such case the claim of plaintiff to the ranch does not depend at all on the settlement of the partnership. The sale by M. to plaintiff divested the ranch of its character as partnership property, and the reconveyance by plaintiff to M. of one half made them tenants in common.

Id.

82. If a copartner, even by consent, retires from the firm of which he is a member, a suit at law can not be maintained against him by the members who remain in the firm, for money alleged to be due from him to them in the copartnership transactions, unless there has been a final settlement of all the firm accounts and a balance has been struck.

Ross v. Cornell, 45 Cal. 133.

83. Partners can not sue one another at law, for any of the business or undertakings of the partnership. This can only be done in chancery, by asking for a dissolution and an account.

Stone v. Fouse, 3 Cal. 292.

Russell v. Ford, 2 *Id.* 86.

Nugent v. Locke, 4 *Id.* 318.

Barnstead v. Empire M. Co., 5 *Id.* 299.

84. A court of law is not competent to administer redress in adjusting the affairs of a partnership, and to ascertain and enforce

the equitable liens of creditors, and of the several copartners.

Stokes v. Stevens, 40 Cal. 391.

85. If damages accrue in such proceedings, if liquidated they can be settled by the court; if unliquidated, by directing an issue to have them ascertained.

Stone v. Fouse, 3 Cal. 292.

86. It may not be necessary, in order to enable a partner to maintain an action at law against a copartner, or one who has been such, to show an express promise to pay a sum ascertained as a balance due, but the balance itself must be one which has been ascertained by the act of all the partners, and agreed to as constituting such balance.

Ross v. Cornell, 45 Cal. 133.

87. A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where in consideration of outfit and advances made by plaintiffs, the defendant agreed to account for and pay over a portion of the proceeds of his labor and speculations of every kind for a certain period of time, although the parties may not have been technically partners.

Garr v. Redman, 6 Cal. 574.

88. Where two shareholders in such company sold to the company goods to a large amount, and afterwards, during the existence of the company, sold their stock to A. and assigned their account for such goods to B., who sued such company on said account by attachment: *Held*, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion.

Bullard v. Kinney, 10 Cal. 60.

89. The assignees of such account were placed in no better situation by the assignment, to sue, than the assignors before the assignment.

Id.

90. If in any case one partner can assign to another partner his interest in a firm claim and then become a witness for him, he can not when the claim is for goods sold and delivered, because this is an unliquidated demand within the practice act.

Cravens v. Dewey, 13 Cal. 40.

91. A decree adjudging that a partnership existed between two of the parties to the action, and that another partnership existed between one of them and another party to the action, each partnership embracing all business and property, both real and personal, of the parties, and deciding that the one partnership is subject to the other, and directing an account to be taken, there being other parties to the action, representing the interest of one of the partners in each partnership, is interlocutory, and not final.

Gray v. Palmer, 9 Cal. 616.

92. Such a decree does not ascertain the specific sum due to any of the partners, nor direct the disposition of the partnership property. It does not settle the present condition of the partners, but only the original terms of their partnership. *Id.*

93. Where a party institutes an action against a portion of his associates in a mining partnership to establish a disputed right to an interest in a mine, and a conveyance of the interest claimed is a part of the relief sought, a court of equity may give judgment establishing the right and directing a conveyance to be made, without dissolving the partnership.

Septembre v. Putnam, 30 Cal. 490.

94. In an action of *assumpsit* against a firm, where the answer of one of the defendants denies that he was a member of the firm, it is error to admit in evidence, as against that defendant, a letter admitting the indebtedness, signed in the firm name, without proof that defendant wrote the letter or authorized it to be written.

Hudson v. Simon, 6 Cal. 453.

95. S. sued V., G. & D. to recover twenty-two thousand dollars, alleged to be a balance due from them as partners on account of certain mercantile transactions. Defendant V., who was the managing partner of defendant's firm, had unbeknown to his copartners made a payment of ten thousand dollars, which should have been credited upon the amount demanded by plaintiff, but of this fact G. and D. were kept in ignorance, and V., conspiring with the plaintiff to conceal the payment, induced his co-defendants to suffer a judgment for the full amount claimed. Subsequently, G. and D. having paid on the judgment more than the amount for which it should have been rendered, discovered the fraud, and the present action having been commenced by S. thereon to recover the balance, they set up these facts as an equitable defense: *Held*, that the defense was permissible, and sufficient to defeat the action, and that defendants were entitled to an injunction against the enforcement by plaintiff of the original judgment.

Spencer v. Vigneaux, 20 Cal. 442.

96. Defendant D., in his answer, stated that he had been informed before the first trial that the ten thousand dollar payment had been made by V., but that he was assured by V. that such was not the fact; that the papers and books of the firm were in V.'s possession, and access to them could not be had, and that he had no personal knowledge of the fact, or means of ascertaining or proving it upon the former trial: *Held*, that this statement did not show such negligence or laches on D.'s part as to prevent him from now availing himself of the defense. *Id.*

97. It was not negligence on the part of D. to fail to make an application for a con-

tinuance, it being evident that he could not have made a showing sufficient for that purpose, and that the application would have been a mere matter of form. *Id.*

98. If partners agree that the partnership shall be dissolved and the business closed, and that the partnership accounts shall be considered and taken as if the partnership had never existed, and that the amount already received by one partner from the partnership shall be his compensation paid by the other partner to him as an employee, and that the other partner shall collect the debts due the firm, and pay the debts due by the firm, and the agreement is acted on, the partner who receives the compensation as an employee has no further interest in the partnership accounts, and can not maintain an action for a settlement of such accounts.

Wagner v. Wagner, 50 Cal. 76.

99. A settlement of partnership accounts between the partners can only be made in action in which all the partners are parties.

Young v. Allen, 52 Cal. 466.

100. If the liability of the defendant to the plaintiff depends on the settlement of the accounts between partners who are not parties to the action, the partners must be made parties before the case can be determined. *Id.*

101. If two men are in partnership for a term of years, in the care and one half the increase of a flock of sheep, under a contract with the owner of the flock, who receives the other half of the increase, and the owner buys the interest of one through fraudulent representations that he has purchased the interest of the other, and then takes possession of the flock and increase, the remedy of the partner who has not sold is in equity for an accounting, and in such action the partner who sold is a necessary party. In such case an action at law for damages does not lie.

Blood v. Fairbanks, 48 Cal. 171.

DISSOLUTION.

102. A mere desire of one of the copartners is not sufficient to authorize the courts to decree a dissolution of the same, and a settlement of its affairs, but cause must be shown. *Bradley v. Harkness*, 26 Cal. 69.

103. A copartnership is the result of agreement between the parties, and one of the firm can not sell out his interest in the same, nor can a stranger buy in the same at pleasure. Where such purchase or sale is made with the consent of the firm, it works a dissolution of the partnership, and necessitates the final closing out and settlement of the old firm. *Id.*

104. Where one partner has the management of the partnership affairs, and makes false entries in the books, and defrauds his copartner of a portion of the partnership re-

ceipts, and retains the same to his own use, the partner thus defrauded is entitled to a dissolution of the partnership and an accounting, even if the partnership was by agreement to continue for a fixed term, and the term has not expired.

Cottle v. Leitch, 35 Cal. 434.

105. If in such a case there has been an accounting between the partners, and the partner defrauded does not discover the fraud until after the accounting, he may sue for an accounting and dissolution, and on the trial may surcharge and falsify the account, without demanding a reaccounting prior to the commencement of the action. Id.

106. Whenever a partner is entitled to a dissolution, the taking of an account is necessary, and follows as a matter of course. Id.

107. Where McKenzie and Dickinson, bag manufacturers, dissolved partnership, leaving certain assets of the firm in McKenzie's hands, and afterwards McKenzie purchased, for much less than its face, a judgment against Dickinson, and had it levied upon Dickinson's interest in the assets, and on the execution sale bought them in on his own account: *Held*, that Dickinson was not entitled to an account of the profits made by McKenzie in the transaction, nor could he attack the sale made to McKenzie.

McKenzie v. Dickinson, 43 Cal. 119.

108. If, in a case where there are several members of a partnership, one of them, even by consent, retires from the firm, this dissolution necessarily severs the copartnership relations of each of its members.

Ross v. Cornell, 45 Cal. 133.

109. In such case, if there are two or more members who remain in the firm, they can not maintain a joint action at law against the member who retired from the firm. Id.

110. Where the complaint, in an action for the dissolution of a partnership and a settlement of the accounts, avers a loss in the transactions of the firm, borne exclusively by the plaintiff, and asks for a judgment against the defendant for his proportion of such loss, the plaintiff may prove a loss resulting from his own act done in violation of the partnership agreement.

Clark v. Gridley, 41 Cal. 119.

111. In such case, the plaintiff is entitled to a settlement of the partnership accounts, on such terms as may be equitable; and the defendant may show, as a matter of defense, that he suffered loss by such violation of the contract, and may charge the plaintiff with it. Id.

112. The plaintiff in such action need not aver in his complaint that the act from which the loss resulted was in violation of the partnership agreement, in order to let in the testimony as to the loss. Id.

113. If a partner sells his interest in the

partnership property to his copartner, but there is a dispute whether the sale included a settlement of the partnership accounts, and in an action brought for their settlement, the issue as to whether such sale included such settlement is submitted to a jury, the jury, in determining it, can not take into consideration the amount which the purchasing partner paid his copartner, or the amount which he sold the purchased property for.

Warden v. Marcus, 45 Cal. 594.

114. The "Riggers and Stevedores' Union Association of San Francisco," a voluntary association for mutual relief, having excluded plaintiffs from the association because of their refusal to take an oath not required by the constitution or by-laws of the association, and foreign to the objects thereof, plaintiffs, as members, brought suit for dissolution of the association and distribution of its funds, and the supreme court having decided, on demurrer to the complaint, that the association was a partnership, and would be dissolved by a court of equity for improperly excluding a member, and the cause having been remanded for further proceedings, the defendants rescinded their resolutions requiring an oath, and filed an answer offering to admit plaintiffs to all their rights and privileges in the association: *Held*, that this action of the association suffices to prevent a decree of dissolution, and that the bill was properly dismissed.

Gorman v. Russell, 18 Cal. 688.

115. Where, in the settlement of a partnership, a mistake occurs, and both parties were ignorant, or had equal knowledge of, or equal opportunities of knowing the mistake, and there has been no fraud or concealment, equity will not correct the mistake.

Belt v. Mehen, 2 Cal. 159.

116. To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him.

Johnson v. Totten, 3 Cal. 343.

117. An ostensible partner, retiring from the firm, must give notice of his retirement, or he will be liable to creditors of the continuing firm, on contracts made by them after his retirement.

Williams v. Bowers, 15 Cal. 321.

118. The question of notice of the dissolution of a partnership is a fact for the jury, under the charge of the court.

Rabe v. Wells, 3 Cal. 143.

119. The publication of the notice of dissolution in a paper taken by the plaintiffs is a fact from which a jury may infer actual notice. The court has no right to charge the jury in regard to conclusions of fact.

Treadwell v. Wells, 4 Cal. 260.

120. Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party, which was never reduced to the possession nor under

the control of the **receiver**, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time.

Adams v. Hackett, 7 Cal. 187.

121. Upon the application of the receiver in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment creditor of the partnership.

Id.

122. In a case where one partner has filed his bill for a dissolution of the partnership and the appointment of a receiver, it seems that until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and thereby gaining a preference.

Id.

123. A bill for a dissolution and the appointment of a receiver can not operate as an assignment for the benefit of creditors, so as to prevent a creditor from acquiring a legal priority, because all such assignments, except in insolvency, are void under the statute.

Adams v. Woods, 8 Cal. 152.

124. It is only in cases of insolvency that the equitable rule for a *pro rata* distribution will apply, and then as of necessity. If the firm be solvent, a creditor whose claim is due can not be placed on a par with others whose claims are not yet due, or who have been less diligent in securing claims already due.

Id., 9 Cal. 24.

125. If, in an action to wind up a partnership between the plaintiff and defendant in the stock of a corporation, standing in the name of defendant, it appears that the plaintiff has agreed that the defendant may retain certain shares until a demand made against the partnership is settled, the court should not direct a conveyance of those shares to the plaintiff without proof that the demand has been settled.

Harper v. Lamping, 33 Cal. 641.

126. The decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale, is dangerous as a precedent, and liable to great abuse in practice.

Jones v. Thompson, 12 Cal. 191.

127. When a bill is filed to settle the affairs of a partnership, the partnership transactions of each and all the partners should be taken into account; and the decree should include all these, so as to leave nothing open for future litigation.

Griggs v. Clark, 23 Cal. 427.

128. In a suit by one partner for the dissolution of the partnership, and an account, etc., alleging that **dividends of profits** were to be made at stated periods, the court

may decree the payment of the sum due for such dividends, before final distribution of the assets.

O'Connor v. Stark, 2 Cal. 153.

129. A judgment winding up the affairs of a partnership may make a division of the partnership property, if there are no debts, and if a division in kind is as fair to all the parties as a sale and division of the proceeds. If the property consists of stock standing in the name of the defendant, the judgment should not be in the alternative, requiring the defendant to either transfer to the plaintiff his part thereof or pay him a certain sum of money, but should direct a division in kind or a sale and a division of the proceeds.

Harper v. Lamping, 33 Cal. 641.

130. Where the partnership property is seized under attachment proceedings, and applied towards payment of the firm debts, the partners not doing business after such attachment being levied: *Held*, that such matters do not of themselves operate a dissolution of the partnership.

Barber v. Barnes, 52 Cal. 650.

131. In such case, if there is an action pending, brought by the partners to recover a debt due the firm, any inference of dissolution arising from the above facts is rebutted.

Id.

132. A partner can not have partition and accounting without a dissolution of partnership; and a dissolution being found and decreed, the decree should provide for an accounting.

Nisbet v. Nash, 52 Cal. 540.

133. H. came to California, and died here in 1876, leaving property of large value. In an action for an accounting brought against his administrator, the complaint alleging that the partnership was never dissolved until the death of H., but also alleging, and attempting to excuse the fact, that no demand had ever been made for an accounting in the life-time of H.: *Held*, upon demurrer to the complaint, without deciding whether in any case an objection that the demand is stale can be taken by general demurrer, that in this case, in view of the allegation that the partnership was never dissolved, the objection did not lie, although the other facts stated might tend strongly to show, or *prima facie* might even show, that in point of fact the partnership had been dissolved long before the date alleged.

Harris v. Hillegass, 54 Cal. 463.

134. If one of two partners sells to a third person his interest in the goods owned by the partnership, the sale dissolves the partnership, and the purchaser can not maintain an action to recover his interest in the goods, but must sue for an accounting, and will recover whatever his assignor would have been entitled to upon a settlement of the partnership accounts; and until the affairs of the partnership are thus wound up, the partner

who did not sell is entitled to the possession of the property.

Miller v. Brigham, 50 Cal. 615.

135. The rights of parties in relation to the **rents and profits** of property which had belonged to a partnership, but which had accrued intermediate to the entry of a decree of dissolution in the lower court and the decision of an appeal to the supreme court, must be determined in the same manner and by the same rule by which they would have been determined had they accrued prior to the decree of dissolution.

Clark v. Jones, 50 Cal. 425.

IN REAL ESTATE.

136. Where one of two **holders of the leasehold**, holding in partnership, purchases the fee in his own name and with his own money, it inures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money.

Lafian v. Naglee, 9 Cal. 662.

137. And as the relation sustained by the tenant purchasing the fee, to his co-tenant or partner, is one of confidence, the proof that the latter had waived his right must be clear, and the **burden of proof** rests upon the tenant purchasing. Id.

138. This being the true character of partnership in real estate the **surviving partner** has an **equitable lien** upon it for his indemnity against the debts of the firm, and for the balance due him. See facts.

Gray v. Palmer, 9 Cal. 616.

139. In equity real property acquired with **partnership funds** for partnership purposes is regarded as personal estate, so far as the payment of partnership debts and the adjustment of partnership rights are concerned; and it is immaterial in whose name the legal title of the property stands; whether in the individual name of one copartner or in the joint names of all, it is first subject to the payment of partnership debts and then to be distributed among the **copartners** according to their respective rights.

Dupuy v. Leavenworth, 17 Cal. 262.

140. The **possessor of the legal title** in such case holds the estate in **trust** for the purposes of the partnership, and until such purposes are accomplished, each partner has an equitable interest in the property. Upon the dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title. Id.

141. Where two partners purchased in the **firm name**, with **firm funds** and for partnership purposes, a lot of land, and one

then absconds with all the available funds of the firm, leaving his copartner without sufficient means to pay the debts of the copartnership, and he in good faith first exhausts the personal property to pay the debts of the concern, and this is insufficient, he may then convey in the firm name the interest of the firm in the lot to pay debts, and the grantee can in equity compel a conveyance of the legal title to the undivided half of the lot, standing in the absconding partner's name, from him or from parties taking a conveyance from him with notice of its partnership character. Id.

142. This rule is not in conflict with the doctrine that real property of a copartnership may be conveyed by one partner, on his individual account, to the extent of his legal title, so as to cut off the **equitable rights** of the copartnership, or its liability to the payment of the copartnership debts. A **bona fide purchaser**, for a valuable consideration, without notice of the partnership character of the property, will take the title in such cases, freed from the equitable claims of others, upon grounds of policy. Id.

143. A partner has a right, generally, to buy the whole or a portion of the interest of his copartner in real estate at **private sale**.

Bradbury v. Barnes, 19 Cal. 120.

144. A partner may purchase with his own funds and on his own account the **interest of his copartner** in real estate at sheriff's sale, if there be no circumstances of fraud or of trust, apart from the partnership relation, and hold the property so purchased as a stranger could hold it. Id.

145. Partners occupy a confidential relation towards each other in respect to firm business, but this does not prevent one from buying of another when both have an **equal opportunity** and means of **knowing the value** of the property and its condition. Id.

146. If two or more persons are partners in the ownership and management of real estate and owe partnership debts, and one of the partners mortgages his interest in the property to secure his individual debt, the mortgagee acquires only the mortgagor's interest in the surplus after the payment of the partnership debts, and if these debts equal or exceed the value of the property, and it is afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, holds no interest in the property, liable in equity to be sold, and the **mortgage** can not be foreclosed.

Jones v. Parsons, 25 Cal. 100.

MINING PARTNERSHIPS.

147. If two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share, according to the interest of each,

the profit and loss, the **partnership relation** subsists between them, although there is **no express agreement** between them to become partners, or to share the profits and losses. *Duryea v. Burt*, 28 Cal. 569.

148. As a sale of an interest in a mining partnership by a partner to a stranger does not dissolve the partnership, such **stranger** by his purchase presumptively becomes a partner, though he takes no part in the management of the partnership affairs, and does not hold himself out to the world as a partner. *Taylor v. Castle*, 42 Cal. 369.

149. A., who claimed to be in possession of a tract of coal-bearing land, made a verbal agreement with B. & C., by which they were to prospect for coal until they struck a particular seam, or ledge, and before they struck this ledge they were to do all the work and have two thirds of the claim; but after the ledge was struck, the work was to be prosecuted by the parties jointly, A. to bear one third of the expenses, and B. & C. two thirds: *Held*, that this agreement did not create the **relation of landlord and tenant** between A. & B. and C., but that it made them **tenants in common**, or partners in mining; and that the action of unlawful detainer was not the proper remedy for A., if excluded from the premises by B. & C.

Henderson v. Allen, 23 Cal. 519.

150. The parties owning a mining claim as tenants in common, and engaged in working the same, are partners.

Dougherty v. Creary, 30 Cal. 290.

151. An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes one of those **qualified partnerships**, common in California, known as mining partnerships.

Settembre v. Putnam, 30 Cal. 490.

152. Where a person claiming an undeveloped mine agrees with another that if he will devote his labor and skill in its development, the former will furnish him with tools and provisions, and give him an equal interest in the mine in case it shall prove valuable, the latter is entitled to an equal interest in the mine when it becomes valuable, if he devotes his **labor and skill** until that time. *Id.*

153. Where a contract in writing purported to have been made by a mining partnership in its firm name through its secretary, and it appeared that such contract had been authorized by a vote of a majority of the shares at a meeting of the company, and

after being signed by the secretary had been ratified and approved in the same manner, and it further appeared that though there were no written regulations or by-laws, the company usually did business in this way: *Held*, that the **recognized and established usage** on the part of the firm should be taken as a part of the contract of partnership.

Taylor v. Castle, 42 Cal. 369.

154. A **managing superintendent** can not bind a mining partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless specially authorized.

Jones v. Clark, 42 Cal. 181.

155. Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits or the established practice of the particular company has established a different rule, the only differences generally existing being such as flow from the fact that in such partnerships there is no **delectus personæ**. *Id.*

156. Where a **promissory note**, purporting to be executed for and on behalf of a mining partnership, and signed by the superintendent as such, was given in payment for property which the partnership was using, and such use was a beneficial one, and all the members knew soon after the execution of the note of its existence, and believed it to be a company note, and acquiesced in paying interest upon it until long after the original debt would have been barred if the note were held invalid: *Held*, that the **members of the partnership** should be **estopped** from disputing its validity. *Id.*

157. If a promissory note is binding upon a mining partnership as a valid contract, such partnership continues liable, at least to the extent of the partnership assets, though some members of the company may have parted with their interests, the new members having purchased with knowledge, and subject to the **payment of partnership debts**. *Id.*

158. If, in the case of a mining partnership, a **retiring partner** still continues bound for a partnership debt, he, nevertheless, parts with his equity to have the partnership debts paid out of the partnership property; and in a suit to dissolve the partnership as among the partners, though he may be a proper, he is not a necessary, **party**. *Id.*

159. A mining partnership is not dissolved by the death of a partner, nor has a surviving partner any right to take control of the property as survivor, this right only applying where the **delectus personæ** exists. *Id.*

160. It is well established that in mining partnerships there is usually no **delectus personæ**, and as a consequence, that such a part-

nership is not dissolved by the death of a partner, or sale of an interest by a partner to a stranger. Id.

161. Where two persons entered into an agreement to engage together in a mining adventure, under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine, and paid a note given in the firm name for a portion of the price: *Held*, that the contract was one of partnership, in the ordinary sense, as distinguished from what is known as a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership.

Decker v. Howell, 42 Cal. 636.

162. The rule that in "mining partnerships" one partner has no authority to bind the firm by a promissory note is based upon the reason that in such partnership there is no *delectus personarum*, and that, consequently, the membership is continually subject to changes beyond the control of the partners; but there is nothing in the nature of mining which forbids a contract of strict partnership; and when it appears that the confidential relations of an ordinary partnership are established, and the firm not subject to the intrusion of other partners at will, the reason of the rule fails, and with the reason the rule itself. Id.

163. Where a mining company, not incorporate, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm. Rich v. Davis, 6 Cal. 163.

164. Where one of the mining company acted as a salesman of the firm, it can not be pretended that he was a dormant partner, whose acts would not bind the firm. Id.

165. Whether associates in a mining claim are general partners, not decided; but if they are, still the rule qualifying the right of trustees and guardians as to purchasing from their *cestuis que trust* and wards do not apply. Bradbury v. Barnes, 19 Cal. 120.

166. Where the several owners of a mine unite and co-operate in working the same, they form a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself.

Skillman v. Lachman, 23 Cal. 198.

167. The law does not, in case of a mining partnership, imply any authority, either to a member of such partnership, or to its managing agent, to bind the company or its individual members by a promissory note, or a contract of indebtedness, executed in the name of the company; but it is incumbent on the party claiming to hold the company for such indebtedness to show that the person, executing or contracting the same in the name of the company, had power and authority to do so. Id.

168. Where Howell and Haynes entered into a strict partnership for the purpose of purchasing, holding, and working a mine, and while such partner, Howell gave a firm note for money borrowed in the name and for the use of the firm, and afterwards conveyed all his interest to Haynes: *Held*, that the note was valid as a firm note, and could be collected by Haynes.

Decker v. Howell, 42 Cal. 636.

169. B., a member of a quartz mining company, received as the proceeds of quartz rock belonging to the company, and crushed in their mill, seven thousand and seventy-three dollars and ninety-eight cents. Subsequently, the mill, lead, and ditch of the company were sold at sheriff's sale under execution on a judgment in favor of A., against the company, for two thousand five hundred and fifty-eight dollars, C. becoming the purchaser for two thousand seven hundred and fifty-six dollars and two cents, funds furnished by B., receiving the sheriff's certificate, and then assigning the same to B. Still later, W. obtains judgment against the company for two thousand three hundred and ten dollars and ninety-seven cents, and under execution thereon, the same property was sold by the sheriff to C., who received the certificate and assigned it to B., C. having bought the claim before judgment for two thousand two hundred and fifty-four dollars, with funds furnished by B. Plaintiff, a member of the company, sues to cancel these certificates, prevent a sheriff's deed to B., and to hold him, on a dissolution of the company, as trustee for the company of the interest bought at the sheriff's sale: *Held*, that the conduct of B. is grossly inequitable, and that, if the company is willing to affirm his purchase as done for its benefit, the money paid should be credited to him on his indebtedness, and the title of the property go to or remain in the company, unaffected by the transaction; *held, further*, that if B. paid the judgments against the company, he, as a member, would be entitled to recover of his associates contribution for their proportion; but that he could not make this payment through the process of an assignment, and then enforce the judgment against the company by selling out the property and buying it in, especially as he had in hand at the time more money of the company than he paid for the judgments.

Bradbury v. Barnes, 19 Cal. 120.

170. The mining ground belonging to and worked by a mining partnership and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property. Duryea v. Burt, 28 Cal. 569.

171. One of the partners in a mining

partnership may convey his interest in the mine and business without dissolving the partnership.

Duryea v. Burt, 23 Cal. 569.

Skillman v. Lachman, 23 Id. 198.

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PAWNBROKERS.

1. The act of 1861, prohibiting pawnbrokers or pledgees from charging more than four per cent. per month on loans made on property pledged as security, is not in violation of section 2 of article I of the constitution,

which provides that "all laws of a general nature shall have a uniform operation."

Jackson v. Shawl, 29 Cal. 267.

2. Where a pawnbroker loans money upon property pledged, and the borrower contracts to pay him more than four per cent. interest per month, he can recover possession of the property by tendering him the principal and four per cent. per month interest. Id.

See PLEDGE.

PAYMENT.

1. IN GENERAL.
13. APPLICATION OF PAYMENTS.
25. PAYMENT UNDER PROTEST.

IN GENERAL.

1. Where a note was delivered to the maker long before it became due, upon his giving the holder an order on the indorsers, which was dishonored, and thereupon it was returned to the holder, it did not operate as a payment. Smith v. Harper, 5 Cal. 329.

2. Where the defendant, being indebted to the plaintiff, a banking firm, made a payment on account in the bank, to one of the plaintiff's clerks, and on a subsequent day agreed to lend to the clerk the amount thus paid, who took the money and used it, and the amount thus paid was never credited to the defendant on the books of the plaintiff: Held, that the amount paid by defendant, in the usual way of business, was a legal payment, and that defendant lost all control over it. If defendant is ultimately liable for the amount thus advanced to the clerk, it must be in an action for thus advancing it, and not in an action on the original indebtedness.

Rhodes v. Hinckley, 6 Cal. 283.

3. A part payment of a demand of one of two debtors will not discharge such debtor making the payment from the payment of the balance. His obligation is to pay the whole. Griffith v. Grogan, 12 Cal. 314.

4. M. & T. being indebted to V. in the sum of six hundred and seventy-one dollars, plaintiff, for the accommodation of the debtors, procured E. to assume the debt and execute to V. his (E.'s) note for the amount, and, to secure E., plaintiff assigned to him a note and mortgage of M. for two thousand dollars, with an agreement that the latter should be retransferred to plaintiff upon the payment by him to E. of the amount of his (E.'s) note to V. Subsequently E. died, having in his hands at the time one thousand four hundred dollars belonging to M., and received by E. as rents and profits of a cer-

tain ditch of which he and M. were joint owners. Defendants were appointed administrators of E., and received the one thousand four hundred dollars as assets of deceased, and afterwards from the funds of the estate paid the six hundred and seventy-one dollar note to V. The action is brought to compel defendants to redeliver to plaintiff the two thousand dollar note and mortgage, he claiming that the transaction above stated amounted to a payment by him of the debt for which they had been pledged as security: *Held*, that the facts did not show a payment of E.'s note to V. by plaintiff; that they only established that there was a balance due to M. from the estate of E., and that plaintiff was not authorized in this action to avail himself of such counter claim of M. against the estate as a payment on behalf of M. & T. *Cook v. Davis*, 22 Cal. 157.

5. An acknowledgment of the payment of the purchase money by the grantor in a subsequent deed is no evidence of the fact of payment as against one claiming under a prior deed. *Colton v. Seavey*, 22 Cal. 496.

6. Where an action is brought in a court of law upon a promissory note, and a defense is interposed that the note has been paid by the execution and delivery of a deed of land by the maker to the payee, and the defendant, in proving the allegations of the answer, shows that the conveyance was in fact intended as a mortgage to secure the note, plaintiff is entitled to judgment. *Lodge v. Turman*, 24 Cal. 385.

7. The payment of a debt by a person not legally responsible, for it is a satisfaction of the debt, if the money is accepted for that purpose. *Martin v. Quinn*, 37 Cal. 55.

8. Defendants were indebted to plaintiff in the sum of ten thousand dollars; subsequently parties had a settlement, and defendants gave to plaintiff in part payment of the debt, a note of third parties for two thousand five hundred dollars, which was received by plaintiff without objection, and the same left with defendants for collection. The note was not paid at maturity, and plaintiff demanded the amount for which the note was taken in settlement of the defendants, who paid one thousand two hundred and fifty dollars, and gave to plaintiff another note of same parties for the balance, payable in one year: *Held*, in an action by plaintiff against the defendants to recover the balance, that defendants are liable for the amount. *Griffith v. Grogan*, 12 Cal. 317.

9. In 1861, Q. recovered a money judgment in justice's court against K. and C., from which, in 1862, K. and C. appealed to the county court, and procured M. and S. as sureties to execute an undertaking in the sum of five hundred dollars, in the usual form on appeal, to stay execution. The undertaking was not executed by K. and C.

Thereafter, judgment was rendered by the county court in said action against K. and C., for a sum greater than five hundred dollars. Thereupon Q. demanded of M. and S. said five hundred dollars expressed in their undertaking, to be applied in satisfaction of the last-named judgment, which they paid. Q., however, failed to enter satisfaction of said judgment *pro tanto*, but, on an execution issued thereon, collected under a sheriff's sale of K. and C.'s property, the whole amount of his judgment recovered in the county court. K. and C. then assigned their demand against Q. for the money received by him in excess of the unpaid balance due on his judgment, after deducting said five hundred dollars, to M. and S., who brought action therefor, setting up said facts, and recovered judgment. The only defense was by way of demurrer to the complaint, which was overruled: *Held*, that said last-named judgment was properly rendered. *Id.*

10. The giving of a mortgage to secure a debt, and an agreement to pay the same in gold coin, form a sufficient consideration for an extension of the time of payment. *Kinsey v. Wallace*, 36 Cal. 463.

11. No man can be made a debtor for money paid to his use, unless it was done at his request, or unless the party paying the money was bound as surety or otherwise to pay it for him. *Curtis v. Parks*, 55 Cal. 106.

12. The plaintiffs and defendant, and others, who were sureties on the bond of a public administrator, promised and agreed to pay to one F., to whom their principal had become liable, as his successor in the administration of an estate, the amount of the liability; promising and agreeing each with each and all the others, that they would so pay in certain definite proportions. The plaintiffs, having paid the whole amount, brought their action against the defendant to recover the amount that he should have paid: *Held*, that under the contract alleged there was no obligation resting upon the plaintiffs to pay defendant's part of the amount, and therefore their payment was voluntary, and gave rise to no cause of action against the defendant. *Id.*

APPLICATION OF PAYMENTS.

13. Where the maker did not specify that the payment to the indorser was to meet the indorsed note, the indorser had a right to apply it to any indebtedness he held against the maker, and to stand upon his strict legal rights as to demand and notice in regard to the indorsed note.

Van Norden v. Buckley, 5 Cal. 283.

14. When the plaintiff employs an agent to collect a note due from defendant, and the defendant employs the same agent to collect other notes due him, and apply the same on plaintiff's note, and the agent fails,

after collecting money on defendant's account: *Held*, that unless the appropriation was actually made, the loss occasioned by the failure of the agent must fall on the defendant. *Phillips v. Mayer*, 7 Cal. 81.

15. There is no rule of law which prevents a debtor, in **insolvent** circumstances, from the application of his property to the payment of one debt rather than another.

Randall v. Buffington, 10 Cal. 491.

16. If the debtor at the time of, or previous to, payment, neglects to designate to which of several debts he applies his payment, his **right to control the application** is gone, and the creditor may exercise it at any time before suit.

Haynes v. Waite, 14 Cal. 447.

17. The institution of suit evidences the creditor's application of the payment. *Id.*

18. Where money is paid generally, upon an account composed of **different items**, made at divers dates, and no appropriation thereof is made by either party to any particular part of the account, the rule is that the payment shall be applied to the charges in the order of time in which they are made.

Wendt v. Ross, 33 Cal. 650.

19. Where payments are made generally to a party having **two accounts** against the party paying, one due to himself, the other to a third party, for whom he was acting as agent, and no appropriation of such payments to either account is made by either party, the rule is that said payments will be applied ratably to both accounts. *Id.*

20. The debtor may, at or before the time of payment, direct the application of the payment, and if the creditor receives the money, he is bound by the direction. If the debtor omits to make such application, the creditor may, generally, apply the payment to any debt he chooses, but when so made he can not, without the consent of the debtor, **change such application**. *Id.*

21. If a party who is indebted on **several promissory notes**, all held by the same person, makes a payment of money to the holder and directs it to be applied on one of the notes, but the holder applies it on other notes than the one directed, and the payor afterwards acquiesces, and takes the notes upon which the application was made, this is a ratification of the application made by the creditor. *Cardinell v. O'Dowd*, 43 Cal. 586.

22. The debtor, who owes the same person on several promissory notes, has the **right to direct verbally** on which notes any payments he may make shall be applied.

Clarke v. Scott, 45 Cal. 86.

23. In an action upon a **promissory note** against the debtor and one who signed as surety, where the defense is that other notes were given by the debtor at the same time as the one in suit, with a verbal agreement

with the plaintiff that the first payments made by the debtor should be applied on the note signed by the surety until it was paid, and that payments had been made and had been wrongfully indorsed on the notes not signed by the surety, the defendants have a right to give such verbal agreement in evidence, as tending to show that the debtor, when he made the payments, had not changed his first intention as to how the payments were to be applied. *Id.*

24. Pending the delivery of bricks, and within a few days thereafter, the **original contractor** paid money to the plaintiff, without specially directing the application of the payments; and the plaintiff applied a portion of the money to the payment of a debt due him from the contractor previous to the making of the contract: *Held*, that he had no right to do so.

Goss v. Strelitz, 54 Cal. 640.

PAYMENT UNDER PROTEST.

25. The **object of a protest** is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal. It is notice, only, to the party receiving the payment, that, if the demand is illegal in whole, or in any specified particular, he may be subjected to an action for the recovery back of the amount to which the objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion.

McMillan v. Richards, 9 Cal. 365.

26. Where a **redemptioner**, under the statute, pays to the sheriff an **excess of money** under protest as to the excess, the payment is not compulsory.

McMillan v. Vischer, 14 Cal. 232.

27. In such case the **sheriff** is the **bailee** of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *Id.*

28. The **compulsion or coercion** which is sufficient in law to render a payment involuntary must come from the party to whom or by whose direction the payment is made, and arise from the exercise or threatened exercise of some power, possessed, or supposed to be possessed, by him, over the person or property of the party making the payment.

Garrison v. Tillinghast, 18 Cal. 404.

29. Whether these provisions of the statute be constitutional or not, does not affect the question of plaintiffs' right to recover back his money. If they are constitutional, then there is no basis for the action; if they are unconstitutional, and the plaintiffs were ignorant of this at the time, the case becomes only one where a recovery is sought, because a payment is made under a mistake of law, a ground which can not avail; but if the plaintiffs knew the act to be unconstitutional, as they protested it was, then the case is only an attempt to recover an **illegal demand**, voluntarily paid, knowing it to be illegal at the time, and is not entitled to any consideration. Id.

30. The rule laid down in *Garrison v. Tillinghast* (No. 1), 18 Cal. 404, and *Brumagim v. Tillinghast*, Id. 265, as to what constitutes such an **involuntary payment** as that it may be recovered back, applied to money paid for a license as passenger broker under the act of March 25, 1857, and affirmed. Id.

BILLS AND NOTES, 263.	PLEADING, 458, 931-
CONDITION, 3.	1015.
EVIDENCE, 149, 551.	PROBATE, 480-486.
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PAYMENT UNDER PROTEST.

EXECUTION, 382.	TAXATION.
PAYMENT, 25-30.	

PENALTY.

1. An action founded upon a statute to recover a penalty, where no penalty is imposed by the statute, can not be sustained.

Board of Health v. P. M. Co., 1 Cal. 197.

2. Where a statute required the owners or consignees of every vessel entering the harbor of San Francisco to give a several bond to the state in a penalty of two hundred dollars for every passenger and member of the crew on board of such vessel, but no penalty was given by the statute for the neglect or refusal to give such bond, and an action was brought to recover two hundred dollars for each passenger brought on the defendant's steamer into the port of San Francisco, as a penalty for neglecting to give such bond: *Held*, that the action could not be sustained. Id.

3. If there be any rule requiring the payment of a debt, in judgment, or a denial of its justice, before a party, complaining of

judgment without notice to him, can ask equity to vacate it, that rule can not apply to the case of judgment rendered for a penalty under a **penal statute**.

Chester v. Miller, 13 Cal. 558.

4. Where a **telegraph company** fails to transmit a message, upon compliance by the person contracting with it with the conditions required by section 154 of the act of 1850 (stats. 1850, p. 370), an action for the penalty given by the act lies in favor of such person. *Thurn v. Alta Tel. Co.*, 15 Cal. 472.

5. The sum to be recovered is a penalty for breach of the duty to transmit the message, and the act is, in this section, a penal law, to be strictly construed. Id.

6. Under the above section, the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He may, probably, do this by his agent or servant; but when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown. Id.

7. In an action to enforce a penalty or forfeiture imposed by statute, the claim is to be strictly construed.

Askew v. Ebberts, 22 Cal. 263.

CRIMINAL LAW, 171,	EVIDENCE, 767.
429.	PLEADING, 572.

PERSONAL RIGHTS.

CONSTITUTIONAL LAW, 79-84, 86.

PETALUMA.

LAND, 586, 595-599.

PETITION.

MEXICAN GRANT, 9,	PROBATE, 339, 370.
10.	

PHONOGRAPHIC REPORTER.

1. The notes of evidence taken by the phonographic reporter of a court are *prima facie* evidence only in the court below, and can not be considered in the supreme court.

People v. Woods, 43 Cal. 176.

2. The notes of evidence taken by the phonographic reporter at the trial, and transcribed into long hand, even if verified by his affidavit, do not constitute a part of the record on appeal for any purpose.

People v. Armstrong, 44 Cal. 320.

3. The act of March 26, 1872 (stats. 1871-72, p. 551), allowing the shorthand reporter of the county court of San Joaquin county to attend before a grand jury and take down the testimony of witnesses, is repealed by the amendments to the code of civil procedure, approved March 30, 1874, and said amendments are a substitute for all former acts, both general and special, respecting official shorthand reporters.

People v. Lon Mc, 49 Cal. 353.

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PHYSICIAN.

1. In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection, that he is not a graduate of a legally constituted medical institute, if good at all, can not be taken by demurrer unless the demurrer distinctly present the objection.

McDaniel v. Yuba Co., 14 Cal. 444.

2. If, after such a contract, which compels the physician to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his salary. Id.

3. The board could not abrogate the contract by rescinding the order under which plaintiff was appointed, or abolishing the office. Id.

For employment of, etc., in hospitals in the counties of San Francisco, Sacramento, San Joaquin, and Stockton, see those counties.

4. The state in the exercise of the police power may provide for boards authorized to examine persons seeking to be admitted to practice medicine to be appointed by any citizen or citizens named.

Ex parte Frazer, 54 Cal. 94.

EVIDENCE, 444. | OFFICE, 28.

PILOT.

1. The board of pilot commissioners is a *quasi* judicial body, intrusted with duties, the performance of which requires the exercise of judgment and discretion; and its

members are not civilly answerable for their acts as such. Downer v. Lent, 6 Cal. 94.

2. The place of pilot in the port of San Francisco is an office.

People v. Woodbury, 14 Cal. 43.

3. The board of pilot commissioners, under the act of 1854, as amended by the act of 1858, have only the powers conferred by the act, and must appoint the pilots from the classes of persons named therein. They can not appoint a man as pilot who has not served two years on a pilot boat in the harbor, or commanded a vessel in and out of port for three years. Id.

4. Quo warranto lies to test the right of an appointee of this board. Id.

5. The act of April 21, 1860, relative to pilots in the port of San Francisco, did not legislate out of office pilots licensed under acts repealed by the act of April 21, whose terms of office had not expired when this act went into operation.

Flynn v. Abbott, 16 Cal. 358.

6. The half pilotage allowed by the twenty-third section of the act of 1856, "to establish pilots and pilot regulations for the port and harbor of Benicia and Mare Island," is not a toll within the fourth section of article VI of the constitution of this state.

Harrison v. Green, 18 Cal. 94.

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GENERAL PRINCIPLES.

1. Where the legislature creates a **right of action**, and makes no special provisions for its enforcement, other than by directing that a civil action may be brought for that purpose, such action may be commenced and prosecuted pursuant to the provisions of the general law regulating proceedings in civil cases, and parties to such actions may take any and all the steps authorized thereby.
 Burson v. Cowles, 25 Cal. 537.

2. The old rules of **chancery pleadings** are superseded by the practice act.
 Cordier v. Schloss, 12 Cal. 143.

3. But where the **code** and the statute are silent, the rules of the **old system of pleading** and practice, whether legal or equitable, should be applied, irrespective of former technical distinctions, to all actions under the new system.
 Rowe v. Chandler, 1 Cal. 167.

4. The **forms** alone of the several actions have been **abolished** by the statute; the substantial allegations of the complaint in a

given case must be the same under our practice act as are required at common law.

Miller v. Van Tassel, 24 Cal. 458.

5. But while the mere forms of pleadings are simplified, the body of the law is preserved with all those general principles, those wise distinctions, those strict principles and unerring rules, those sound and logical conclusions, which constitute its justice and justifies its glory as a science.

Sampson v. Shaeffer, 3 Cal. 196.

6. The plaintiff need only state his cause of action in **ordinary and concise language**, whether it be at common law or in equity, without regard to the ancient forms or technicalities; and while there is no difference in the form of a bill in chancery and a common law declaration, the distinction between law and equity is as broad as ever.

De Witt v. Hays, 2 Cal. 468.

Jones v. Steamship Cortes, 17 Id. 487.

Smith v. Rowe, 4 Id. 6.

7. Every action under our practice may be properly termed an **action on the case**.

Jones v. Str. Cortes, 17 Cal. 487.

But the general principles which govern the case remain unchanged.

Lubert v. Chauviteau, 3 Cal. 463.

In the form of the remedy no distinction exists between legal and equitable rights.

Wiggins v. McDonald, 18 Cal. 127.

Bowen v. Aubrey, 22 Id. 566.

8. All the forms of pleading, and the rules by which their sufficiency is to be determined, are prescribed by the practice act (Payne v. Treadwell, 16 Cal. 243), which supersedes the **old rules** of pleading.

Cordier v. Schloss, 12 Cal. 147.

9. The statute makes no distinction between the rules of pleading applicable to **natural persons**, and those applicable to **artificial persons**.

Gas Co. v. San Francisco, 9 Cal. 467.

10. It governs all cases of pleading, legal and equitable, by the same rules, **evidence** included.

Goodwin v. Hammond, 13 Cal. 169.

Riddle v. Baker, Id. 382.

Payne v. Treadwell, 16 Id. 243.

11. It is only **declaratory of the common law**. Goodwin v. Stebbins, 2 Cal. 103.

Ultimate Facts Only must be Alleged.

12. Under our practice, whichever ground of recovery the pleader adopts, his complaint must contain the same **allegations** of fact as were required at common law.

Miller v. Van Tassel, 24 Cal. 458.

13. Facts only must be stated. This means the facts as contradistinguished from the law, from **argument**, from **hypothesis**, and from the **evidence** of the facts.

Green v. Palmer, 15 Cal. 411.

14. A **pleader must insert** in his pleading, first, whatever he is to prove; second, he must insert no affirmative allegation which he is not to prove; and third, that what he does insert must be decisive of some part of the cause one way or the other. Id.

15. The practice act requires only a **simple statement** of the facts constituting the cause of action or defense.

Piercy v. Sabin, 10 Cal. 27.

16. Those facts, and those only, must be stated which constitute the **cause of action**, the defense, or the reply; therefore, each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged.

Green v. Palmer, 15 Cal. 413.

Racouillat v. Rene, 32 Id. 455.

Willson v. Cleaveland, 30 Id. 192.

17. Every fact which, if controverted, plaintiff must prove to maintain his action, must be stated in the complaint.

Jerome v. Stebbins, 14 Cal. 457.

18. It was the intention of the code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them respectively, but to **narrow the proofs** on the trial.

Piercy v. Sabin, 10 Cal. 22.

19. The rule is that the **allegations and proofs must correspond**; and a consequence of the rule is another, which is, that evidence of a fact essential to the support of the action can not be heard unless it be averred in the complaint.

Maynard v. F. F. Ins. Co., 34 Cal. 48.

20. **Ultimate facts** only, and not such as are probative, should be stated in pleadings.

Miles v. McDermott, 31 Cal. 271.

21. Allegations of matters of evidence in pleading are not **issuable facts**. If the answer puts in issue the ultimate fact resulting from the evidence, it is a sufficient denial.

Moore v. Murdock, 26 Cal. 514.

22. Every fact **essential to the claim** or defense should be stated. If this part of the rule be violated, the adverse party may demur.

Piercy v. Sabin, 10 Cal. 26.

23. Nothing should be stated which is not essential to the claim or defense, or, in other words, that none but **issuable facts** should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts. Id.

24. The **title** of the plaintiff is the ultimate fact, the fact in issue, upon which a recovery must be had in **ejectment**. The facts established by the plaintiff, going to support his alleged title, are probative facts, which, if disputed by the defendant, are facts in controversy.

Marshall v. Shafter, 32 Cal. 176.

25. It is the ultimate and not the probative facts which should be averred; and it is

error in the court to exclude evidence offered to establish the probative facts, although they are not averred in the complaint.

Grewell v. Walden, 23 Cal. 165.

Depuy v. Williams, 26 Id. 313.

Miles v. McDermott, 31 Id. 271.

Marshall v. Shafter, 32 Id. 176.

26. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged; and must allege nothing affirmatively which he is not required to prove.

Green v. Palmer, 15 Cal. 411.

27. Even where a statement of **evidentiary** facts, if admitted to be true, would establish *prima facie* an ultimate or pleadable fact, they can not be substituted in a pleading for an allegation of the fact to be put in issue. Harris v. Hillegass, 54 Cal. 463.

Negative Allegations.

28. Negative allegations, however, are frequently necessary, though they are not to be proved.

Green v. Palmer, 15 Cal. 411.

29. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation, which is the basis of the action, or to negative an inference from an act which is in itself indifferent.

Payne v. Treadwell, 16 Cal. 220.

30. Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negated, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse and not as an averment of new matter.

Frisch v. Caler, 21 Cal. 71.

WHAT SHOULD NOT BE ALLEGED.

31. A legal inference or conclusion from the facts.

Green v. Palmer, 15 Cal. 414.

32. Argument in a pleading. Id.

33. Hypothetical statements. Id.

34. The defendant's pretenses. Id.

35. Irrelevant, redundant, immaterial, unessential, and surplus allegations should be omitted. Id.

36. The facts from which the conclusion is to be drawn must be stated, not the conclusion of law.

Levinson v. Schwartz, 22 Cal. 229.

37. An allegation of indebtedness, without an averment of facts from which the indebtedness arises, is a conclusion of law.

Curtis v. Richards, 9 Cal. 33.

Wells v. McPike, 21 Id. 215.

38. "Wrongful or unlawful" conclusions of law. Payne v. Treadwell, 16 Cal. 220.

39. In an action of **assumpsit**, for goods

sold and delivered, after the submission of the case upon the pleadings, defendants asked leave to amend their answer, which, as it then stood, raised no issue, by averring that the goods were purchased "on credit," and that the "term of credit" had expired, which the court refused: *Held*, that the refusal was proper, as the averment proposed was only a conclusion of law, and therefore immaterial.

Levinson v. Schwartz, 22 Cal. 229.

40. The words "**duly**," "**wrongfully**," and "**unlawfully**," when used in connection with issuable facts, while they do not vitiate a pleading, are surplusage, and had better be omitted.

Miles v. McDermott, 31 Cal. 271.

Halleck v. Mixer, 16 Id. 574.

41. That the defendant became or was lawfully bound by a judgment declared on, is only a conclusion of law.

People v. San Francisco, 27 Cal. 655.

42. An allegation that the plaintiff is the "**owner and holder of a note**" is a conclusion of law.

Wedderspoon v. Rogers, 32 Cal. 569.

Poorman v. Mills, 35 Cal. 118; 39 Id.

345; 43 Id. 323.

Held sufficient in Rollins v. Forbes, 10 Cal. 299.

43. An allegation that a certain amount is due upon a note is a conclusion of law.

Frisch v. Caler, 21 Cal. 71.

44. The promise to pay, alleged in the common count in assumpsit, is a conclusion of law, and need not be averred under the new code, which requires only the facts to be stated. Wilkins v. Stidgers, 22 Cal. 231.

45. An allegation in an answer, that certain goods were sold on a credit which had not expired, is a conclusion of law.

Levinson v. Schwartz, 22 Cal. 229.

46. An answer which avers "that any right that plaintiffs may have ever had to the possession," etc., they forfeited by a non-compliance with the rules, customs, and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendant's entry, is the averment of a legal conclusion.

Dutch Flat Co. v. Mooney, 12 Cal. 534.

47. To aver that a "location was duly and properly made, according to the provisions of an act," is insufficient; the conditions of the act, and the performance thereof, must be specially averred.

People v. Jackson, 24 Cal. 632.

48. An averment in a complaint that an ayuntamiento had full power and lawful authority to do a particular act is an averment of a conclusion of law, and does not tender an issue of fact.

Branham v. San Jose, 24 Cal. 585.

49. The averment in the complaint "that

defendants took the land subject to the Pangburn mortgage," is but a conclusion of law, and defendants might safely omit to traverse it.

Wormouth v. Hatch, 33 Cal. 121.

50. The only object to be gained by a plaintiff in **anticipating a defense**, and replying to it in advance, is to put the adverse party on his oath without making him a witness, and the effect of allowing this would be to establish a system of discovery in conflict with the spirit of the statute.

Canfield v. Tobias, 21 Cal. 349.

51. The only allegations essential to a complaint are those required in stating the cause of action. Allegations inserted for the purpose of intercepting and cutting off an anticipated defense are superfluous and immaterial and do not require an answer. *Id.*

52. Evidence should not be alleged.

Racouillat v. Rene, 32 Cal. 450.

Depuy v. Williams, 26 Id. 313.

Probative facts should not be alleged.

Marshall v. Shafter, 32 Cal. 176.

Grewell v. Walden, 23 Id. 165.

Miles v. McDermott, 31 Id. 271.

Willson v. Cleaveland, 30 Id. 192.

53. Matters of evidence and unnecessary matters of description of demanded premises should be stricken out of a complaint to recover possession of land.

Willson v. Cleaveland, 30 Cal. 192.

54. Averments of mere evidence are not admitted by failure to deny them in the answer.

Racouillat v. Rene, 32 Cal. 450.

55. The averments in complaint that the defendants paid interest for a time to plaintiff on the Pangburn note, and that they have always admitted their liability to pay it, and the principal also, etc., are at the most but evidence to prove the original undertaking of the defendants, upon which the action is based, and as averments of evidence, and not of facts, the defendants were not obliged to traverse them.

Wormouth v. Hatch, 33 Cal. 121.

56. But should it be considered that these averments bear upon the statute of limitations, relied upon as a defense to the action, they are all mere evidence of the statute avoidance of the bar, except the allegation that "the defendants have always admitted their liability to pay the principal and interest on the Pangburn note and mortgage." This allegation might perhaps suffice to remove the bar, did it not affirmatively appear on the face of the complaint that the defendants were never, in fact, liable upon the note; hence no traverse of these allegations by the defendants was necessary. *Id.*

FACTS HOW STATED.

57. Material allegations must be distinctly stated in pleadings, and are not to

be inferred from doubtful or obscure language.

Campbell v. Jones, 38 Cal. 507.

58. In pleading, the essential facts upon which the legal points in the controversy depend should be stated with **clearness and precision**, so that nothing is left for the court to surmise. Gates v. Lane, 44 Cal. 392.

59. Unless the **facts essential** to the support of the case be alleged in the pleadings, evidence upon such omitted facts can not be heard or considered.

Hicks v. Murray, 43 Cal. 515.

60. Evidence of facts, or stipulations as to the facts of the case, can not make a case broader than it appears by the allegations of the pleadings, nor do they entitle a party to any relief beyond what the averments entitle him to. *Id.*

61. The mere allegation in a pleading that a party is a **corporation** does not put its existence as a corporation beyond the reach of inquiry.

O. & V. R. Co. v. Plumas, 37 Cal. 354.

62. When a party relies upon **fraud**, either to support his cause of action or in defense, he must set up the facts which constitute the fraud.

Capuro v. Builders' Ins. Co., 39 Cal. 123.

O. & V. R. Co. v. Plumas, 37 Cal. 354.

So in pleading mistake.

Douglass v. Brooks, 38 Cal. 670.

63. In pleading a **judgment** of the probate court, it is not necessary to allege the facts conferring **jurisdiction**, but the judgment may be stated to have been duly rendered.

Beans v. Emanuelli, 36 Cal. 117.

64. A party claiming a title to property by virtue of such a **statute** (relating to condemnation of lands) as against the original owner, must allege and prove that all the provisions of the statute for the acquisition of such title have been strictly complied with. Trumpler v. Bemerly, 39 Cal. 490.

65. In pleading, each **cause of action** or ground of defense should be **separately stated**, and not so mingled together as to render it impossible to determine the precise nature and limits of each.

White v. Cox, 46 Cal. 169.

66. If a **board of brokers** have rules which are not rules or **usages of trade and commerce** that would be recognized without their adoption by the board, the court will not take **judicial notice** of them unless they are pleaded.

Godsmith v. Sawyer, 46 Cal. 209.

67. An **essential**, or what is the same thing, an **immaterial allegation**, is one which can be stricken from the pleading without leaving it insufficient; and, of course, need not be proved or disproved. The following question will determine, in every case, whether an allegation be material: "Can it be made the subject of a material issue?"

In other words: "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. It is not one of those which constitute the causes of action, defense, or reply. *Green v. Palmer*, 15 Cal. 413.

68. Another test is this: Could the averment be stricken from the pleading without leaving it insufficient?

Whitwell v. Thomas, 9 Cal. 499.

69. A statement in a complaint that the contract sued on was made payable in a specific kind of money, is an allegation of a material fact.

Wallace v. Eldredge, 27 Cal. 498.

70. Facts must be stated in unequivocal language, and not left to inference.

Moore v. Besse, 30 Cal. 570.

71. A complaint should allege a material fact by direct averment, and not by inference.

Stringer v. Davis, 30 Cal. 318.

72. All statements must be concisely made, and when once made, must not be repeated.

Green v. Palmer, 15 Cal. 413.

73. An occurrence should be set forth in its logical, that is, in its natural order. Id.

74. Under our system of practice any pleading is sufficient in form which properly states the facts essential to a recovery.

Stanwood v. Sage, 22 Cal. 516.

75. Allegations by way of recital.

Shafer v. Bear River, 4 Cal. 294.

Denver v. Burton, 23 Id. 549.

Stringer v. Davis, 30 Id. 318.

Pleading Written Instruments in Hæc Verba.

76. A written contract may be declared on according to its legal effect, or it may be set forth in *hæc verba*. If declared on according to its legal effect the defendant may, by the rule of the common law in a proper case, crave *oyer* of the instrument; and if it appears that its provisions have been misstated, he may set out the contract in *hæc verba*, and demur on the ground of the variance.

Stoddard v. Treadwell, 26 Cal. 294.

77. In suit upon an agreement under seal, the complaint setting out the agreement in *hæc verba* need not aver any consideration for the agreement. The seal imparts a consideration.

Wills v. Keimpt, 17 Cal. 98.

McCarty v. Beach, 10 Id. 461.

78. Where a party relies in his complaint upon a contract in writing and it affirmatively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been committed, the complaint is insufficient. So held, in an action upon a policy of fire insurance, where the policy attached to the complaint as part thereof, referred to the application of

the assured, as forming a part of the policy, and as a warranty on the part of the assured; but the application was not attached, nor the effect alleged in the complaint.

Gilmore v. Lycoming Ins. Co., 55 Cal. 123.

Records and Papers, How Made a Part of a Pleading.

79. Records and papers can not be made part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them with the answer, so as to form a part of the record in the cause.

People v. De la Guerra, 24 Cal. 73.

79a. In an action of foreclosure, where the complaint has a copy of the mortgage annexed, and to which it refers, a correct description of the land in the mortgage is sufficient for the purpose of the suit.

Emeric v. James, 6 Cal. 155.

80. Matters of substance, which are necessary to be alleged in a complaint, can not be left out, and the defect supplied by reference to an exhibit attached to and made part of the complaint.

Los Angeles v. Signoret, 50 Cal. 298.

When Pleadings may be Read to Jury.

81. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted.

Garfield v. Knight's F. Co., 14 Cal. 35.

82. Defendant can protect himself against any improper effect of this, by asking of the court directions, limiting effect to a particular purpose.

Id.

THE COMPLAINT, WHAT TO CONTAIN.

Parties to the Action.

For parties to action, consult PARTIES.

Real Party in Interest.

83. The practice act permits a party defendant, whose name is unknown, to be sued by any name. *Morgan v. Thrift*, 2 Cal. 562.

83a. If a bond be executed by the plaintiff to the defendant, by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended.

Id.

Statement of Fact.

84. Where the facts, averred by plaintiff as constituting his cause of action, show turpitude on his part, he states himself out of court.

Abbe v. Marr, 14 Cal. 210.

85. If the complainant does not show a

good cause of action, the judgment will be reversed though no objection be taken below.

Russel v. Ford, 2 Cal. 86.

86. The statute requiring the complaint to contain a statement of the facts constituting a cause of action, in **ordinary and concise language**, is only declaratory of the common law.

Godwin v. Stebbins, 2 Cal. 103.

87. If the complaint contains **one good count**, and the findings of fact are defective, but the court below is not asked to find the omitted facts, the judgment will not be disturbed.

Lucas v. San Francisco, 23 Cal. 501.

88. The complaint must show a **subsisting cause of action**; and when the original cause has been barred by the statute, or a discharge in insolvency, and a new promise is relied on, the new promise must be pleaded.

Chabot v. Tucker, 39 Cal. 434.

89. Where the alleged **new fact** existed at the commencement of a former action in which the point in issue was the same, and the plaintiff neglected to avail himself of it, he is not entitled to set it up in a subsequent action.

Sullivan v. Triunfo M. Co., 39 Cal. 459.

90. If the **second count** in a complaint is in part a copy of the first, but the additional allegations it contains do not present any new or **additional ground of relief**, the second count is redundant, and the judgment will not be reversed because a demurrer to such second count was sustained, for no injury was sustained thereby.

N. S. & S. C. Co. v. Kidd, 37 Cal. 282.

91. An allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as **surplusage**.

Gates v. Salmon, 46 Cal. 362.

92. A judgment is not void or erroneous, because the **name of the plaintiff's attorney** attached to the complaint is printed, instead of being written.

Hancock v. Bowman, 49 Cal. 413.

Causes of Action which may be United.

93. All matters arising from and constituting **part of the same transaction** may be litigated in the same action. Every action, under our system, may be termed an action on the case, and any ground of relief which can be regarded as part of the case may be included in the action.

Jones v. Str. Cortez, 17 Cal. 487.

94. A claim to enforce an express or implied **trust** may be joined in a complaint with a claim to enforce a vendor's lien existing without any written contract.

Burt v. Wilson, 23 Cal. 632.

95. Under our system a cause of action in **tort** may be united with a cause of action on

contract, if the two causes of action arise out of the same transaction.

Jones v. Str. Cortez, 17 Cal. 487.

96. Cases from New York cited to show that, although there as here the statute provides, a claim for injuries to the person shall not be joined with a claim for **injuries to character**; yet if the facts of the whole case or transaction embrace an injury to the person, and also an injury to the character, then plaintiff may recover in one action for the compound injury.

Id.

97. It is not necessary, in an action against a sheriff to recover **damages** (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit.

Pearkes v. Freer, 9 Cal. 642.

98. After the purchase of the property by the plaintiff at sheriff's sale, he has a right to sue for his possession; and the discovery of a **fraud** after suit brought would entitle him so to shape his action as to include it, for the consideration of the court.

Truebody v. Jacobson, 2 Cal. 269.

99. Where a suit was brought to **foreclose a mortgage** executed by husband and wife to secure a note made by the husband alone, and the complaint prayed for judgment against the husband for the amount of the note and interest, and a decree against both defendants for the sale of the mortgaged premises: *Held*, there was no misjoinder of actions.

Rollins v. Forbes, 10 Cal. 299.

100. Where a party is entitled to both **legal and equitable relief**, in a matter arising out of the same transaction and founded on the same instrument in writing, the whole matter may be litigated and finally settled in the same action.

Gray v. Dougherty, 25 Cal. 266.

101. In a **bill for an account** for the settlement of the proceeds of a joint adventure, where, in consideration of outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculations of every kind for a certain period of time, although the parties may not have been technically partners, the plaintiff may demand, in the same action, that defendant account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract.

Garr v. Redman, 6 Cal. 574.

102. The **common counts** may be united in **one complaint**, if separately stated.

Frechorn v. Glazer, 10 Cal. 337.

De Witt v. Porter, 13 Id. 171.

Buckingham v. Waters, 14 Id. 146.

103. A party may sue the **indorser of a promissory note** on his liability as such, and ask a decree against the mortgagor fore-

closing a mortgage, given to secure the same note by another party.

Eastman v. Turman, 24 Cal. 382.

104. Where it is desired to unite **several causes of action** in the same complaint, they should be separately stated. Otherwise, though the complaint contains words which, if properly arranged, might state two causes of action, it will be construed as stating only the cause of action principally intended.

Sharp v. Miller, 54 Cal. 329.

105. Where the complaint sets up **more than one cause of action**, each count must contain all the facts necessary to constitute a cause of action; and its defects can not be supplied from statements in other counts, unless expressly referred to in it; and not then, if the matters referred to constitute the gravamen of the action.

Haskell v. Haskell, 54 Cal. 260.

106. If a mortgage is assigned by the mortgagee to another party as a pledge for the payment of a debt due the other party by the mortgagee, it is not an improper joinder of several causes of action for the assignee to unite in the same action his claim against the mortgagor and mortgagee and persons having liens or incumbrances upon the mortgaged property.

Farwell v. Jackson, 28 Cal. 105.

107. A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of misjoinder of causes of action.

Keller v. Hicks, 22 Cal. 457.

108. The plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action.

Sullivan v. Davis, 4 Cal. 291.

109. The union in one count of a complaint, of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek * * * so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * * hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several **distinct causes of action** in one count.

Gale v. Tuolumne W. Co., 14 Cal. 25.

110. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means,

is not important enough to require several counts. *Id.*

111. The **abatement of a nuisance**, and the recovery of **damages** therefor, are not distinct causes of action which can not be united in the same complaint, but merely different kinds of relief to which the plaintiff may be entitled where a nuisance is the cause of action. *Yolo v. Sacramento*, 36 Cal. 193.

112. In an action for damages for breaking defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count, and charges that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants, broke away," etc.: *Held*, that the complaint is sufficient.

Hoffman v. Tuolumne W. Co., 10 Cal. 413.

113. Whether such **negligence** arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material under our system of pleading, to require separate counts. *Id.*

114. If several tracts of **swamp land** of the same owner be separately assessed under one **assessment**, the assessments on the several tracts may be recovered in one action.

People v. Hagar, 52 Cal. 171.

115. The plaintiff can not, in the complaint, unite a cause of action to **annul a marriage** by reason of a former marriage of the plaintiff to one who is still alive, with a cause of action to **quiet her title** to her separate property, in which the defendant falsely claims an interest. *Uhl v. Uhl*, 52 Cal. 250.

116. **Value of property destroyed** and damages for the same may be joined.

Tendesen v. Marshall, 3 Cal. 440.

117. In an action for **injuries to a mining claim** a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears W. Co.* 12 Cal. 555.

118. The owner of land may join in the same complaint a claim for **damages**, as assignee, caused by a **trespass** on the land, while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land.

Moore v. Massini, 32 Cal. 590.

119. The plaintiff may join in the same complaint a cause of action for **distinct and independent injuries** to property, and the property injured in each cause of action may be the same or different, and may be either personal or real. *Id.*

Causes of Action which can not be United.

120. A claim for damages for a **personal**

tort can not be united with a demand properly cognizable in a court of equity in the same action. *Mayo v. Madden*, 4 Cal. 27.

121. A claim for the **possession of real property**, with **damages** for its detention, can not be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business.

Bowles v. Sacramento T. Co., 5 Cal. 224.

122. Suit on a **recognizance** given before a justice for the appearance of defendant S. to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance, avers that S., to secure his sureties, executed a trust deed to T. of certain warrants and money. This deed provides that in case the recognizance be forfeited, and the sureties become liable thereon, the trustee is to apply the property to the payment, so far as it will go, of the recognizance. The complaint asks to have this property so applied: *Held*, a **misjoinder of causes of action**; that the trust deed has nothing to do with the liabilities of the sureties.

People v. Skidmore, 17 Cal. 200.

123. A bill in equity is **multifarious** when several matters are united against one defendant, which are perfectly distinct and unconnected, or when relief is demanded against several defendants of several matters of a distinct and independent nature.

Wilson v. Castro, 31 Cal. 420.

124. A bill in equity is not multifarious if there is a **common liability in the defendants** and a common interest in the plaintiffs, or if the interests of the plaintiffs are the same, and the defendants have not a co-extensive common interest, but their interests are acquired under different instruments from the same source of title.

Id.

125. If a bill in equity to enforce a trust avers that plaintiffs' grantors inherited a tract of land as heirs-at-law of their brother, who received a grant of the same from the government of Mexico, and died intestate, and that two of the defendants afterwards received patents for distinct parcels of the same, and that the several other defendants claim the title to **separate and distinct parcels** of the same derived from the patentees, and that the defendants hold the legal title to the several distinct parcels in trust for the plaintiffs, it is not multifarious.

Id.

126. Where two persons are employed by the claimants of a tract of land under a Mexican grant, as agents to procure the confirmation of the grant in the United States courts, and services are thus rendered and expenses incurred by the agents: *Held*, that such service and expense are individual in their character, and not joint, and that sepa-

rate actions may be maintained by such agents for their **expenses** thus incurred.

Connor v. Hutchinson, 12 Cal. 126.

127. If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action.

Ghirardelli v. Bourland, 32 Cal. 585.

128. A complaint setting up in one and the same count ownership in, and ouster from, a certain **water right**, and also a site for a dam, and the land on which a dam is built, and praying for restitution, is demurrable, for **improperly uniting** several causes of action.

N. & S. C. Co. v. Kidd, 43 Cal. 180.

129. Action to recover damages for alleged injuries to the person and property of the plaintiff, and for **false imprisonment** of the plaintiff's person, for forcibly ejecting him from a house and premises alleged to have been in plaintiff's possession, and keeping him out of the possession thereof: *Held*, improper joinder of causes of action.

McCarty v. Fremont, 23 Cal. 197.

130. A party can not join an action of **trespass, quare clausum fregit**, with **ejectment**, and "pray" for an injunction.

Bigelow v. Grove, 7 Cal. 133.

Causes of Action which must be Separately Stated.

131. The different causes of action which are allowed by the sixty-fourth section of the practice act to be united in one complaint should be separately stated.

McCarty v. Fremont, 23 Cal. 196.

132. Where the complaint, in an action of trespass, asks also for the equitable interposition of the court, if the **law and equity** are inseparably mixed together it would be demurrable.

Gates v. Kieff, 7 Cal. 125.

133. **Common counts** can not all be united in one count as one cause of action, without any specification of the sums due upon each several cause.

Buckingham v. Waters, 14 Cal. 146.

134. Complaint in ejectment may be for **two separate and distinct pieces of land**; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial.

Boles v. Cohen, 15 Cal. 150.

135. If the damages for which the plaintiff demands satisfaction in his complaint resulted partly from a successful conspiracy to expel him from a church, partly from libelous publications in charges preferred to the church, and partly from the malicious prosecution of those charges before the church, each of these causes of action

should be separately stated, so that the defendant may plead to them separately.

White v. Cox, 46 Cal. 169.

136. An entry upon and **ouster** from a dam site and dam in process of construction, and a canal site and canal in process of construction, and a **diversion of water** claimed by means of the dam and canal, are two distinct causes of action, which can not be united in the same statement of cause of action in a complaint, but should be separately stated. N. & S. Co. v. Kidd, 37 Cal. 282.

137. The several causes of action upon which a party relies must be set out with directness and precision, the amount due upon each cause of action being separately stated.

Watson v. S. F. & H. R. Co., 41 Cal. 17.

138. If several causes of action in a complaint are not separately stated, or if a cause of action stated is against public policy, the defects can not be taken advantage of by a **motion to dismiss** the action, or by a **motion** for judgment on the pleadings.

Watson v. S. F. & H. R. Co., 50 Cal. 523.

Prayer for Relief.

139. **Objections** to the prayer of a complaint can not be taken by **demurrer**. If the specific relief asked can not be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause, where an answer is filed.

Rollins v. Forbes, 10 Cal. 299.

140. The prayer of a complaint is not subject of demurrer.

Althof v. Conheim, 38 Cal. 230.

141. Although the prayer of a bill be **artificially** framed, the court will, under the general prayer for relief, disregard **mistakes**, and grant such relief as will conform with the bill. Truebody v. Jacobson, 2 Cal. 269.

142. Where a party, in his notice of motion served on the adverse party, asks for a **specific relief**, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented. People v. Turner, 1 Cal. 152.

143. Section 39 of the practice act requires the complaint to contain "a **demand of the relief** which the plaintiff claims." The policy is to require the plaintiff to apprise the party of the extent of the judgment he demands. For this purpose the prayer is sometimes significant.

N. & S. Co. v. Kidd, 37 Cal. 282.

144. If the complaint contains **two independent counts**, each complete within itself, and concluding with its own appropriate prayer for relief, and separately signed by counsel, the prayer to the second count will not be deemed to have any reference to the first, and on a verdict on the first count

only, the relief granted will follow the prayer of that count. Id.

145. When **treble damages** are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damages of the plaintiff against the form of the statute.

Chipman v. Emeric, 5 Cal. 239.

146. Where a suit is brought to test the question as to the **priority of appropriation** of water, a prayer for an injunction to prevent further injury is proper.

Marius v. Bicknell, 10 Cal. 217.

147. A complaint which sets out a cause of action in trespass, and concludes with a **prayer for an injunction**, is correct.

Gates v. Kieff, 7 Cal. 125.

148. The complaint stated that at a foreclosure sale plaintiff purchased an undivided one-third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed, and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds: *Held*, that on the facts stated plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous.

Hill v. Taylor, 22 Cal. 191.

149. Under a prayer for general relief, no relief can be granted in equity beyond that which is authorized by the facts stated in the bill.

Carpentier v. Brenham, 50 Cal. 549.

Objections to Complaint, When Waived.

149a. The objection that there is a **defect of parties** to the complaint must be taken by demurrer or answer, or it will be deemed to have been waived; but the defendant may object on the trial if the proof does not sustain plaintiff's allegations, as to his right of action. Alvarez v. Brannan, 7 Cal. 503.

Dunn v. Tozer, 10 Id. 167.

150. The objection to the **want of verification** of a complaint where verification is required by statute, must be taken either before answer or with the answer.

Greenfield v. Str. Gunnell, 6 Cal. 67.

151. The objection for a **non-joinder** of all the proper parties as plaintiffs, where the defect does not appear upon the face of the complaint, must be taken by answer, else the objection will be deemed waived.

Wendt v. Ross, 33 Cal. 650.

152. The objection that **too many persons** are joined as plaintiffs must be taken

advantage of by demurrer, if it appear on the face of the complaint, and if it does not so appear, by answer, or the same is waived.

Gillam v. Sigman, 29 Cal. 637.

153. A complaint which contains no other designation of the party plaintiff than the name of a copartnership firm is defective; but such defect can only be made available to defendant by demurrer for defect of parties, or by denial in the answer of any cause of action, and objection thereunder to evidence in support of the claim.

Gilman v. Cosgrove, 22 Cal. 356.

154. The plaintiff having a claim against A., brought suit against him to enforce the claim, and, in the same action, sought to set aside a conveyance of real estate from A. to B., on the ground that it was executed in fraud of the creditors of A., and made B. a party to the suit: *Held*, there having been no objection taken, either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A. to B.

Macondray v. Simmons, 1 Cal. 393.

155. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued.

Hentsch v. Porter, 10 Cal. 555.

156. A complaint in an action to set aside a judgment which contains no averment showing that relief could not have been obtained on motion, may be demurrable; but, if defendant fails to demur, and answers on the merits, and the facts supplying the defect appear in the record, the objection is waived.

Bibend v. Kreutz, 20 Cal. 109.

157. Although the allegations of a pleading are defective, yet, if there is not an entire want of allegations constituting a cause of action, and no demurrer is filed or objection made in the court below, the judgment will not be disturbed.

Lee v. Figg, 37 Cal. 328.

158. If a material fact is only stated inferentially in a complaint, and the pleading is not demurred to specially for this reason, it is good after judgment.

Hill v. Haskin, 51 Cal. 175.

159. In an action brought by the husband and wife to recover money paid on a judgment recovered against the wife, if the complaint avers that the wife was compelled to pay the judgment, and then alleges that the husband paid it for and on account of the wife, without an allegation that it was done at her request, the defect in the complaint, if it is one, can be taken advantage of only by special demurrer.

Drais v. Hogan, 50 Cal. 121.

160. The court will not reverse a judg-

ment on the ground that the complaint does not state the facts quite as fully as it ought. If no demurrer has been interposed, there must appear to be an entire want of material facts to justify the disturbing of the judgment.

Hibernia S. & L. S. v. Ordway, 38 Cal. 679.

161. When a complaint is defective in manner rather than in matter, if no objection is taken by demurrer, it will be held sufficient to support a judgment.

Russell v. Mixer, 42 Cal. 475.

162. In a suit for partition, if the complaint fails sufficiently to state the origin, nature or extent of the interest of the plaintiff, objection should be presented by demurrer. If not taken in that mode it is waived.

Broad v. Broad, 40 Cal. 493.

163. If all the parties interested in the demand, where there has been an assignment of a part of it, are not made parties to the action, the objection, under the code, to the complaint, is not that it lacks facts, but that it lacks parties, and will be waived unless the complaint is demurred to on that ground.

Grain v. Aldrich, 38 Cal. 514.

164. When it appears on the face of the complaint that there is a misjoinder of parties plaintiff, the objection must be taken by demurrer and can not be taken by answer.

Tennant v. Pfister, 45 Cal. 270.

165. If a complaint improperly unites two causes of action, or is ambiguous and uncertain, the defect must be taken advantage of by demurrer or it is waived.

Lawrence v. Montgomery, 37 Cal. 183.

Shelby v. Houston, 38 Id. 410.

166. Unless the objection of a misjoinder of parties or causes of action is taken by demurrer, it is considered waived.

Hibernia S. & L. S. v. Ordway, 38 Cal. 679.

167. And if a demurrer on these grounds has been interposed but not prosecuted, and be overruled by the court below, because it was not prosecuted, the objection will be held to be waived.

Id.

167a. If an account on which the plaintiff seeks to recover is attached to and made a part of the complaint, an objection that it is unintelligible can not be raised unless taken by demurrer.

Goldsmith v. Sawyer, 46 Cal. 209.

DEFENDANT'S PLEADINGS AND PROCEEDINGS.

When Defendant may Demur.

168. The defendant may demur and answer at the same time to the entire complaint, and also to each cause of action stated therein.

People v. McClellan, 31 Cal. 101.

Grounds of Demurrer.

For Want of Jurisdiction.

169. A demurrer on the ground "that the court has no jurisdiction either of the persons of the defendants or of the subject of the action," is sufficiently explicit.

Kent v. Snyder, 30 Cal. 666.

Ellissen v. Halleck, 6 Id. 388.

170. Demurrer to the jurisdiction of a court of general jurisdiction lies only where the want of jurisdiction appears affirmatively on the face of the complaint. Otherwise, of courts of limited and special jurisdiction; there, every fact essential to confer jurisdiction must be alleged.

Doll v. Feller, 16 Cal. 432.

For Defect, or Misjoinder of Parties.

171. Where a defect of parties is apparent upon the face of the complaint, the objection must be taken by demurrer, or the same will be waived.

Dunn v. Tozer, 10 Cal. 167.

Mott v. Smith, 16 Id. 557.

Sampson v. Shaeffer, 3 Id. 202.

Warner v. Wilson, 4 Id. 313.

Beard v. Knox, 5 Id. 257.

Tissot v. Throckmorton, 6 Id. 473.

McKeene v. McGarvey, 6 Id. 498.

Burroughs v. Lott, 19 Id. 125.

Barber v. Reynolds, 33 Id. 497.

Andrews v. Mokelumne Hill Co., 7 Id. 330.

172. A misjoinder of parties plaintiff must be objected to by demurrer or answer, and can not, in the absence of such objection, be made a ground for nonsuiting such of the plaintiffs as show themselves entitled to recover.

Rowe v. Bacigalluppi, 21 Cal. 633.

173. The objection that a wife is improperly joined with the husband as party plaintiff should be taken advantage of by demurrer, and comes too late on appeal.

Tissot v. Throckmorton, 6 Cal. 471.

174. Where the defendants demurred to a complaint for a misjoinder of parties plaintiff, and the court overruled the demurrer, and the plaintiffs then moved to amend the complaint by striking out the names of the plaintiffs thus alleged to be improperly joined, and the defendants resisted successfully such motion: *Held*, that such action on the part of defendants was a waiver of the objection of misjoinder raised by their demurrer.

Summers v. Farish, 10 Cal. 347.

175. When there is a non-joinder of parties defendant, and the defect does not appear on the face of the complaint, the objection must be taken by answer or it is waived. It can not be taken by a motion for a nonsuit.

Pavisich v. Bean, 48 Cal. 364.

176. The question of a misjoinder of parties in a complaint can not be raised under a

demurrer interposed upon the ground that the complaint does not state facts to constitute a cause of action.

Tennant v. Pfister, 51 Cal. 511.

Misjoinder of Causes of Action.

177. Objections to the misjoinder of causes of action should be taken by demurrer or answer, or they are deemed waived.

Jacks v. Cooke, 6 Cal. 164.

Marius v. Bicknell, 10 Id. 217.

Gates v. Kieff, 7 Id. 124.

Weaver v. Conger, 10 Id. 237.

Rollins v. Forbes, Id. 300.

Macondray v. Simmons, 1 Id. 393.

178. Suit on a recognizance given before a justice for the appearance of defendant S. to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance, avers that S., to secure his sureties, executed a trust deed to T. of certain warrants and money. This deed provides, that in case the recognizance be forfeited and the sureties become liable thereon, the trustee is to apply the property to the payment, so far as it will go, of the recognizance. The complaint asks to have this property so applied: *Held*, that a demurrer for misjoinder of causes of action lies; that the trust deed has nothing to do with the liability of the sureties.

People v. Skidmore, 17 Cal. 260.

179. The liability of the sureties can only be tested by suit, and if after judgment against them they are insolvent, the question of plaintiff's right to subject this property may arise.

Id.

180. The contract declared on, contained a covenant for stipulated damages, and by the same contract, the parties were constituted partners. The plaintiffs prayed judgment for the liquidated damages, and for an account and dissolution of the partnership. Defendant demurred, assigning for cause that two causes of action, the one of legal, and the other of equitable jurisdiction, could not be joined, and the district court sustained the demurrer: *Held*, that this was error.

Stone v. Fouse, 3 Cal. 292.

181. Where a complaint set forth a contract by defendants to build a dam, and their failure to comply therewith; alleged damages to plaintiffs on account of loss of profits which they would have made by their ditch if the dam had been built, and demanded a judgment for damages: *Held*, that a demurrer on the ground that it united two causes of action would not lie.

Reedy v. Smith, 42 Cal. 245.

182. *Held*, that the complaint in this case, being a combination of several independent and distinct causes of action, could not have been sustained had a demurrer been interposed. Tomkins v. Sprout, 55 Cal. 31.

183. A misjoinder of causes of action in a complaint can not be taken advantage of, unless specially assigned by a demurrer.

Haverstick v. Trudel, 51 Cal. 431.

184. The plaintiff can not unite in his complaint two or more causes of action for penalties incurred by a toll gatherer for demanding and receiving too much toll, even if they are separately stated.

Brown v. Rice, 51 Cal. 489.

185. Two causes of action for enforcing liens for two street assessments, made in San Francisco, on the same lot at different times and on different contracts, and for improving the same street, can not be joined in the same suit.

Dyer v. Barstow, 50 Cal. 652.

186. The question not decided, whether the joinder of a cause of action for the recovery of money, with a cause of action for the foreclosure of a mechanic's lien to secure the money, is proper, if the complaint is demurred to for a misjoinder of causes of action.

Cox v. W. P. R. Co., 47 Cal. 87.

187. The joinder of a cause of action for the recovery of money, with a cause of action for the enforcement of a lien to secure the money, if improper, can be taken advantage of only by a special demurrer for misjoinder of causes of action. *Id.*

Facts Insufficient to Constitute Cause of Action.

188. A demurrer to a complaint on the ground "that the complaint does not state facts sufficient to constitute a cause of action," and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for injury done to one, is a good demurrer for misjoinder of parties. *Summers v. Farish*, 10 Cal. 347.

189. The objection "that the complaint does not state facts sufficient to constitute a cause of action," is confined to those cases in which no cause of action at all, as against the defendants, arises from the complaint. *Id.*

190. Upon plaintiff's statement of his case, the court intimates that, conceding the fact, he can not recover, and the plaintiff then offers to prove his allegations; whereupon defendant admits they could be proved, and demurs to the evidence: *Held*, that this is not a demurrer to the evidence. It is rather deciding the case on the demurrer, or as on demurrer to the complaint, or as on motion for nonsuit.

Snodgrass v. Ricketts, 13 Cal. 359.

191. The demurrer is sufficient, without a specification of the reason why it does not state such facts, unless the defense relied on is one which, to be made available, must be specially pleaded.

Kent v. Snyder, 30 Cal. 166.

192. Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer. *Abbe v. Marr*, 14 Cal. 210.

193. The failure of the plaintiff to allege in his complaint in an action to foreclose a mortgage made by deceased upon a claim against an estate, its presentation to and rejection by the administrator, is an objection that the complaint does not state facts sufficient to constitute a cause of action.

Ellissen v. Halleck, 6 Cal. 386.

194. But the failure to aver this presentment is not such a fatal objection to the complaint as to make a judgment by default a nullity, or review on appeal.

Hentsch v. Porter, 10 Cal. 562.

195. Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of the defendant. Defendant commenced raising his dam two feet higher. Plaintiff brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on plaintiff's claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill, which they intended to construct: *Held*, that the action was premature, and that demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained.

Harvey v. Chilton, 11 Cal. 114.

196. An averment in a complaint, that the plaintiff was prevented by the defendant from performing a contract, is sufficient, as against a general demurrer, without stating by what means the plaintiff was prevented from performing it.

Cox v. W. P. R. Co., 47 Cal. 87.

197. A complaint, which states a good cause of action for the recovery of money, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action, because there is also an ineffectual effort to state in the complaint a cause of action for the foreclosure of a mechanic's lien to secure the same money. *Id.*

198. A demurrer to the entire complaint is not well taken, if the complaint contains two counts, and one count contains a cause of action. *Griffiths v. Henderson*, 49 Cal. 566.

199. A complaint is not demurrable on the score of a want of facts, if upon the facts stated the plaintiff is entitled to any relief, either at law or in equity.

Grain v. Aldrich, 38 Cal. 514.

200. G. & M. sued A. W. & Co. upon an assignment of part of an entire demand against them, but did not aver that the assignment had been assented to by A. W. & Co., nor did they make the holders of the remainder of the demand parties to the action.

A. W. & Co. demurred to the complaint for want of facts, but not for want of parties: *Held*, that the demurrer, under the code, was bad. *Id.*

201. When a complaint is defective in form, but not in substance, such defect can only be reached by demurrer, on the ground that the complaint is unintelligible or uncertain. *Merritt v. Glidden*, 39 Cal. 559.

202. In an action to obtain a reconveyance of one or two tracts of land, described in the same deed, which it is alleged was conveyed by mistake, and the complaint failed to show sufficiently that a mistake was committed, or to explain why the plaintiff included in the conveyance the second tract after having described the one intended to be conveyed: *Held*, that a demurrer to the complaint was properly sustained.

Barfield v. Price, 40 Cal. 535.

203. If a complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

White v. Lyons, 42 Cal. 279.

204. Though a complaint purporting to be a bill in equity is insufficient as such, yet if the facts alleged are cognizable in a court of law, the proper relief will be administered; and a demurrer for want of facts sufficient to constitute a cause of action will not lie. *Id.*

205. Objections which go to the sufficiency of the statement of facts contained in the complaint, but not to the sufficiency of the facts themselves, can not be entertained, unless presented by special demurrer.

Himmelmunn v. Spanagel, 39 Cal. 401.

206. Grounds of special demurrer which were not presented in the court below, will not be considered in the supreme court.

Gale v. T. C. W. Co., 44 Cal. 43.

207. It is not the office of a demurrer to set out facts. All the facts devolved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of those facts. *Brennan v. Ford*, 46 Cal. 7.

208. An allegation in a demurrer, "that it appears by the complaint that the cause of action is barred by the statute of limitations," is sufficient in form to raise the question of law as to whether the alleged cause of action is barred by the statute. *Id.*

209. When a pleading alleges an agreement to have been entered into by parties, but does not aver whether it was verbal or in writing, the presumption, on demurrer, is that it was in writing. *Id.*

210. When a complaint contains several counts, one of which sets up a former judgment as estopping the defendants, a general demurrer does not raise the question of

law, whether the judgment did estop the defendants. *Spanagel v. Reay*, 47 Cal. 608.

211. This court will not reverse a judgment for alleged defects in the complaint, where it can be gathered therefrom, as a whole, that the plaintiff had a cause of action upon which he was entitled to the judgment rendered, however defectively his cause of action may have been stated.

Hallock v. Jaudin, 34 Cal. 167.

212. In an action by J., a vendor of real estate, against H., his vendee, to compel, first, a specific performance, and, second, if from any cause such performance should be impossible, then to recover judgment for the purchase money, etc., the complaint showed that at the date of the alleged contract the plaintiff was the owner in fee of the land in question, and that, being desirous of selling, and the defendant minded to buy, the parties entered into and signed the following agreement: "I have this day purchased of J. his brick building and lot * * * for the sum of ten thousand dollars, to be paid in the following, viz.: To give two promissory notes of S. and G. for two thousand dollars each, dated thirteenth July, 1867; * * * also, one note for two thousand seven hundred and seventy-five dollars, dated July 13, 1867; * * * and my note for three thousand dollars, payable at ten years from date. * * * I also agree to release J. from paying the taxes on the property herein described due for the years 1867 and 1868. Abstract of title must be satisfactory. Signed, H. and J.," and dated at San Francisco, September 26, 1867. The complaint further alleged that upon due performance of the contract by the defendant, the plaintiff was ready and willing to convey the premises by good and sufficient deed and let the defendant into possession. That the defendant, upon demand duly made, refused to perform the contract, and expressly waived a tender of said deed by the plaintiff. The court below sustained a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action: *Held*, that while said agreement in writing is valid under the statute of frauds, it is nevertheless insufficient as a pleading of the contract of sale sought to be enforced, and that the demurrer was properly sustained. *Joseph v. Holt*, 37 Cal. 250.

Ambiguity.

213. A demurrer to a complaint for ambiguity and uncertainty should point out specially in what the ambiguity or uncertainty consists, or it will be disregarded.

Blanc v. Klumpke, 29 Cal. 156.

Yolo v. Sacramento, 36 Id. 193.

Lorenzana v. Camarillo, 45 Id. 125.

214. If the complaint on an official bond in a suit is against the principal and his sure-

ties, and a copy of the bond is annexed to the complaint, which does not contain the signature of the principal, the complaint is good, unless demurred to specially for being ambiguous in this respect.

Mendocino v. Morris, 32 Cal. 145.

215. A complaint in ejectment which avers that, on a day named, "the plaintiff was, and ever since has been, and still is, the owner in fee simple, seised and possessed," etc.; "that, on a day thereafter named, and while the plaintiff was so the owner in fee simple, seised and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same," etc., is good, unless demurred to on the ground that it is ambiguous, unintelligible, and uncertain.

Brown v. Martin, 25 Cal. 82.

216. A complaint in an action on the bond given by a tax collector, as collector of taxes of Yuba county, is not ambiguous and uncertain because it does not aver that any of the money sued for was collected by the tax collector on account of foreign miners' licenses.

People v. Love, 25 Cal. 520.

217. An objection that a complaint in an action for divorce, stating the existence of common property, is uncertain and defective in not stating the facts showing the property to be common, must be raised by demurrer or it will be deemed waived.

Gimmy v. Gimmy, 22 Cal. 633.

218. A demurrer on the ground of ambiguity should be overruled if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt.

Salmon v. Wilson, 41 Cal. 595.

219. A complaint is ambiguous, unintelligible, and uncertain, which avers that the plaintiff delivered a horse to the defendant of the value of three hundred dollars, on an agreement that the latter would sell him and account for the proceeds, and that the defendant accepted the horse at the price of three hundred dollars, and promised to sell him at that price and account for the proceeds, and that the defendant sold the horse without stating at what price.

Tomlinson v. Monroe, 41 Cal. 94.

220. Such a complaint is founded on contract and not upon tort. Id.

221. A complaint which in one part avers a covenant for a lease, and in another part states matter which constitutes the contract a present lease, is bad on demurrer for ambiguity. Crow v. Hildreth, 39 Cal. 618.

222. A complaint which leaves it in doubt whether the plaintiff sues for a trespass upon and ouster from his dam site and dam in process of construction, or for a diversion of the water claimed by the plaintiff, is am-

biguous, and a demurrer for that reason should be sustained.

N. & S. Co. v. Kidd, 37 Cal. 282.

223. In an action to compel the conveyance of land in pursuance of an agreement, the complaint did not clearly set forth whether the title which the defendant agreed to obtain, and did obtain, was a title to the land as *lieu* land or a title under the pre-emption laws of the United States: *Held*, that the complaint was ambiguous and uncertain. Hudson v. Johnson, 45 Cal. 21.

224. A pleading on the part of a defendant not showing what portions of it are intended as a legal defense to a complaint in ejectment and what portions are intended as a cross-complaint, will be held bad on demurrer for ambiguity.

O'Connor v. Frasher, 53 Cal. 435.

225. The defendant is entitled to a distinct averment in the complaint of the facts which the plaintiff claims to exist, and if the averments are in the alternative, the complaint is ambiguous, even if either averment states a cause of action.

Jamison v. King, 50 Cal. 132.

226. A complaint which alleges that the plaintiff is the owner of certain goods and chattels on a certain ranch; that the defendant wrongfully and fraudulently took them; that the defendant promised and agreed to buy them at what they were reasonably worth; that he afterwards refused to negotiate, and that the defendant by force and threats prevented the plaintiff from removing the goods from the ranch, is ambiguous and uncertain. Buell v. Cory, 50 Cal. 639.

228. Under a general demurrer that a complaint does not state facts sufficient to constitute a cause of action, an objection can not be taken that it is merely ambiguous. Slattery v. Hall, 43 Cal. 191.

229. A defect in a complaint for uncertainty must be taken advantage of by special demurrer. It is not reached by a general demurrer. Reynolds v. Hosmer, 45 Cal. 616.

Grounds must be Distinctly Specified.

230. A demurrer to the complaint for any reason except an objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of action, must distinctly specify the grounds upon which any of the objections to the complaint are taken.

Kent v. Snyder, 30 Cal. 666.

231. A party can not recover against another a judgment payable in gold or silver coin, on the ground that the other received it for him, in trust, in that form, unless the kind of money received is specially averred in the complaint.

McComb v. Reed, 28 Cal. 281.

232. An omission to allege delivery in a

suit on a bond can be taken advantage of only on demurrer.

Garcia v. De Satrustegui, 4 Cal. 244.

233. Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objections to it should be taken by demurrer.

Greenfield v. Str. Gunnell, 6 Cal. 67.

234. If the complaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind or how much relief shall be granted to him can not be made on demurrer.

Poett v. Stearns, 28 Cal. 226.

Defects in General.

235. A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer.

Hentsch v. Porter, 10 Cal. 553.

236. If every fact essential to the claim or defense be not stated, the adverse party may demur. *Green v. Palmer*, 15 Cal. 411.

237. Bill filed by a judgment creditor of J., upon order of court permitting it, against defendants as executors. Bill avers that the will of deceased "directed, by written or oral instructions," the executors to sell certain cattle, and retain the proceeds for the use and benefit of J. after first discharging his then debts. That it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions, when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: *Held*, that a demurrer was properly sustained; that a pleading must be taken most strongly against the pleader, and that there is no law giving effect to an oral instruction of a testator, as a will, or part of a will; and that the creditor of J. can have no more rights than J. himself.

Sparks v. De la Guerra, 14 Cal. 109.

238. An objection that securities sued on are not promissory notes must be taken advantage of on demurrer, and a demurrer having been filed without pointing out this defect, it must be considered waived.

Powell v. Ross, 4 Cal. 197.

Multifariousness.

239. Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained.

People v. Morrill, 26 Cal. 336.

Condition Precedent.

240. When the declaration states a condition precedent, and fails to aver perform-

ance, the defect must be taken advantage of by demurrer in the court below. It is too late to urge such defect after verdict.

Happe v. Stout, 2 Cal. 460.

241. When the payment of a promissory note is, by agreement of parties, made conditional upon the payment, by the payee, of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover, and must be averred in the complaint.

Rogers v. Cody, 8 Cal. 324.

Demurrer Overruled when too General.

242. If a demurrer is too general, that is, if it covers, or is applied to the whole bill, when it is good as to part only, it will be overruled. *People v. Morrill*, 26 Cal. 361.

243. A demurrer to the whole declaration, when some of the counts are good, should be overruled.

Whiting v. Heslep, 4 Cal. 327.

Young v. Pearson, 1 Id. 448.

Weaver v. Conger, 10 Id. 233.

Stoddard v. Treadwell, 26 Id. 294.

244. Where the complaint contains two counts, and there is a demurrer to one count only, and the demurrer is sustained, the plaintiff is entitled to judgment on the other count, if no answer has been filed.

Barber v. Cazalis, 30 Cal. 92.

245. A demurrer admits the facts as alleged in the complaint.

Tuolumne W. Co. v. Chapman, 8 Cal. 392.

246. A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint.

Branham v. San Jose, 24 Cal. 602.

Tuolumne W. Co. v. Chapman, 8 Id. 392.

247. Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer.

De Boom v. Priestly, 1 Cal. 206.

Pierce v. Minturn, Id. 470.

Brooks v. Minturn, Id. 481.

248. A statement of facts in a demurrer is not admissible.

Cook v. De la Guerra, 24 Cal. 237.

Demurrer, When it will not Lie.

249. Unless a ground of demurrer be included under one or more of the statutory causes of demurrer, it can not be sustained.

Hentsch v. Porter, 10 Cal. 553.

250. An allegation in an answer that the debt sued for, if due at all, is due to the plaintiff and another, as partners, can not be treated as a demurrer.

Andrews v. Mok. Hill Co., 7 Cal. 330.

251. Where a demurrer to the whole complaint is interposed, and the same is not

good as to all, the demurrer should be overruled. *Weaver v. Conger*, 10 Cal. 233.

252. If a complaint contains **several counts**, and the defendant demur to the whole complaint, the demurrer should be overruled if there is one good count in the complaint, although the other counts may be bad. *Stoddard v. Treadwell*, 26 Cal. 294.

253. An application for a **mandamus**, set forth, as the ground of this application, certain services and a claim for compensation, performed under the authority of an act of the legislature, by plaintiff, and that he had submitted his account to the defendants (appointed by law to audit and allow like accounts) to be audited and allowed, who had refused to act in the premises. Defendants demurred to the application, and alleged as ground, that they did not see fit to allow the claim for compensation, which was a matter of discretion for them: *Held*, that the effect of the demurrer was to admit the truth of the facts alleged, and that, while defendants had discretionary power to determine the amount of compensation, they can not be permitted, in the same breath, to admit the right to compensation, and then refuse to grant it.

Selkirk v. Sacramento, 3 Cal. 323.

254. In a complaint for **trespass**, the plaintiff claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages; defendant demurred on the ground that two causes of action were improperly joined; and the court below sustained the demurrer: *Held*, that this was error.

Tendesen v. Marshall, 3 Cal. 440.

255. Where a complaint alleges that the plaintiff, a **married woman**, signed and delivered to the defendant a deed of conveyance of premises which were her **separate estate**, it will be presumed, on demurrer, that the conveyance was so executed as to pass that estate, and the objection that the complaint does not allege that the husband united with her in the execution of the deed, or that she did not acknowledge its execution separately as required by statute, must be taken by answer and not by demurrer.

Kays v. Phelan, 19 Cal. 128.

256. In an action for the **breach of a contract**, the want of any averment of special damage can not be reached by demurrer. For the breach of contract an action lies, though no actual damage be sustained. *McCarthy v. Beach*, 10 Cal. 461.

257. It is no ground of demurrer to a complaint that the **christian name** of one of the plaintiffs does not appear.

Nelson v. Highland, 13 Cal. 74.

258. **Matters of form** are not the subject of a demurrer.

Ottero v. Bullard, 3 Cal. 188.

259. When a demurrer is general to a complaint, courts are not bound to notice defects which are mere matter of form.

Phelps v. Owens, 11 Cal. 22.

260. Where a bill alleges a **parol trust**, a general demurrer will not lie.

Peralta v. Castro, 6 Cal. 354.

261. Objections to the prayer of a complaint can not be taken by demurrer.

Rollins v. Forbes, 10 Cal. 299.

Statute of Limitations.

262. Under our system of pleading the rule is the same in law and equity; if it appear upon the **face of the complaint** that the action is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective and demurrer lies. *Smith v. Hall*, 19 Cal. 85.

Smith v. Richmond, 19 Id. 476.

Sublett v. Tinney, 9 Id. 423.

Barringer v. Warden, 12 Id. 311.

263. Where a complaint shows *prima facie* upon the facts stated that the claim of debt upon which suit is brought is barred by the statute of limitations, the defendant may take advantage of the defect by demurrer. But when the complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer can not be sustained on this ground. This is the chancery rule under the English system, and as our pleadings approximate more nearly to the chancery than the common law form, we have adopted the former.

Barringer v. Warden, 12 Cal. 311.

264. The bar of the statute must clearly appear. *Ord v. De la Guerra*, 18 Cal. 67.

265. It should be **distinctly stated** in the demurrer. *Brown v. Martin*, 25 Cal. 89.

Farwell v. Jackson, 28 Id. 106.

266. It is a **personal privilege** of the debtor, which he may assert or waive at his option; but it must be set up in some form, either by demurrer or answer, or it will be deemed to have been waived.

Grattan v. Wiggins, 23 Cal. 16.

267. On demurrer to a complaint, founded upon the statute of limitations, if the complaint fails to show whether the contract in suit was verbal or in writing, it will be **presumed to have been in writing** for all the purposes of the demurrer.

Miles v. Thorne, 38 Cal. 335.

268. When the complaint states a cause of action for **goods sold and delivered**, and a bill of items is annexed to the same as an exhibit, with the date of each item, an answer, which refers to the exhibit and avers that the last item only is within two years previous to the commencement of the action, and that, except as to the last item, "no action has accrued to said plaintiff by reason of the matter mentioned and set forth in

said complaint, at any time within two years next preceding the commencement of this action," is a good answer to the statute of limitations to all the items except the last.

Adams v. Patterson, 35 Cal. 122.

269. The words "**preceeding the commencement of this action**" in such answer are equivalent to the words preceding the filing of the complaint. *Id.*

LEAVE TO ANSWER AFTER DEMUR- RER OVERRULED.

270. Where a demurrer to a complaint is overruled and an application subsequently made for leave to file an answer, the **allowance of the application rests in the discretion** of the court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the court must in a great degree depend upon the special circumstances of each case and be so governed as to prevent delays and to promote justice. Thornton v. Borland, 12 Cal. 438.

271. In such case, where no application is made to the court for leave to answer, and no **meritorious defense** was asserted, this court will not reverse the judgment and open the case for another trial. *Id.*

272. If leave be granted, the defendant must answer within the same **time** as in case of a service of summons, with a copy of the original complaint.

People v. Rains, 23 Cal. 127.

273. When a demurrer is overruled, with leave to answer, it is not necessary that the order fix the time within which the answer must be filed. The court has power to fix such time for answering as it may deem proper; but where no time is fixed, the defendant should answer within the same time as in case of service of a copy of the original complaint. *Id.*

274. An answer already filed may be allowed to stand as the answer to the amended complaint.

Mulford v. Estudillo, 32 Cal. 131.

275. If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made. *Id.*

276. A demurrer is an answer within the meaning of section 150 of the practice act. Oliphant v. Whitney, 34 Cal. 25.

THE ANSWER.

Objections, How Taken.

277. Before entering on the trial of an action, the plaintiff is entitled to an explicit denial of the **material allegations** of the complaint, or an admission of their truth, either by direct statement, or by silence; and

it is the duty of the court to enforce this right. Gay v. Winter, 34 Cal. 153.

278. The **intention of the code** is to adopt the true and just rule that the defendant must either deny the facts as alleged, or confess and avoid them.

Piercy v. Sabin, 10 Cal. 22.

279. A defendant should set forth the **true nature of his defense** in his answer, and in case he does not, should not be permitted to insist upon it.

Walton v. Minturn, 1 Cal. 362.

280. Where an answer contains an allegation of **alteration of an instrument** it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff.

Humphreys v. Crane, 5 Cal. 173.

281. **Immaterial averments** in a pleading need not be answered, and if it be done, both the complaint and answer, so far as they relate thereto, will be disregarded when the sufficiency of the pleadings and issues are brought in question.

Jones v. Petaluma, 36 Cal. 230.

282. If the plaintiff goes to trial on the merits, without objection to the **verification of an answer**, he will not be allowed to raise the point in the appellate court that it was not properly verified.

McCullough v. Clark, 41 Cal. 298.

283. An answer which commences by stating that the defendant for answer says he denies, etc., is in **form of expression unexceptional**, and the court will not call in question the fact of denial.

Espinosa v. Gregory, 40 Cal. 58.

284. If the complaint, in an action to enjoin the **diversion of water**, alleges that the plaintiff has appropriated and used the water for more than five years, and the answer denies that the plaintiff ever at any time used or took up or appropriated the water, the denial is sufficient.

Wilkins v. McCue, 46 Cal. 656.

285. If the complaint in such action avers that from the spring there ran and flowed immemorially upon the plaintiff's premises a constant and never-failing stream of pure fresh water, and the answer denies that the water flowing from the spring ever at any time ran or flowed to or upon the plaintiff's premises, the denial is sufficient. *Id.*

286. Where defendant alleges that he owns the ground in dispute, or denies that the plaintiff is the owner, without alleging title in himself, it is competent to him to overcome the plaintiff's evidence of title by showing title in himself.

Stone v. Bumpus, 40 Cal. 428.

287. A denial in an answer that the **relation of trustee and cestui que trust** exists between the parties, dispenses with the

necessity of averring in the complaint, or proving a prior demand and refusal.

Parrott v. Byers, 40 Cal. 614.

288. Proof of abandonment of mining claim is admissible under the general denial of title. *Bell v. Bedrock Co.*, 36 Cal. 214.

289. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment.

Blankman v. Vallejo, 15 Cal. 638.

290. A general denial in a verified answer is inadmissible, and may be stricken out on motion of the plaintiff.

People v. Hagar, 52 Cal. 171.

291. If the petition for the formation of a swamp land district under the act of March 28, 1868, is signed by persons purporting to be holders of certificates of purchase, patents, or other evidences of title, representing at least one half of the land in the proposed district, and if the petition is approved and the district organized by the board of supervisors, in an action to enforce an assessment, an averment in the answer that there were a large number of land-owners in the district who did not sign the petition is immaterial and may be stricken out. *Id.*

292. If the answer does not deny the allegations of the complaint, and plaintiff moves for judgment on the pleadings, and the motion is denied, and on the trial defendant recovers judgment, on appeal the judgment will be reversed and a new trial awarded, with leave to defendant to amend.

More v. Del Valle, 28 Cal. 170.

293. The defendant has a right by a general denial to put the plaintiff to the proof of his demand. *Fay v. Cobb*, 51 Cal. 313.

294. Under section 46 of the code there are only two classes of defense allowed. The first consists of a simple denial; and the second of the allegation of new affirmative matter. And as the code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases. *Piercy v. Sabin*, 10 Cal. 22.

295. When the complaint is verified, an answer which denies its allegations in the conjunctive is insufficient.

Leroux v. Murdock, 51 Cal. 541.

Specific Denials.

296. A specific denial to each allegation of a complaint is a separate denial, applica-

ble only to the particular allegation controverted.

Gas Co. v. San Francisco, 9 Cal. 453.

297. The object of the code was to narrow the proof upon the trial, and to accomplish this end the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation. *Id.*

298. An answer to a verified complaint, which undertakes to deny material allegations, should contain a specific denial to each allegation controverted.

Fish v. Redington, 31 Cal. 185.

299. When the facts alleged in a verified complaint are **presumptively within the knowledge of the defendant**, the code requires his denial to be specific, not general. The object of the provision is to call the attention of the defendant, and to confine each denial to one allegation at a time, and not permit him to deny all at once.

Gas Co. v. San Francisco, 9 Cal. 453.

300. There may exist the best reasons for a different rule of pleading when a **municipal corporation** is a defendant, but this court can make no distinction, because the code makes none. It is a matter for the legislature, and not for the court. *Id.*

301. Bad faith in entry can not be set up by one tenant in common against another. In an action of ejectment by one tenant in common against another, the latter can not invoke the maxim, *ex dolo malo non oritur actio*, nor defend upon the ground that he and plaintiff entered upon the premises wrongfully in the first instance.

Bornheimer v. Baldwin, 42 Cal. 27.

302. Though two defenses, separately pleaded under section 49 of the practice act, may be inconsistent, the plaintiff can not disregard them, or either of them, on the trial.

Buhne v. Corbett, 43 Cal. 264.

303. Separate defenses may be inconsistent if answer is not under oath. A separate plea or defense should not contain matters repugnant or inconsistent in themselves; but a defense regarded as an entirety is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded, and there is no distinction in this respect between verified and unverified pleadings. *Id.*

304. If a judgment entered by confession is *prima facie* fraudulent because the statement upon which it was entered fails to set out the facts upon which the indebtedness accrued, and a bill is filed by a creditor of the judgment debtor to set aside the judgment, allegations in the answer of the facts out of which the indebtedness arose are matters in avoidance of the *prima facie* fraudulent judgment, and are new matter.

Pond v. Davenport, 45 Cal. 225.

305. In setting up an **equitable defense** in an action at law the defendant becomes an actor and the defense interposes a pleading in equity, the sufficiency of which, in matters of substance, though not in point of mere form, is to be determined by the application of the rules of pleading observed in courts of equity, when relief is sought there in cases of like character. *Bruck v. Tucker*, 42 Cal. 346.

Denials on Information and Belief.

When Sufficient.

306. A denial on "information and belief" is sufficient. It is not necessary to follow the **precise words** of the statute, by saying "on his information and belief," etc. *Roussin v. Stewart*, 33 Cal. 208.

307. Where the alleged fact is, from its nature, presumptively within the **personal knowledge of the defendant**, he can not be permitted to answer on information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, is presumptively based on information, he is not bound to deny positively, but only "according to his information and belief;" but in such case he must answer according to both his information and belief. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information.

Humphreys v. McCall, 9 Cal. 59.

308. Defendant can know what is his belief, and can therefore state it. This belief may be founded on the statements of others, not competent witnesses, and not under oath, etc. Yet, if the defendant has formed a belief from this source, he must state it. He can not be the judge as to whether his information is legal testimony. *Id.*

309. If the complaint aver the **recovery of a judgment** against one of several defendants, the court in which it was recovered, and the date and amount of the same, the defendants in their answer may deny the same upon information and belief.

Vassault v. Austin, 32 Cal. 597.

310. An allegation is an answer by an administrator that the defendant "averts, on information and belief, that no such deed or deeds were ever executed," is a sufficient denial of an averment in the complaint that defendant's intestate executed and delivered the particular deeds referred to.

Thompson v. Lynch, 29 Cal. 189.

311. To a complaint sworn to on a promissory note payable in a sum certain, "in monthly *pro rata* installments, out of the first net proceeds from sale of water," and an allegation that defendants turned off the water from the ditch, the proceeds of the sales of which water were to be applied to the pay-

ment of the note, and thereby diminished the quantity, etc., the defendant answered by admitting the making of the note, but denied, "to the best of his knowledge, information, and belief, all and singular the other allegations in said complaint." *Held*, that such answer did not amount to a **specific denial** of the allegations of the complaint.

Stewart v. Street, 10 Cal. 372.

312. In a verified answer, a denial "upon" information and belief is sufficient.

Kirstein v. Madden, 38 Cal. 158.

313. An answer that denies a material averment of a complaint "upon information and belief" is a sufficient denial to raise an issue thereon. *Vassault v. Austin*, 32 Cal. 597, and *Roussin v. Stewart*, 33 Cal. 208, affirmed. *Jones v. Petaluma*, 36 Cal. 230.

When Insufficient.

314. In no case can the allegation of a verified complaint be controverted by a **denial of sufficient knowledge** or information upon the subject to form a belief.

Curtis v. Richards, 9 Cal. 33.

Gas Co. v. San Francisco, Id. 453.

315. An answer stating that defendant has **no knowledge** or information respecting the same, and therefore denies the same, is insufficient. *Ord v. Uncle Sam*, 13 Cal. 369.

316. Also an averment in the answer "that defendant has not **sufficient knowledge** to form a belief," and therefore neither admits nor denies.

Anderson v. Parker, 6 Cal. 197.

317. The denial as to **value** being based on the want of knowledge or information, is insufficient.

Kuhland v. Sedgwick, 17 Cal. 123.

318. A denial in the answer of an allegation in the complaint, in the following terms, is **not sufficient**, viz.: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia ditch to them, plaintiffs, as alleged." *Humphreys v. McCall*, 9 Cal. 59.

319. The answer that the defendant, a **municipal corporation**, has no knowledge or information "in respect to the obligations of a count in a verified complaint, and therefore denies the same," is insufficient.

Gas Co. v. San Francisco, 9 Cal. 453.

320. The statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matter alleged in a verified complaint, to enable them to answer in the proper form. *Id.*

321. If the allegations of a verified complaint are **presumptively** within the knowledge of the defendant, a denial of the

same in the answer, according to his best knowledge, information and belief, is **evasive** of the issue tendered.

Humphreys v. McCall, 9 Cal. 59.

Brown v. Scott, 25 Id. 194.

Vassault v. Austin, 32 Id. 597.

322. In such case the defendant must **answer positively**, or must state how it is that he is without knowledge of such facts.

Vassault v. Austin, 32 Cal. 597.

323. The **recovery of a judgment** is not presumptively within the knowledge of the defendant. Id.

Denials in General to Verified Complaints.

324. Where the complaint averred a contract between plaintiff and the board of supervisors on behalf of the county, and the answer admitted a contract between the plaintiff and another on the one side and the county on the other, and averred that this was the only contract made by the county in relation to the matter and denied that any other was made by the board of supervisors: *Held*, that this **denial was sufficient** to put the plaintiff on **proof of the contract**.

Murphy v. Napa, 20 Cal. 497.

325. If the answer puts in issue the **ultimate facts** resulting from the evidence, it is a sufficient denial.

Moore v. Murdock, 26 Cal. 524.

326. A denial of the **material allegations** only is sufficient.

Racouillat v. Rene, 32 Cal. 450.

327. Each denial of an answer must be regarded as applying to the **specific allegation** it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. Id.

328. There are but two forms in which a defendant can controvert the allegations of a verified contract: First, positively, when the facts are within his **personal knowledge**; and, second, upon information and belief, when they are not.

Curtis v. Richards, 9 Cal. 33.

329. Where a material fact stated in a verified complaint is denied upon information and belief, the answer should state how it happened that the defendant is without knowledge as to the fact averred.

Brown v. Scott, 25 Cal. 189.

Form of Denials.

330. If an answer, in response to an allegation of the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the facts alleged to exist do not exist, these averments of the answer traverse the matters alleged and are good denials of the same. Hill v. Smith, 27 Cal. 470.

Evasive Denials, How Determined.

331. In order to determine whether the denials of an answer are evasive, each **separate denial** of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it and there is no admission in the answer inconsistent with this denial, an issue is fairly made. Recouillat v. Rene, 32 Cal. 450.

332. Each denial of an answer must be regarded as applying to the **specific allegation** it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. Id.

333. In a verified answer an **evasion of controlling fact** in issue is a strong circumstance against the defendant.

Baker v. Baker, 13 Cal. 87.

334. The complaint alleged that "East street, in the city of Stockton, had been laid out and dedicated as a public highway, and has been used as a public thoroughfare for sixteen years." The answer denies that there is such a street in Stockton: *Held*, that the answer is evasive.

Fuhn v. Weber, 38 Cal. 636.

335. In an action for damages a denial in the answer that the plaintiff has suffered damage in the **exact sum** claimed in the complaint is insufficient.

Huston v. T. & C. Co., 45 Cal. 550.

336. One of the allegations of the complaint was that "the defendant fraudulently transported plaintiff into Kern county for the purpose of having her served with a copy of the summons and complaint." The answer to which was as follows: "Defendant denies, and it is not true, that he fraudulently transported plaintiff into Kern county for the purpose of having her served with a copy of the complaint and summons in said aforesaid action:" *Held*, to be a palpable evasion of the **substance of the charge** which it pretended to answer.

De Godey v. Godey, 39 Cal. 157.

337. An answer, in an action against a tenant for **unlawful detainer**, which avers that a person, not a party to the suit, had formerly brought an action to quiet title to the demanded premises, and that such person was at the time in the actual possession of the premises, claiming title in fee thereto, is not ambiguous nor uncertain.

Douglas v. Dakin, 46 Cal. 49.

338. If the complaint avers the **sale and delivery** to defendant of goods, and the value of the same, an answer which denies the indebtedness, but does not deny the facts, the sale and delivery and amount of goods does not raise an issue, as it only denies the **legal conclusion** resulting from the facts. Lightner v. Menzell, 35 Cal. 452.

339. An averment in an answer that the plaintiff's debt is barred by a **discharge in**

insolvency is only a conclusion of law and not the statement of a fact.

Christy v. Dana, 42 Cal. 175.

340. If the complaint alleges that an act was wrongfully and maliciously done, a denial in the answer that it was **wrongfully and maliciously done** does not put in issue the doing of the act.

Kinsey v. Wallace, 36 Cal. 463.

341. To a complaint seeking to enforce the lien of an assessment for **street improvements** in San Francisco, an answer which denies that the superintendent of streets "originally" made the assessment in his official capacity is evasive, and tenders an **immaterial issue**.

Shepard v. McNeil, 38 Cal. 72.

342. The rules of pleading, under our system, are intended to prevent evasion, and to require a denial of every averment in a sworn complaint, in substance and in spirit, and not merely a denial of its **literal truth**, and when the defendant fails to make such denials he admits the averment.

Doll v. Good, 38 Cal. 287.

343. If the complaint avers that the defendant wrongfully broke down the plaintiff's flume for carrying water, and the answer denies that the defendant wrongfully broke down the flume, it is an admission that the defendant broke down the flume, and only a denial of its **wrongful character**.

Feely v. Shirley, 43 Cal. 369.

344. If a complaint avers the commission of a wrongful act by the defendant, and the answer merely denies the wrongful nature of the act, and the plaintiff owns the property upon which the injury was done, the plaintiff is entitled to **nominal damages** without proof that the defendant committed the act.

Id.

345. A defense by the payor of a note, that the plaintiff is not the lawful owner or holder of the instrument sued on, when upon its face it runs to him, and which discloses no issuable fact to support it, is merely frivolous.

Felech v. Beandry, 40 Cal. 439.

Poorman v. Mills, 35 Id. 118.

346. If the complaint avers a judgment, and the issuing of an **execution** thereon, and a sale thereunder of land, and the answer denies the validity of the judgment, and avers that it was void for want of **jurisdiction**, and denies that the plaintiff acquired any title by the pretended sale by the sheriff, the execution and sale thereunder are not sufficiently denied to require the execution to be put in evidence.

Lee v. Figg, 37 Cal. 328.

347. When a complaint alleges the **value** of all the property destroyed, for which suit is brought in gross, for some items of which no recovery can be had, an answer which contains no denial of the averment of value

will not be held as admitting the value of the property for which a recovery may be had.

Nunan v. San Francisco, 38 Cal. 689.

348. When it is admitted by the pleadings that a **promissory note** in suit given to a married woman was assigned by the payee to the plaintiffs, the question can not be raised on the trial whether the assignment was made in such form as to pass the interest of a **married woman**.

Hellman v. Howard, 44 Cal. 101.

349. The question as to what facts are admitted by the pleadings is one for the court, and not for the jury, and the court should not submit such a question to a jury.

Tevis v. Hicks, 41 Cal. 123.

350. K. acquired the legal title to land under such a state of facts as made his purchase fraudulent, and made him the trustee of S. U. bought from K. S. commenced an action against U., to have him declared his trustee and to compel him to convey the land. In his complaint he averred the facts, showing K.'s fraud, and which, in law, made him the plaintiff's trustee. S., in his answer, admitted these facts and his knowledge of them, but denied that he became the trustee of S., or that there was anything unfair or fraudulent in the facts alleged: *Held*, that the answer **admitted the trust**.

Scott v. Umbarger, 41 Cal. 410.

351. A defendant on the trial can not controvert a **fact admitted** by the pleadings.

Bradbury v. Cronise, 46 Cal. 287.

Denial with Qualifications.

353. Where a complaint is verified, an answer denying "generally and specifically each and every material allegation in the complaint, the same as if such allegations were here herein recapitulated," and also denying each allegation in the same form, with certain **qualifications and exceptions**, does not raise an issue upon any fact stated in the complaint.

Hensley v. Tartar, 14 Cal. 508.

354. A **sworn answer** must be consistent in itself, and must not deny in one sentence what it admits to be true in the next.

Id.

355. If the pleadings are under oath, and the replication in response to a material averment of the answer undertakes to deny, by saying, "it is not true," etc., the **replication** is **evasive**, and does not specifically deny the averment.

Verzan v. McGregor, 23 Cal. 339.

356. The answer verified ran thus: That defendants "have been informed and believe the same to be true, and therefore say that it is not true that plaintiff" was in the peaceable or actual possession of the land, etc.; "and for a further answer, they say that it is not true," etc.: *Held*, sufficient.

Comerford v. Dupuy, 17 Cal. 308.

357. Where the complaint, verified, avers that defendant is indebted to plaintiff for goods, wares, and merchandise, sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, and the answer denies that defendant is indebted in the sum of eight hundred and twenty-eight dollars, sixteen cents, as is set out in said complaint: *Held*, that the denial is insufficient.

Higgins v. Wortell, 18 Cal. 330.

Woodworth v. Knowlton, 22 Id. 164.

358. If an answer merely denies what is non-essential in the averments of a complaint, it is an admission of all that is essential to a recovery.

Lettingwell v. Griffing, 31 Cal. 231.

359. If the complaint avers that the defendant is indebted to the plaintiff in the sum of three thousand dollars in gold coin, for so much money received by defendant for plaintiff's use, and the answer denies that the defendant received three thousand dollars in gold coin for plaintiff's use, it is only a denial of its receipt in gold coin, and does not raise an issue. *Id.*

360. An allegation in a sworn answer that "on the twenty-fourth day of March, 1862, the said French and Robinson, by deed duly executed, acknowledged and recorded, conveyed said premises to this defendant for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication, that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum." Such denial is a mere denial that French and Robinson conveyed the premises, without denying the facts which constitute the conveyance; besides, it does not deny the conveyance, the material fact, but only a conveyance for a consideration. Under such denial, the party making such averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute.

Landers v. Bolton, 26 Cal. 416.

361. An averment in a complaint that the defendant, since November, 1858, "has continued to possess and occupy said land and premises, and use the same in her said sole trader business," is not denied by a denial in the answer that defendant has continued since the ninth day of November, 1858, to occupy or use the said premises in her business as such sole trader. It is simply a denial of continuous occupation.

Camden v. Mullen, 29 Cal. 564.

Denials of Conclusions of Law.

362. If the answer merely denies the conclusions of law resulting from the facts

averred in the complaint, it is insufficient to raise an issue, and the facts are deemed admitted. *Nelson v. Murray*, 23 Cal. 338.

363. The denial of any indebtedness without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issue.

Curtis v. Richards, 9 Cal. 33.

Wells v. McPike, 21 Id. 215.

364. If the complaint contains averments of the rendition of a judgment against the defendant, by a court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment, is only a denial of a conclusion at law, and does not raise an issue of fact.

People v. San Francisco, 27 Cal. 655.

365. If a complaint avers the passage of an ordinance by a municipal corporation, and the answer in reply states in general terms that the ordinance is illegal and void, no issue of fact is raised. *Id.*

366. So of an answer which states in general terms that an ordinance passed by a municipal corporation is illegal and void. *Id.*

367. An answer is fatally defective if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief—the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any form is unknown to our system of practice, and can not have any legal effect.

Gas Co. v. San Francisco, 9 Cal. 453.

General Denials.

368. The legal effect of general denials is not changed by expressions showing that they were intended to be specific.

Hensley v. Tartar, 14 Cal. 508.

369. A denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. *Coles v. Soulsby*, 21 Cal. 47.

370. Under the system of practice in this state, a general denial is equivalent to the general issue at common law, and such a plea does not put in issue the plaintiff's title to sue. *White v. Moses*, 11 Cal. 69.

Brooke v. Chilton, 6 Id. 640.

371. A denial does not raise the issue of misjoinder of plaintiffs.

Gallam v. Sigman, 29 Cal. 637.

372. In a case of malicious prosecution, where the defendants filed a general denial, and also averred that they had nothing to do with the prosecution, except as witnesses, plaintiff filed a replication taking issue on this averment: *Held*, that if plaintiff chose to consider this a good defense, and join issue

on it, defendants can not complain; though, probably, this matter was put in issue by the general denial, and the replication was unnecessary. *Dreux v. Domec*, 18 Cal. 83.

373. The general denial only puts in issue the allegations of the complaint. **New matter** must be specially pleaded, and new matter is that which the defendant must affirmatively establish.

Glover v. Cliff, 10 Cal. 303.

374. A general denial of the averments of a verified complaint with the qualifications of "except as hereinafter admitted," is insufficient to put in issue any of its allegations. *Lewiston v. Schwartz*, 22 Cal. 229.

375. If the answer does not traverse the material allegations of the complaint, and the new matter contained in it does not state facts sufficient to constitute a defense, and the pleadings are not verified, a closing denial, stating that "the defendants denying each and every allegation set forth in plaintiff's complaint not consistent with the foregoing answer," fails to raise any issue.

Richardson v. Smith, 29 Cal. 529.

Literal and Conjunctive Denials.

376. If the allegations in a complaint in forcible entry and detainer are **conjunctively stated**, an answer which denies them in that form does not raise an issue.

Burke v. Carruthers, 31 Cal. 467.

377. Where an allegation in a verified complaint embraces **several distinct propositions**, stated conjunctively, a denial, in the answer, of the **entire allegation**, following the language of the complaint, is insufficient and raises no issue.

Woodworth v. Knowlton, 22 Cal. 164.

378. If several averments in a complaint are conjunctively stated, an answer attempting to deny them by repeating them in their conjunctive form does not raise an issue.

Reed v. Calderwood, 32 Cal. 109.

379. Where several allegations of a complaint are connected by the conjunction "and," a denial in the answer of these allegations, conjunctively, does not amount to a denial of the allegation to which the defendant professes to respond.

Fitch v. Bunch, 30 Cal. 203.

380. In equity the general denials made by traversing literally and conjunctively the statements of a sworn bill are not legitimate for the purpose of putting in issue specific allegations; for, in this way, a party may deny the **entire charges in form** as stated against him, in consistency with admitting the truth of the **specific charge**, or even the **substantial fact**.

Blankman v. Vallejo, 15 Cal. 638.

381. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and

to require a denial of every **specific averment** in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. *Id.*; *Smith v. Richmond*, 15 Id. 501.

382. An answer which undertakes to deny **averments as a whole**, as conjunctively stated, is evasive, and an admission of the allegations thus attempted to be denied.

Fish v. Redington, 31 Cal. 185.

384. If an allegation of a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied.

Moore v. Del Valle, 28 Cal. 170.

Fitch v. Bunch, 30 Id. 203.

Woodworth v. Knowlton, 22 Id. 164.

385. Thus, where the form of the allegation was that defendant "unlawfully and wrongfully seized and took said property into his possession from said plaintiff," and the denial was "that he (defendant) wrongfully and unlawfully seized, took, or carried away the said property: *Held*, that the fact that defendant took the property from the plaintiff was not denied, but admitted.

Lay v. Nevill, 25 Cal. 545.

386. If the plaintiff in his complaint in an action to recover the **possession of personal property** avers that the "defendant wrongfully took the property from the plaintiff's possession, and from thence to the time the action was commenced, wrongfully detained the same property from him," and the defendant, in his answer, denies "that the defendant at any time wrongfully took and detained the property from the plaintiff," the allegation in the complaint is to be deemed admitted.

Richardson v. Smith, 29 Cal. 529.

387. Where the answer denied the allegations of **indebtedness** as to time, amount, and work, in the very words of the complaint: *Held*, that the answer raised an immaterial issue upon these particulars, instead of meeting the substantial matter averred.

Caulfield v. Sanders, 17 Cal. 569.

388. If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the allegation thus attempted to be denied.

Doll v. Goods, 38 Cal. 287.

389. The allegation of a complaint, that M., at the time of his death, owned and was in possession of twenty-two head of work oxen, each worth seventy-five dollars, is not put in issue by a denial "that M., at the time of his death, was in the possession of, or the owner of, twenty-two head of work oxen, worth seventy-five dollars per head."

On the contrary, it is evasive, and equivalent to an admission of the allegation. *Id.*

Allegations which Need not be Denied.

390. Allegations inserted for the purpose of intercepting and cutting off an anticipated defense are superfluous and immaterial, and do not require an answer.

Canfield v. Tobias, 21 Cal. 349.

391. Averments of mere evidence.

Racouillat v. Rene, 32 Cal. 450.

392. A legal inference or conclusion from facts. *Id.*

393. Argument in pleading, hypothetical statements, the defendant's pretenses, allegations by way of recital, and conclusions of law.

Green v. Palmer, 15 Cal. 411.

394. If a complaint contains more than one count, and one of the counts does not state a cause of action, the answer need not deny the allegations of such count.

Haskell v. Moore, 29 Cal. 437.

What may be Proved under General and Specific Denials.

395. That the **overflow** or leakage was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants opened their case.

Jackson v. Feather R. Co., 14 Cal. 18.

396. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, the defendant may show anything **disproving the contract as averred**, as that another party, who in fact sold the cattle, sold them as his own, and not as the agent of plaintiff, or that defendant was not to pay until the cattle were fattened and slaughtered.

Hawkins v. Borland, 14 Cal. 413.

397. Defendant may prove an **eviction** on a claim for rent in arrear, under the plea *nil debet*, or general denial.

McLarren v. Spaulding, 2 Cal. 510.

Overruled in *Piercy v. Sabin*, 10 Cal. 30, and consequently an eviction must be set up in the answer.

398. Abandonment of land.

Willson v. Cleaveland, 30 Cal. 192.

399. If the defendant does not know that **too many persons are joined as plaintiffs** until the same appears in the evidence, he should then apply for leave to amend his answer.

Gilman v. Sigman, 29 Cal. 657.

400. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, and has not pleaded such title in a **supplemental answer**, and for that rea-

son his evidence of such title is excluded by the court, it is not an **abuse of discretion** of the court to deny his application made during the trial, to be allowed to amend his answer so as to obviate the objection.

McMinn v. O'Connor, 27 Cal. 238.

401. If the testimony offered by the defendant is rejected by the court because an allegation of the complaint to which it relates is not properly denied in the answer; the defendant should be allowed to **amend his denial** if he asks to do so.

Stringer v. Davis, 30 Cal. 318.

402. When in the course of a trial it is discovered that pleadings are so defective that the **real subject of dispute** can not be finally determined, the court, if an application is made therefor, should allow amendments on such terms as may be just. *Id.*

403. The plaintiff alleged that *Hull & Co.* were indebted to him, but failed to prove that there were others in company with *Hull* in the transaction: *Held*, that the words "and company" might be treated as **surplusage**, and the action proceed as against *Hull* alone. *Mulliken v. Hull*, 5 Cal. 245.

404. Two defendants filed a joint plea of the **statute of limitations**, and the plea being held bad as to one defendant, the court, on the trial, permitted the other defendant to file a separate plea of the statute: *Held*, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson v. Smith*, 14 Cal. 254.

405. The fact that **new matter** set up by an amendment was well known to the defendant at the time he filed his original answer is no good reason why the amendment should not be permitted.

Pierson v. McCahill, 22 Cal. 127.

406. Upon the trial every material allegation of the complaint not specifically controverted is to be taken as true; but if the defendant supposed he had denied material allegations, and the court sustained his view of the answer, the appellate court, when it reverses the judgment, may allow the court below to exercise its **discretion** in permitting the answer to be amended.

Fish v. Redington, 31 Cal. 185.

407. The plea of the **statute of limitations** is not favored, unless in aid of justice; but the court should allow it to be pleaded at any time, when justice will be attained thereby. *Cooke v. Spears*, 2 Cal. 409.

408. It is not error for a court to refuse permission to set up the statute of limitations **after answering** to the merits.

Stuart v. Lander, 16 Cal. 372.

410. The answer may be **verified** even after the close of the plaintiff's case.

Arrington v. Tupper, 10 Cal. 464.

Angier v. Masterson, 6 Id. 61.

NEW MATTER WHICH MUST BE SPECIALLY PLEADED.

412. New matter is where defendant seeks to introduce into the case a **defense not disclosed by the pleadings**—something relied on by him, but not put in issue by the plaintiff. *Bridges v. Paige*, 13 Cal. 640.

413. Whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time **avoids it**, that is, shows that it has ceased to exist, is new matter. *Coles v. Soulsby*, 21 Cal. 47.

414. Suit by an attorney on a *quantum valebat*, for professional services. Answer denies the value of the **services**: *Held*, that the rule requiring new matter to be set up in the answer does not apply.

Bridges v. Paige, 13 Cal. 640.

415. Anything which shows plaintiff has **no right of recovery** at all, or to the extent claimed on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer. *Id.*

416. New matter is that which, under the rules of evidence, the defendant must **affirmatively establish**. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter.

Piercy v. Sabin, 10 Cal. 22.

Glazer v. Clift, *Id.* 303.

417. Where new matter exists, it must be **stated in the answer**. *Id.*

418. The code makes no distinction between different classes of new matter. *Id.*

419. A defense that concedes that plaintiff once had a good **cause of action**, but insists that it **no longer exists**, involves new matter. *Id.*

420. Under section 46 of the code, there are only **two classes of defense** allowed. The first consists of a simple denial, and the second of the allegation of new affirmative matter. And as the code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases. *Id.*

421. If the answer, either directly or by way of necessary implication, **admits the truth** of all the essential allegations of the complaint which shows a cause of action, but sets forth facts from which it results that notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if the facts averred in the answer only show that some **essential allegation** of the complaint is **untrue**, then they are not new matter, but only a traverse.

Goddard v. Fulton, 21 Cal. 430.

422. An admission in the answer of the averments of the complaint, that defendant received money to plaintiff's use, and refused to pay the same on demand, does not preclude the defendant from **proving payment**, if he sets up payment as new matter in the answer. *McDonald v. Davidson*, 30 Cal. 173.

423. Where the allegations of an answer, although stated in an affirmative form, are in effect only a **denial of the allegations** of the complaint, they do not constitute new matter within the meaning of our practice act. *Goddard v. Fulton*, 21 Cal. 430.

424. To a complaint in the usual form upon a **promissory note**, an answer was filed admitting the signing of the note, but averring that it was made, not on account of any indebtedness existing between the parties, but for the purpose of being used as collateral security for a debt due to a third person from the maker and payee jointly; that the joint debt was subsequently paid, and that note having thus become *functus officio*, should have been canceled, but through fraud was taken and held by the payee, and transferred without consideration by him to the plaintiff: *Held*, that these allegations were not new matter, which, under the system of replication then in force, was admitted by a failure to reply; that their only effect was to deny that any obligation of the character counted upon in the complaint was ever created by the signing of the instrument, and thus to traverse its essential allegations. *Id.*

425. A complaint in an action to **recover personal property** averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and, in addition, averred affirmatively that the property was at that time owned and possessed by a third person: *Held*, that this averment was but another form of denial, and not new matter which, under the system of replication formerly in force, was admitted by a failure to reply.

Woodworth v. Knowlton, 22 Cal. 164.

426. **Abandonment** of land need not be pleaded, when.

Willson v. Cleaveland, 30 Cal. 192.

Bell v. Brown, 22 *Id.* 671.

427. Abandonment was affirmatively averred by the defendant in

St. John v. Kidd, 26 Cal. 266.

428. **Matter in abatement**, or which was such at common law, as a motion to change the venue, must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary.

Tooms v. Randall, 3 Cal. 438.

429. Wherever the subject-matter of the plea or defense is that the plaintiff can not maintain any action at any time, whether present or future, in respect to the supposed

cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. *Hentsch v. Porter*, 10 Cal. 555.

430. The non-presentation of the claim to the administrator is, in its nature and effect, nothing more than a matter of abatement. *Id.*

431. A failure to join all the parties in interest may be pleaded in abatement.

Whitney v. Stark, 8 Cal. 514.

432. Pleas in abatement are not favored, and the party pleading must prove his plea as put. *Thompson v. Lyon*, 14 Cal. 39.

433. Accord and satisfaction.

Coles v. Soulsby, 21 Cal. 47.

Piercy v. Sabin, 10 Id. 30.

434. Attachment. See *post*, "Pleas in Justification."

435. Composition with creditors.

Smith v. Owens, 21 Cal. 11.

436. Conditions precedent. See *post*, "Performance of Conditions Precedent."

437. Counter claim.

Hicks v. Green, 9 Cal. 74.

Stoddard v. Treadwell, 26 Id. 306.

438. Damages which do not legally result from the breach of the contract can not be recovered, unless they are specially claimed and set forth in the pleading; thus, damages sustained by vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him. *Cole v. Swanston*, 1 Cal. 51.

439. An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and wife, is not a disclaimer.

De Uprey v. De Uprey, 27 Cal. 331.

Noë v. Card, 14 Id. 576.

440. Equitable titles, defenses and estoppels. "Equitable Titles."

Clarke v. Huber, 25 Cal. 597.

Carpentier v. Oakland, 30 Id. 439.

Flandreau v. Downey, 23 Id. 354.

Blum v. Robertson, 24 Id. 146.

Downer v. Smith, 24 Id. 124.

441. Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief.

Lorraine v. Long, 6 Cal. 452.

442. In an action at law for money had and received, an equitable defense, if it exists, must be pleaded.

Marks v. Sayward, 50 Cal. 57.

443. Estoppels.

Clarke v. Huber, 25 Cal. 593.

Davis v. Davis, 26 Id. 39.

444. An estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it. Where no opportunity to plead it occurs, it is conclusive as evidence.

Flandreau v. Downey, 23 Cal. 354.

445. Eviction of the tenant must be set up, when. *Piercy v. Sabin*, 10 Cal. 30.

446. Execution, levy on.

Mulford v. Estudillo, 23 Cal. 94.

447. A partial failure of consideration can not be pleaded in bar of an action upon a note given for the purchase money of land.

Reese v. Gordon, 19 Cal. 147.

448. Forfeiture of mining claims.

Wiseman v. McNulty, 25 Cal. 230.

Dutch Flat Co. v. Mooney, 12 Id. 534.

Morenhout v. Wilson, 52 Id. 263.

449. Former recovery.

Vance v. Olinger, 27 Cal. 358.

Marshall v. Shafter, 32 Id. 176.

Piercy v. Sabin, 10 Id. 22.

450. A party, in order to avail himself of a former judgment as a defense to a new action, must plead the former judgment.

Cave v. Crafts, 53 Cal. 135.

451. Fraud.

People v. San Francisco, 27 Cal. 656.

Post, "Fraud," No. 1.

452. Grant of an easement or servitude.

American Co. v. Bradford, 27 Cal. 368.

453. Justification.

Towdy v. Ellis, 22 Cal. 650.

454. Misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by supplemental answer, or it is waived.

Calderwood v. Pyser, 31 Cal. 333.

Barstow v. Newman, 34 Id. 90.

455. A misjoinder of parties plaintiff, which does not appear upon the face of the complaint, may be pleaded in the answer, and be made a ground of nonsuit against all the plaintiffs.

S. F. & P. Canal Co. v. Snow, 49 Cal. 155.

456. Suithy an attorney on a quantum valebat, for professional services: If, that negligence and want of skill need not be set up in the answer. *Bridges v. Paige*, 13 Cal. 640.

457. New matter occurring after issue joined, must be set up by supplemental answer. *Jessup v. King*, 4 Cal. 331.

458. Payment. That it must be specially pleaded. *Coles v. Soulsby*, 21 Cal. 47.

Piercy v. Sabin, 10 Id. 27.

Glazier v. Clift, 10 Id. 303.

Green v. Palmer, 15 Id. 417.

That it is not new matter, and need not be specially pleaded.

Frisch v. Caler, 21 Cal. 71.

Fairchild v. Amsbaugh, 22 Id. 575.

459. Performance of conditions precedent, when. *People v. Jackson*, 24 Cal. 632.

460. Release.

Turner v. Caruthers, 17 Cal. 431.

Coles v. Soulsby, 21 Id. 50.

461. Statute of Frauds.

Osborne v. Endicott, 6 Cal. 149.

463. If, in an action for money, the defendant, in his answer, sets up a counter claim, which is barred by the statute of limitations, the plaintiff, under the provisions of the practice act, is considered to have pleaded the statute by way of replication.

Curtiss v. Sprague, 49 Cal. 301.

464. Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing, first, that the land is public land; second, that it contains mines or minerals; third, that he enters for the *bona fide* purpose of mining; and such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right, under the statute or by law, to enter.

Lentz v. Victor, 17 Cal. 271.

465. Subsequently acquired title by defendant in ejectment.

Moss v. Shear, 30 Cal. 468.

466. Tax titles must be pleaded.

Russell v. Mann, 22 Cal. 132.

467. Tax titles accruing after action commenced must be pleaded in a supplemental answer. *McMinn v. O'Connor*, 27 Cal. 246.

468. Tender.

Magraw v. McGlynn, 26 Cal. 428.

Barron v. Frink, 30 Id. 486.

469. Title or prior claim to water, in a third party. *Humphreys v. McCall*, 9 Cal. 59.

470. Title to personal property in a third party and trial before a sheriff's jury.

Strong v. Patterson, 6 Cal. 156.

471. Title in the defendant need not be pleaded, and may be given in evidence under a denial of plaintiff's title.

Marshall v. Shafter, 32 Cal. 176.

472. Transfer of title by plaintiff.

Id.; *Moss v. Shear*, 30 Cal. 468.

473. Unworkmanlike manner of doing work must be specially set up in the answer.

Kendall v. Vallejo, 1 Cal. 371.

474. Want of capacity in the plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient.

Cal. S. N. Co. v. Wright, 8 Cal. 585.

475. That items in an account stated are overcharged. *Terry v. Sickles*, 13 Cal. 427.

476. Where the pleadings are verified, every matter of defense, not directly respon-

sive in the allegations of that complaint, must be set up in the answer. *Id.*

477. Wherever the subject-matter of the plea or defense is that the plaintiff can not maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. *Hentsch v. Porter*, 10 Cal. 555.

478. The defendant is not bound to set up or litigate new matter constituting a cause of action in his favor.

Ayers v. Bensley, 32 Cal. 620.

479. If the answer contains a special defense which consists of an averment of facts which, if admissible in evidence, can be proved under the denials contained in the answer, an order of the court overruling a demurrer to the special defense, if erroneously made, constitutes an immaterial error.

Brown v. Kenfield, 50 Cal. 129.

480. That a good special defense, held to be bad on demurrer, might have been proved under the general issue, will not be considered as a correction of the erroneous ruling, when it appears from the record that material evidence in support of such defense was excluded upon objection made and sustained at the trial.

Green v. Campbell, 52 Cal. 586.

481. Inconsistent defenses may be set up.

Billings v. Drew, 52 Cal. 565.

482. A party does not waive the effect of a denial contained in one portion of his answer by setting up, in the appropriate manner, new or affirmative matter. *Id.*

OMISSION TO PLEAD DEFENSE SPECIALLY.

483. Omission to plead a defense specially is not cured by the introduction of evidence without objection in support of it.

Smith v. Owens, 21 Cal. 11.

McComb v. Reed, 28 Id. 281.

484. Where an equitable estoppel *in pais* is not properly pleaded, but on the trial evidence is introduced without objection, in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence, without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded.

Davis v. Davis, 26 Cal. 23.

COUNTER CLAIM AND SET-OFF.

Nature and Effect of.

485. A counter claim is a cause of action in favor of the defendant, upon which

he might have sued the plaintiff and obtained affirmative relief, in a separate action.

Belleau v. Thompson, 33 Cal. 495.

486. Where, to an action commenced April 5, 1867, by B. against T. and S., charging T. and S., as joint makers of a promissory note made and delivered to plaintiff March 22, 1864, and by its terms payable on demand, S. answering separately, denied the averments of the complaint, and set up that T. made the note sued on, which S., at T.'s request and for T.'s accommodation solely, indorsed and delivered to B. to be negotiated; that no demand for payment had ever been made of T., or notice of dishonor of the note served on S., and prayed judgment that S. is in no wise indebted or liable to plaintiff on said note: *Held*, that the answer did not contain a counter claim.

Id.

487. Where the plaintiff's action arises out of contract, defendant may introduce evidence of any counter claim arising out of contract existing at the commencement of the action, even though the contracts are not the same.

Stoddard v. Treadwell, 26 Cal. 294.

488. To authorize a set-off at law, the debts must be between the parties in their own rights, and must be of the same kind and quality, and be clearly ascertained or liquidated; they must be certain and determined debts.

Naglee v. Palmer, 7 Cal. 543.

489. *Naglee v. Palmer and Russell v. Conway*, 11 Cal. 93, upon this subject of offset, and the distinction, if any, under our system between actions at law and in equity, commented on, and not approved.

Duff v. Hobbs, 19 Cal. 646.

490. Where the parties to two judgments are not the same, a court of common law jurisdiction can not set off one against the other; but a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. *Hobbs v. Duff*, 23 Cal. 596.

491. Action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against James R. Duff and James T. Ryan, and eleven other defendants in that suit, upon the ground that James R. Duff and James T. Ryan are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset are insolvent: *Held*, that the set-off can not be allowed, as well because of the provisions of section 47 of the practice act, which require a counter claim to be between parties to the record, between whom a several judgment might be had in the action, as of the provisions of sections 176 and 199, which

would require a judgment for the excess to be given against the plaintiff, although as against him it is not claimed that defendants have any demand.

Duff v. Hobbs, 19 Cal. 646.

492. *Held*, further, that the matter set up in the answer is not a defense, legal or equitable, in any other sense than as being purely an offset, and therefore such matter can not be relied on as an equitable defense, independent of and beyond the right of offset given by the practice act. *Id.*

493. When judgments in different courts are to be set off, the moving party must go into the court in which the judgment against himself was recovered.

Russell v. Conway, 11 Cal. 93.

494. A judgment in favor of a defendant for costs, based upon a finding of one of several issues in his favor, by the jury, even if erroneous, is not void. While unversed it is to be treated, for the purpose of set-off, as a valid judgment.

Porter v. Liscom, 22 Cal. 430.

495. It is not necessary that the demand sought to be used as a set-off should be in the form of a personal judgment.

Hobbs v. Duff, 23 Cal. 596.

496. A decree rendered in an action on a bond, and to foreclose a mortgage given to secure the bond, which, after reciting the amount found due on the bond, directed that the mortgaged premises be sold, and out of the proceeds the costs and the amount found due on the bond and accruing interest be paid, and that if there was a surplus, the sheriff pay such surplus into court; but that if the proceeds were insufficient to pay the debt, interest, and costs, the sheriff should report the amount of such deficiency or balance, and that, therefore, the plaintiff have execution against the defendants, merges the original debt in such judgment, at least so far as to make it a certain and liquidated demand, existing at the date when the amount of balance was ascertained, by the report of the sheriff, sufficient as a foundation of a right of action or set-off. *Id.*

497. In equity, the right of set-off depends, not on the statutes of set-off, but upon the right and the equitable jurisdiction of a court of chancery over its suitors. *Id.*

498. As a general proposition, the mere existence of cross demands will not justify a set-off in a court of chancery. There must be some peculiar circumstances, based upon equitable grounds, to warrant the court in interfering. *Naglee v. Palmer*, 7 Cal. 543.

499. To authorize a set-off at law, the debts must be between the parties in their own right, and must be of the same kind and quality, and be duly ascertained or liquidated; they must be certain and determinate debts. *Id.*

500. Where the plaintiff filed his bill as receiver of an insolvent firm, to foreclose a mortgage given to plaintiffs in that capacity, to secure a certificate of deposit for one hundred thousand dollars, originally deposited by the receiver, and defendants admitted the debt, but claimed that the amount is to be distributed *pro rata* among the creditors of the insolvents, whom the plaintiff represents; that the claims of the creditors have been filed and reported upon; that defendants are large creditors of the insolvents, and that they will, upon the distribution of the assets, be entitled to fifty thousand dollars as their dividend; and that the defendants have advanced a further sum to the former custodians of the assets of about fifty thousand dollars, which they pray to have ascertained, and the whole amount set off against the certificate of deposit, and, until then, that plaintiff be restrained: *Held*, that a court of equity will not compel them to pay the money into court, which they would immediately be entitled to receive back; nor will it put them to the cost of so large a judgment, but will order an account and allow the set-off.

Id.

501. An action brought in a court of equity to enforce a set-off of one judgment against another is "an action upon a judgment or decree," within the meaning of section 17 of the statute of limitations, and may be brought at any time within five years of the date of the judgment or decree.

Hobbs v. Duff, 23 Cal. 596.

502. A court of equity, upon bill filed, will compel an equitable set-off, when the parties have mutual demands against each other which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity.

Russell v. Conway, 11 Cal. 93.

503. A counter claim should be specially pleaded.

Hicks v. Green, 9 Cal. 4.

504. Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts, showing that they constitute valid claims against the plaintiff, are sufficiently stated, the defenses ought not to be stricken out.

Wallace v. B. R. W. & M. Co., 18 Cal. 461.

505. To entitle a defendant to set off a claim against a demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off, and when this was not done: *Held*, that the court below properly rejected evidence of the claim proposed to be set off.

Bernard v. Mullot, 1 Cal. 368.

506. In an action for damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant

does not constitute a counter claim within the meaning of section 47 of the practice act.

McDougall v. McGuire, 35 Cal. 274.

507. When a libel is set up in the answer as a counter claim in an action for an assault and battery, the objection to such counter claim is not waived by a failure to demur, and evidence to support it is inadmissible.

Id.

508. An answer which asserts a set-off or counter claim is not a cross complaint within the meaning of the practice act, and no denial thereof by the plaintiff is required.

Jones v. Jones, 38 Cal. 584.

509. Where an answer, in setting up counter claims in the nature of a promissory note and work and labor, failed to show when the note was due or the work and labor performed: *Held*, that it did not appear that the counter claims relied on existed in favor of defendant at the commencement of the action, and that a demurrer on the ground of not stating facts sufficient to constitute counter claims was properly sustained.

Gannon v. Dougherty, 41 Cal. 661.

510. In an action against the maker and indorser of a promissory note, brought by one to whom it was indorsed after it fell due, must not a counter claim set up in the answer be confined to some matter connected with the note, such as payment, want or failure of consideration, etc., or can a collateral demand be set up as such counter claim? *Quære?*

Curtis v. Sprague, 41 Cal. 55.

511. In such action, if the counter claim exceeds the amount due on the note, can judgment be rendered against the plaintiff for the balance? *Quære?*

Id.

512. In an action against the maker and indorser of a promissory note, must not a counter claim, to be available at law, be one existing in favor of the defendants jointly? *Quære?*

Id.

513. In an action on a promissory note by the payee against one of two joint and several obligors, the defendant pleaded a demand, as a counter claim for damages for the unskillful construction of a mill by the plaintiff for the defendant, his co-obligor, and T., for the construction of which the note in suit was given in part payment: *Held*, that said counter claim being for unliquidated damages, and in part a demand in favor of a stranger to the note and suit, it was unavailable as a defense to the action. *Hook v. White*, 36 Cal. 299.

514. A judgment for costs, in an action for the recovery of real property against the tenants in possession, which was defended by the landlord in the name of the tenants, can not as such be enforced against the land-

lord, or be made the ground of a counter claim against him.

Murdock v. Brooks, 38 Cal. 596.

515. A person may receive the money due on a judgment rendered in favor of himself and several others, co-plaintiffs, but he can not without authority from his co-plaintiffs set off a judgment due to him and them jointly against another judgment held by the defendant, in such joint judgment against himself alone.

Cowen v. Ward, 35 Cal. 195.

516. A matter that does not arise out of the transaction set forth in the complaint, and which is not connected with the subject of the action, does not constitute a counter claim.

James v. Center, 53 Cal. 31.

517. A counter claim must contain all the substantive averments necessary in a complaint based upon the same cause of action set out in the counter claim.

Quinn v. Smith, 49 Cal. 163.

518. A claim for damages for a violation of a covenant to ship goods in good cases may be set off by way of counter claim, in an action brought to recover the price of other goods sold to the defendant.

Wheelock v. Pacific Co., 51 Cal. 224.

519. In an action by one in possession of real estate to quiet the title, if the defendant, in his answer, sets up facts essential to a complaint in ejectment against the plaintiff, and asks that the possession of the premises be awarded to him, the answer does not contain a counter claim, and the plaintiff may dismiss the action.

Moyle v. Porter, 51 Cal. 630.

Partnership demands.

520. In an action at law to recover damages for failure to comply with a covenant to indemnify plaintiff against liabilities, the defendant can not set up, as a counter claim, demands which were matters of partnership between the parties.

Haskell v. Moore, 29 Cal. 437.

521. Where two persons sue as partners in possession for a trespass on firm property, the judgment in their favor is firm assets, and the defendant in such case can not afterwards, in equity, enjoin the collection of the judgment, and set off against it a claim against one of the partners, on the ground that in fact this partner was the sole owner of the property, and alone entitled to the damages. The judgment is conclusive as to the joint ownership.

Collins v. Butler, 14 Cal. 223.

522. The defendant can not, in equity, enjoin the collection of this judgment and set off against it a claim against one of the partners, on the ground that in fact, this partner was the sole owner of the property, and alone entitled to the damages. The judgment is conclusive as to the joint ownership. Id.

523. A debtor has a right to purchase cross demands against a partnership, and to set them up as a defense to a debt due by him to a partnership. Naglee v. Minturn, 8 Cal. 540.

Marye v. Jones, 9 Id. 335.

Insolvent debtors.

524. A court of equity will not permit a *cestui que trust* who is insolvent, to enforce and collect through his trustee, a judgment against a party who holds a just and valid demand against the *cestui que trust* which has no means of enforcing or collecting if a set-off is denied.

Hobbs v. Duff, 23 Cal. 396.

525. To justify the allowance of a set-off of joint debt due from plaintiff, and another against the individual claim of plaintiff, upon equitable grounds, it is not sufficient to show that the joint debtors owe a considerable amount, and that their property is incumbered by judgments, mortgages, and attachments without showing that they are insolvent, or that the defendants are in danger of losing their demand.

Howard v. Shores, 20 Cal. 277.

526. The jurisdiction of a court of equity in relation to set-offs, is more extensive than that of common law courts; and where the defendant in one of the judgments is insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgment, a court of equity will decree a set-off.

Hobbs v. Duff, 23 Cal. 596.

Assignment of Judgment.

527. Plaintiff recovered judgment against defendant for seizing, as sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the judgment on which the execution issued, and moved the court to set off this latter judgment against the former: *Held*, that the motion was properly denied; that defendant being sued as a wrong-doer, the judgment of plaintiff for the value of the property must, as between plaintiff and defendant, be regarded as standing in place of the property, and that if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the exemption law.

Beckman v. Manlove, 18 Cal. 388.

528. Where, in the same action, two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum: *Held*, that the defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application of the set-off.

Porter v. Lissom, 22 Cal. 430.

529. Where a judgment, against which a right to set off another judgment rendered

in the same action exists, is assigned, the assignee may be brought into the court upon a proceeding by petition and motion, and will be bound by an order made therein directing a set-off. *Id.*

530. Upon a motion by the defendant to set-off against a judgment rendered against him, a judgment against the plaintiff assigned to him by another, he must show that he is the absolute and beneficial owner of the judgment, or he can not set it off.

Jones v. Chalfant, 55 Cal. 505.

Assignment of Contract.

531. Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the parties.

Payne v. Bensley, 8 Cal. 260.

Affirmed in Robinson v. Smith, 14 Cal. 94.

532. A. executed a note and mortgage to B. Subsequently, A. and B. entered into partnership in the livery business. A. was to furnish the stable, hay, and grain, and board B., and B. was to attend the stable, the profits to be equally divided, and the share of A. was to be applied in discharge of the note. B. received the sum of three hundred and ninety-six dollars, A.'s share of the profits of the business, and then, after maturity, assigned the note and mortgage to C. C. brought suit against A. for the whole amount. A. pleaded payment and set-off: *Held*, that A. was entitled to the credit of the payment. *Mount v. Chapman*, 9 Cal. 294.

533. When a creditor, having a debt due him by mortgage, assigns the debt and mortgage, a judgment in favor of a third person against the creditor, purchased by the debtor after the assignment, but before notice to him, constitutes an offset *pro tanto* to the debt in an action upon it by the assignee.

McCabe v. Grey, 20 Cal. 509.

WHERE IT CAN NOT BE SET UP.

In General.

535. If the complaint is based on a **written contract**, by the terms of which plaintiff is to do certain things, and the complaint avers a faithful performance on his part, and the answer denies the performance, the defendant can not, under this allegation and denial, introduce evidence of a counter claim.

Stoddard v. Treadwell, 26 Cal. 294.

536. M. & T. being indebted to V. in the sum of six hundred and seventy-one dollars, plaintiff, for the accommodation of the debtors, procured E. to assume the debt, and execute to V. his (E.'s) note for the amount, and to secure E., plaintiff assigned to him a note and mortgage of M. for two thousand dollars, with an agreement that the latter should be retransferred to plaintiff upon the pay-

ment by him to E. of the amount of his (E.'s) note to V. Subsequently, E. died, having in his hands at the time one thousand four hundred dollars belonging to M., and received by E. as rents and profits of a certain ditch, of which he and M. were joint owners. Defendants were appointed administrators of E. and received the one thousand four hundred dollars as assets of deceased, and afterwards from the funds of the estate paid the six hundred and seventy-one dollar note to V. The action is brought to compel defendants to redeliver to plaintiff the two thousand dollar note and mortgage, he claiming that the transaction abovestated amounted to a payment by him of the debt for which they had been pledged by him as security: *Held*, that the facts did not show a payment of E.'s note to V. by plaintiff; that they only established that there was a balance due to M. from the estate of E., and that plaintiff was not authorized in this action to avail himself of such a counter claim of M. against the estate, as a payment on behalf of M. & T.

Cook v. Davis, 22 Cal. 157.

537. The captain of a vessel drew on his owner for six hundred dollars to defray the expenses of the first mate, who was injured on the voyage, and whom it became necessary to leave on shore for his recovery. In an action by the captain against the owner for wages, the owner claimed to set off four hundred and fifty dollars of the amount of the draft against the claim, on the ground that he was liable for it, but did not produce the draft, or show payment of it: *Held*, that the court below properly rejected the set-off.

Wakeman v. Vanderbilt, 3 Cal. 380.

538. Plaintiff sues for balance due on a contract for erecting a building, and a small sum for extra work. Defendant seeks to offset a claim for two and one-third months' rent lost by him, because of the neglect of plaintiff to finish the building within the time specified in the contract, defendant having, at the date of the contract, leased the building to responsible tenants, the lease to take effect from the time named in the contract for its completion: *Held*, that the defendant can not offset his rents, because the circumstances show that the contract was modified by the parties as to the time for the completion of the building.

McGinley v. Hardy, 18 Cal. 113.

539. Where, in an action at law, the defendants in their answer set up and claim a set-off to plaintiff's demand, and on the trial of the action the record shows that the court excluded all evidence of the demand sought to be set off, and gave judgment for plaintiff, the judgment in the action at law can not be pleaded or claimed as an **estoppel**, in an action afterwards brought by the defendants in a court of equity to enforce the set-off.

Hobbs v. Duff, 23 Cal. 596.

540. An execution in favor of Peyser and against Calderwood can not be set off against an execution in favor of Calderwood and Douglass (his former wife) against Peyser, the apparent fact being that the parties to the two executions are not the same.

Calderwood v. Peyser, 42 Cal. 111.

541. In an action to recover money claimed to be due, the defendant can not set off, by way of a counter claim, the value of the use and occupation of premises claimed by him which the defendant entered upon and holds under a third person, in hostility to the defendant's alleged title.

Quinn v. Smith, 49 Cal. 163.

Joint and Several Claims.

542. A joint claim by two persons can not be pleaded as a counter claim by one defendant, but he may amend, and allege that the whole interest therein had been transferred to him. Stearns v. Martin, 4 Cal. 229.

543. Demands being joint and several, are not, strictly speaking, due in the same right; yet, if the legal and equitable liabilities on claims of money become vested in or may be urged against one, they may be set off against separate demands, and *vice versa*.

Russell v. Conway, 11 Cal. 102.

544. A set-off can not be pleaded by one of several defendants sued on joint liability.

Collins v. Butler, 14 Cal. 223.

545. Under the forty-seventh section of the practice act, a claim, to constitute a set-off, must be such that the party pleading it might obtain a several judgment against his adversary upon it; and this excludes a joint debt as a set-off against a several one.

Howard v. Shores, 20 Cal. 277.

546. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts.

Collins v. Butler, 14 Cal. 223.

WAIVER OF.

547. An omission to assert a cross claim when a demand is presented for payment does not involve a waiver of the counter claim, nor is a failure to discharge an unfaithful servant before his term of service has expired a release of damages arising from his neglect.

Stoddard v. Treadwell, 26 Cal. 294.

548. A party does not lose his right to bring an action for a demand, which he might have pleaded as a set-off in a former action, but neglected to do so.

Hobbs v. Duff, 23 Cal. 596.

549. When partners are sued as factors, it is not necessary for them to set forth in

their answer their claim for disbursements, commissions, etc., by way of set-off.

Lubert v. Chauviteau, 3 Cal. 463.

DAMAGES—DEFENSE BY WAY OF RECOUPMENT.

550. An unliquidated claim for damages is not the subject of offset, legal or equitable.

Ricketson v. Richardson, 19 Cal. 331.

551. In general, when the claim of plaintiff and counter claim of defendant both arise out of the same contract, defendant may introduce evidence of unliquidated damages embraced in his counter claim, unless the plaintiff come to the contract by assignment. Stoddard v. Treadwell, 26 Cal. 294.

552. If the plaintiff's cause of action is for damages for the breach, on the part of defendant, of a written contract between the parties, defendant may interpose in his answer a counter claim for damages for a breach of the contract by plaintiff.

Dennis v. Belt, 30 Cal. 247.

553. In the case of a sale and delivery of a special cargo, with warranty, and a breach of the warranty, the plaintiffs might recover on the contract and the defendants would be obliged to sue on the warranty, or in the same action to recoup the damages under proper averments in the pleadings.

Ruiz v. Norton, 4 Cal. 355.

554. If a merchant employs one by a written contract, at a stated salary, to act as his chief clerk and managing agent for a stated time, and an action is brought by the clerk on the contract for wages, and the answer sets up a counter claim for damages arising out of neglect of the clerk to attend to the business, the defendant has a right on the trial to introduce evidence of a loss of his profits and discontinuation of business caused by the clerk's neglect; and to do this he may ask a witness what amount of additional business would have been done if the clerk had attended to his business.

Stoddard v. Treadwell, 26 Cal. 294.

555. Where one is employed by another under a contract, at a stated salary, payable monthly or at a stated time, to act as his clerk or transact business for him, and the employee neglects the business, the employer is not precluded from maintaining an action for damages for this neglect, by payment in full of the employee's wages, or by allowing the employee to sue and recover judgment by refraining from interposing any counter claim for a breach of the employee's contract.

Id.

556. When an action is based upon a contract to pay a stipulated sum, and the answer sets up counter claim for damages for matters arising out of the same contract, the defendant can not, on the trial, introduce

evidence of any damages except those **especially set up in the answer.** Id.

557. In an action for the price of goods sold and delivered, there being a **warranty** as to the quality of the goods, the breach of the warranty may be relied on in defense by way of recoupment to mitigate the amount recovered; but it is not available as a complete defense to the action.

Earl v. Bull, 15 Cal. 421.

558. A claim of A. and B. to recoup damages from C., by way of set-off against the promissory note of A., B. and D., held by C., can not be sustained, nor can such claim for damages be set off against an aliquot part of the sum due on the note.

King v. Wise, 43 Cal. 628.

MATTERS IN AVOIDANCE.

559. Matters in avoidance must be specially pleaded. They can not be used as defenses under an answer which is a simple denial of the allegations of the bill.

Caskill v. Moore, 4 Cal. 233.

CROSS COMPLAINT.

560. A party who seeks relief must himself state the facts upon which he relies; failing in this, he can not derive benefit from a **cross bill** which states another and **different cause of action** in his behalf.

Mercier v. Lewis, 39 Cal. 532.

561. Mere naked trespasses, having no relation to or connection with the plaintiff's cause of action, nor with any contract between the parties, can not be the foundation for a cross complaint in an action to recover a **money demand** founded on contract.

Waugenheim v. Graham, 39 Cal. 169.

562. But where the plaintiff has unjustifiably and illegally sued out a **writ of attachment** in the case, and thereby inflicted a great injury on the defendant, the **damages** arising therefrom furnish the ground for a cross complaint in the action. Id.

563. Where proper **matters of defense** are pleaded as such, they should only be regarded as matters of defense, notwithstanding a prayer for affirmative relief at the conclusion of the answer; matters of the cause of complaint must be separately stated as a cause of action against the plaintiff, and not as a defense to the plaintiff's cause of action.

Doyle v. Franklin, 40 Cal. 106.

564. Neither an **agreed statement of facts** nor a finding of facts can add a material fact to a cross complaint, for it must fall unless it can stand on its own allegations of facts.

Collins v. Bartlett, 44 Cal. 372.

565. If the defendant answers the complaint, and also files a cross complaint asking for **affirmative relief**, and both parties introduce evidence on the cause of action set

forth in the complaint, and submit the cause to the court, whether the defendant shall then be permitted to reopen the cause and introduce evidence in support of the cross complaint, is a matter resting in the **discretion** of the court.

Miller v. Sharp, 49 Cal. 233.

566. The appellate court will not disturb the action of the court below in the exercise of such discretion, unless it is incorrectly or **imprudently exercised.** Id.

567. A cross complaint, like a complaint, must, in itself, state all the requisite facts to entitle the defendant to affirmative relief, and **defects** in it can not be cured by the averments of any of the other pleadings in the action.

Kreichbaum v. Melton, 49 Cal. 50.

568. When the answer contains a cross complaint, it must be replied to, so far as the cross complaint is concerned, or the **matters** therein alleged will be **taken as confessed**; but in no other respect is the plaintiff required to reply to the answer.

Herold v. Smith, 34 Cal. 120.

PLEADING SEVERAL DEFENSES.

569. Several defenses **inconsistent** with each other may, under proper circumstances, be set up in a verified answer.

Bell v. Brown, 22 Cal. 671.

570. In an action to recover a mining claim, the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim, they had abandoned and forfeited it before defendant's entry. At the trial, on motion of plaintiffs, the court ordered defendants to elect on which of the above defenses they would rely; and defendants having, after excepting to the order, elected to rely upon their denial, were precluded from introducing proof of the abandonment and forfeiture: *Hill*, that the action of the court was error; that defendants had the right to set up **both** defenses in their answers and support both by proof. Id.

571. The inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of **pleas of confession and avoidance**, as contradistinguished from denials, where the party impliedly or hypothetically admits for the purpose of that particular defense, a fact which he notwithstanding insists does not in truth exist. Id.

572. If a fact, which is directly averred in one part of a verified pleading, is in an-

other part directly denied, whether it be in the statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of perjury, and in the trial that averment which bears most strongly against the pleader will be taken as true. *Id.*

573. The defendant in **ejectment** may deny the title of the plaintiff, and also plead the statute of limitations.

Willson v. Cleaveland, 30 Cal. 192.

574. If no objection be taken to an answer, by a motion to strike out, or by demurrer which sets up **inconsistent** defenses, defendant may on the trial rely on any one of such defenses. *Klink v. Cohen*, 13 Cal. 623. *Uridias v. Morrell*, 25 *Id.* 35.

575. Where there are **several answers**, an admission made in one is not available in proof of issue raised by another.

Nudd v. Thompson, 34 Cal. 39.

576. The defendant in an action to try the right to an office may set forth in his answer **more than one defense**.

People v. Stratton, 28 Cal. 382.

Misjoinder of Parties.

577. Objection should be taken by demurrer or answer to the misjoinder of the parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 313.

578. Where two are joined as plaintiff in an action for the recovery of possession of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs.

Gillman v. Sigman, 29 Cal. 637.

579. Where a misjoinder of parties plaintiff does not appear upon the face of the complaint, and the objection is not taken by answer, it is deemed waived.

Hastings v. Stark, 36 Cal. 122.

Non-joinder of Parties.

580. There are two ways of taking advantage of non-joinder of parties plaintiff in an action of trover, or apportionment of damages, when the defect does not appear upon the face of the complaint; and these are, at law, either by answer at the trial, and in equity by answer or demurrer.

Whitney v. Stark, 8 Cal. 516.

581. A plea in abatement by the defendants sued of the non-joinder of other parties who are alleged to be necessary defendants, if proved on the trial, must prevail, even if the plaintiff was ignorant of the fact that such other parties were necessary defendants. *McDonald v. Backus*, 45 Cal. 262.

Misjoinder of Actions.

582. If several causes of action are improperly united in the same action the objection must be taken either by demurrer or answer, or it will be deemed to have been waived. *Macoudray v. Simmons*, 1 Cal. 393.

Pleas in Abatement.

583. Answers in abatement of an action are to be **strictly construed**.

Larco v. Clements, 36 Cal. 132.

584. In an action to recover land, an answer of another action pending for the same cause must show that the **same title**, the **same injury**, and the **same subject-matter** are in controversy in both actions. *Id.*

585. Where the pendency of another suit is pleaded in bar of action, the **same person** must appear to be the plaintiff in both actions.

Felch v. Beaudry, 40 Cal. 439.

586. The defense that there is **another action pending** between the same parties for the same cause must be pleaded, otherwise evidence can not be introduced to support it. *Walsworth v. Johnson*, 41 Cal. 61.

587. A defendant who interposes a defense of another action pending between the same parties for the same cause, must support it by the record of an action in which he is also a defendant and the present plaintiff is plaintiff. If the party who interposes such defense is a plaintiff in such other action, it is no defense, although for the same cause. *Id.*

588. A plea to abate an action by reason of **another action pending** is not good, unless to show that the pending action was brought for the same cause as the one in which the plea is interposed.

Calaveras v. Brockway, 30 Cal. 325.

589. The pendency of an action to **quiet title** to land will not abate a subsequent action between the same parties to **recover possession** of the same land, in which the same facts are litigated.

Bolton v. Landers (No. 1), 27 Cal. 104.

590. An action can not be abated by a former action pending for the same cause, unless the **parties are the same**.

Calaveras v. Brockway, 30 Cal. 325.

591. Where, on plea in abatement to the entire action, that another suit, for the same cause of action, was pending at the time of suit brought, the proof shows that the first suit is only for **part of the same matter** sued for in the second suit, the plea fails.

Thompson v. Lyon, 14 Cal. 39.

592. If an answer in abatement is found true, the **judgment should not be a bar**, but the suit abate.

Larco v. Clements, 36 Cal. 132.

Pleas in Bar.

593. An **agreement** between the parties

which is to operate as a **discharge of a debt** in suit must be pleaded in defense of the pending action. *Sweet v. Burdett*, 40 Cal. 97.

594. An **estoppel** which is of equitable cognizance must be pleaded, or it will not be considered on the trial.

Etcheborne v. Auzerai, 45 Cal. 121.

595. Estoppel by matter of record must be pleaded. *Blood v. Marcuse*, 38 Cal. 590.

596. A **previous adjudication**, in which the same rights were put in issue, may be properly pleaded by way of estoppel in a subsequent proceeding in equity, between the same parties.

San Francisco v. S. V. W. W., 39 Cal. 473.

597. The defendant is entitled to plead his **discharge in insolvency** in bar of such action, by supplemental answer.

Rahn v. Minis, 40 Cal. 422.

598. Where a discharge in insolvency is pleaded in bar of an action commenced before the proceedings in insolvency were instituted, a judgment in favor of plaintiff is conclusive that he was entitled to his judgment, notwithstanding the alleged discharge in insolvency. *Id.*

600. Where such plea is omitted, the judgment is as conclusive upon the defendant as it would be had his defense been accord and satisfaction, payment, etc., which he had neglected to plead. *Id.*

601. If the record of the proceedings in insolvency neither names the plaintiff, nor the contract in suit, nor states that the defendant has described all his debts and liabilities to the best of his knowledge and recollection, the discharge constitutes **no defense** to the action.

Rourke v. McLaughlin, 38 Cal. 196.

602. A **failure of consideration**, in whole or in part, after a *bona fide* assignment of a promissory note, is no defense to a suit by the assignee against the maker, even though the assignee had full knowledge of the original consideration for which the note was given. *Splivalo v. Patten*, 38 Cal. 138.

603. If McL. and wife convey to R. for the sum of one thousand dollars, and on the same day, and as a part of the same transaction, R. gives McL. and wife a contract for the sale of the same land, for the same price, payable by installments, and for a good and lawful deed upon the payment of the purchase money, in an action by R. to recover an installment, McL. and wife can not rely upon an alleged want of title to the land in R., as a defense to the action.

Rourke v. McLaughlin, 38 Cal. 196.

604. In an action to recover damages for taking personal property, the defendant, who has taken the property from the plaintiff, will not be permitted to show in defense that the former owner made a **fraudulent sale** of

the property to the plaintiff, unless in his answer he makes himself the representative of the former owner, and alleges he was defrauded by the sale.

Leszinsky v. White, 45 Cal. 278.

605. If the wife seeks to avoid her **mortgage** on the ground of the same having been executed or acknowledged under the compulsion or undue influence of her husband, she must allege such to be the fact in her answer. An allegation that she did not acknowledge it freely and voluntarily is not sufficient.

Conn. Ins. Co. v. McCormick, 45 Cal. 580.

606. Where the defendant to an action to quiet title to a mining claim on the public lands set up in a supplemental answer both **abandonment and forfeiture** by plaintiffs of their asserted title and possession to said claim after suit commenced, but failed to set up any subsequently acquired rights therein by defendants: *Held*, that said matters were unavailing to defendant as defenses to the action; and a failure of the court to make special findings of fact thereon was immaterial. *Pralus v. Pacific M. Co.*, 35 Cal. 30.

607. A defendant, in an action for the diversion of water, can not have the benefit of an adverse user or **prescription** as a defense, unless it is set up in the answer.

Mathews v. Ferrea, 45 Cal. 51.

608. Prescription will not avail as a defense against one who purchased from the United States, unless the user has been adverse for the requisite period after the title passed from the United States. *Id.*

609. A judgment in a former action is well pleaded as a bar in a second action, provided the cause of action is the same, though the form of action had been changed.

Taylor v. Castle, 42 Cal. 367.

610. A cause of action is said to be the same as that in a former suit, where the same evidence will support both actions; and a judgment in such former action will be a bar, provided the evidence necessary to sustain a judgment for plaintiff in the second would have authorized a judgment for plaintiff in such former one. *Id.*

611. In an action for the value of services rendered, a plea which does not aver that the cause of action accrued more than two years before the commencement of the action, but only that the services contracted to be rendered by the plaintiff were rendered more than two years before action brought, is insufficient as a plea of the statute of limitations. *Hartson v. Hardin*, 40 Cal. 264.

612. In order to justify the excavation of a ditch on the land of another under a **parol license**, the license must be pleaded.

Alvord v. Barnum, 45 Cal. 482.

See DEFENSES.

Answer not to be Evidence.

613. An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant, though the bill be sustained by one witness only.

Goodwin v. Hammond, 13 Cal. 168.

Bostic v. Love, 16 Id. 69.

Blankman v. Vallejo, 15 Id. 638.

614. The equity rule requiring two witnesses to controvert an answer under oath does not prevail in this state. The answer is only a pleading, and is not evidence for defendant.

Bostic v. Love, 16 Cal. 69.

615. An answer under our statute is not proof for defendant, but an admission in the answer, of a fact stated in the complaint, is conclusive evidence against him.

Blankman v. Vallejo, 15 Cal. 638.

Sham Answers.

616. A sham answer is one good in form but false in fact, and not pleaded in good faith. It sets up new matter which is false.

Piercy v. Sabin, 10 Cal. 22.

617. Plaintiff sued on a note made by defendants to his order, the complaint not being verified, but setting out the note. Defendants pleaded payment. Plaintiff, on affidavits that the plea was false and pleaded in bad faith, moved to strike out the answer and for judgment. Granted: *Held*, that the ruling of the court was right; that under the fiftieth section of the practice act, "sham" answers and defenses are such as are good in form, but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out.

Gostorfs v. Taaffe, 18 Cal. 385.

618. If the complaint avers that the defendant made and delivered the note to plaintiff, and that plaintiff is still the owner and holder, and the answer denies that plaintiff is the owner and holder, and the plaintiff introduces affidavits showing, by a statement of facts, that the note is his, and the defendant's counter affidavits merely state that the answer is true and was put in good faith, the answer is sham, and should be stricken out as such.

Wedderspoon v. Rogers, 32 Cal. 569.

619. An unessential, or what is the same thing, an immaterial allegation is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disproved. Whether an allegation be material may be determined by the question: "Can it be made the subject of a material issue?" In other words: "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material.

Green v. Palmer, 15 Cal. 411.

620. In an action for the seizure and conversion of a bag of gold coin, the complaint,

after the usual averments, went on to detail the manner of the seizure, with the incidents occurring on the street at the time, and everything done by defendants, plaintiff, and the "crowd" relating to or constituting the evidence of the wrongful conversion: *Held*, that this narration should have been stricken out, on motion, as irrelevant and redundant matter.

Id.

621. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claimed to be entitled, is an immaterial averment, and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit.

McDonald v. B. R. & A. Co., 15 Cal. 145.

622. Suit for services as agent of defendant under a contract. Defendant in answer sets up a violation of the contract on the part of the plaintiff, and also certain other matter, amounting to a tort on his part—as conspiracy to have the property of defendant sold and bought in by him; circulating false reports that defendant was bankrupt, its affairs a swindle, etc.: *Held*, that this latter portion of the answer was properly stricken out, on motion of plaintiff.

Bates v. S. N. L. Co., 18 Cal. 171.

623. Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial can not be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on an application of the plaintiff.

Fay v. Cobb, 51 Cal. 313.

624. In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up, among other things, the following: "That said tract of land is situated in the heart of the mineral regions of said state, and is a part of a public domain belonging to the government of the United States, and that said government has never granted or conveyed the same, or any part thereof, to said plaintiff; they further say that their said ditch was constructed in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the waters of the South Fork of the American river from a point about five miles above said land to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the same is fourteen miles in length, and was constructed for the purposes aforesaid at a cost to said defendants of about twenty thousand dollars," which allegations were stricken out on motion of plaintiff's attorney: *Held*, that they were proper'y

stricken out, as irrelevant; for, if true, they constitute no defense to the action.

Weinert v. Lowery, 11 Cal. 104.

625. Where the complaint alleges that plaintiff derives title from original occupant and location, the name of such locator should be given, so as to direct attention of defendant to the particular fact of which evidence will be offered. Where to such complaint defendant sets up, among other things, that in 1855 the premises were in the peaceable possession and occupancy of one Duff and were improved by him; that afterwards, in January, 1856, defendant, by permission and consent of Duff, entered upon possession of the lots and improved them, and has since continued in the actual and peaceable possession and occupancy thereof; and that the premises were conveyed to plaintiffs, by said Duff, by deed executed on the thirtieth of August, 1859: *Hell*, that these **allegations** were properly **stricken out**, on motion of plaintiffs, as irrelevant and immaterial matter, because the possession and improvement of Duff, in 1855, did not confer a right superior or equal to that of the original occupant, through whom plaintiffs claimed, as under the act of 1856, the possession, to confer a superior right, must have preceded the act of April, 1855, by at least one year.

Ricks v. Reed, 19 Cal. 551.

Issues of Law and Fact.

626. An issue of law and fact **should not be mixed** in an answer. A demurrer should be filed as a separate pleading.

Brooks v. Douglass, 32 Cal. 208.

627. Where an **amended answer** is complete in itself, and is **inconsistent with the original answer**, the two can not stand together. *Kuhland v. Sedgwick*, 17 Cal. 123.

628. A **sworn answer** must be consistent in itself, and must not deny in one sentence what it admits to be true in the next.

Hensley v. Tartar, 14 Cal. 508.

629. If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it be in the statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of **perjury**, and on the trial that averment which bears most strongly against the pleader will be taken as true. *Bell v. Brown*, 22 Cal. 671.

630. If the complaint contains **two counts**, and the answer takes issue on the allegations of one only, plaintiff is entitled to judgment on the other.

Lellingwell v. Griffing, 31 Cal. 231.

631. A plea, professing to answer the whole complaint, but in fact only answering one of the two counts, is bad. This was the rule at common law, and it applies under our system. *Wallace v. B. R. Co.*, 18 Cal. 461.

632. When there is both a demurrer and an answer to the same complaint, raising both an issue of law and fact, the **issue of law** should be **first disposed of**.

Brooks v. Douglass, 32 Cal. 208.

633. It is irregular to enter judgment against defendant, on whose behalf a demurrer is on file, without disposing of the demurrer, and a judgment so entered will be reversed on appeal.

Hestres v. Clements, 21 Cal. 425.

634. Although it does not appear from the record on appeal that a demurrer to the complaint was formally disposed of, yet, if it does appear in the statement that one of the errors relied on is "the ruling of the court on the demurrer, and that the same should have been sustained;" and if the appellant went to trial without insisting on a disposition of the demurrer, he can not object in the supreme court that the demurrer was not formally disposed of.

De Leon v. Higuera, 15 Cal. 483.

Filing and Serving Answer.

635. It is not necessary, under the statute, to serve an answer or demurrer upon the opposite attorney, unless he lives in the same county in which the action is pending.

Oliphant v. Whitney, 34 Cal. 25.

What Filing Answer Waives.

636. The answer of the defendant waives the alleged error as to the **change of parties**, whereby the name of such defendant has been substituted for that of another, without notice. *Smith v. Curtis*, 7 Cal. 584.

637. An answer is a **waiver of a demurrer** previously interposed.

Pierce v. Minturn, 1 Cal. 470.

638. An answer to a complaint, after demurrer, overrules the demurrer.

Brooks v. Minturn, 1 Cal. 481.

639. Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer. *De Boom v. Priestly*, 1 Cal. 206.

640. A **complaint in an action to set aside a judgment** which contains no averment showing that relief could not have been obtained on motion may be demurrable, but if defendant fails to demur and answer on the merits, and the fact supplying the defect appear in the record, the objection is waived.

Bibend v. Kreutz, 20 Cal. 109.

641. If a complaint to quiet title avers plaintiff's possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by collusion with defendant's tenant. *Read v. Calderwood*, 32 Cal. 109.

DEMURRER TO ANSWER.

642. Objection should be taken by demurrer, or answer to the **misjoinder of parties** defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 310.

643. The objection to the misjoinder of a defendant must be taken in the court below; it can not be taken in this court for the first time. *Sands v. Pfeiffer*, 10 Cal. 258.

644. Where a demurrer is interposed to an answer, and the cause is tried by the court without first disposing of the demurrer, and no objection is made at the time of trial, it is not such an **irregularity** as entitles the plaintiff to a new trial.

Calderwood v. Tevis, 23 Cal. 335.

645. Where a demurrer is filed to the defendant's answer, it is irregular for plaintiff to take judgment before some disposition is made of the demurrer. And where the record on appeal discloses this state of facts, and nothing more from which an abandonment of the demurrer can be inferred, the judgment will be reversed.

Huse v. Moore, 20 Cal. 115.

646. A demurrer to the answer to a petition for a **writ of mandate** is an admission of the truth of the matters averred in the answer. *Middleton v. Low*, 30 Cal. 596.

REPLICATION.

647. A counter claim, or matter in avoidance, set up in answer, need not be denied by plaintiff, to put defendant upon his proof. The rule is the same as before the amendments of 1866.

Herold v. Smith, 34 Cal. 120.

648. Under the statute the **affirmative allegations** of an answer stand **controverted** by the plaintiff, and the burden is on the defendant to prove the truth of such allegations. *Bryan v. Maume*, 28 Cal. 238.

649. A plaintiff need not reply to any affirmative matter set up in defense, or by way of avoidance or counter claim.

Doyle v. Franklin, 40 Cal. 106.

650. A pleading by a defendant in an action of **replevin** which admits the taking complained of, but justifies under legal process, and prays judgment for a restitution of the property replevied, or for its value, contains only matter of confession and avoidance, and under the fifty-sixth section of the practice act, is deemed controverted by plaintiff. *Stringer v. Davis*, 35 Cal. 25.

651. **Objections to the form** in which denials or defenses in an answer are couched should be presented first in the trial court, where amendments may be allowed in furtherance of substantial justice.

Green v. L. S. & P. Co., 46 Cal. 408.

652. When a case has been tried as though at issue upon all the material points, the plaintiff will not be permitted, for the first time, in the appellate court, to assume the **insufficiency** of the answer. *Id.*

AMENDMENTS TO PLEADINGS.

By Striking out or Adding Parties.

653. Where it appears by the plaintiff's testimony at the trial that there is a **non-joinder of persons** who should have been plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just.

Acquittal v. Crowell, 1 Cal. 191.

654. Whether the court can, after ordering defendants, against whom no proof is adduced, to be stricken from the pleadings, **reinstate** them in the progress of the trial.

Beach v. Covillaud, 2 Cal. 237.

655. The court may allow, after the close of plaintiff's evidence, the **complaint** to be **amended**, by **adding the name** of another party plaintiff, if it does not affect the substantial rights of the parties.

Polk v. Coffin, 9 Cal. 56.

656. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a **mistake of the clerk** in entitling the cause, the error may be corrected in the supreme court, or the court below, on motion.

Browner v. Davis, 15 Cal. 9.

657. An **alteration** by the court of a judgment, without notice, so as to include a party not served with process, if not void, is voidable at the election of the party.

Chester v. Miller, 13 Cal. 558.

658. If a judgment entered be irregular, as embracing more parties than the testimony justifies, the proper practice is to move to correct the judgment in the court below.

Mulliken v. Hull, 5 Cal. 245.

659. A court may order **judgment creditors** as subsequent incumbrancers, to be made parties to an action, by an amendment of the complaint, as a better course, or by petition or intervention.

Horn v. Vol. W. Co., 13 Cal. 62.

660. The **misjoinder of parties** can be corrected by amendment under the statute.

Heath v. Lent, 1 Cal. 410.

661. Facts which occur **subsequent to filing of the original pleading**, and which change the liabilities of the parties, and in consequence, the character of the judgment which is sought, can not be incorporated with the original pleadings by an amendment. *Van Maren v. Johnson*, 15 Cal. 311.

Power of Legislature to Legalize.

662. The legislature has not the power

to legalize existing pleadings, substantially defective, without first requiring them to be amended. *People v. Mariposa Co.*, 31 Cal. 196.

Effect of Amendments.

663. An amended answer supersedes the original and destroys its effect as pleading. *Gilman v. Cosgrove*, 22 Cal. 356.
Jones v. Frost, 28 Id. 246.

664. The filing of a new complaint after a demurrer has been sustained is not the commencement of a new action.

Jones v. Frost, 28 Cal. 245.

665. An amended complaint takes the place of the original, and when it is filed the original ceases to perform any further functions as a pleading.

Barber v. Reynolds, 33 Cal. 497.

Discretion and Liberty.

666. The statute authorizing amendments to pleadings passes the whole matter over to the discretion of the court.

Cooke v. Spears, 2 Cal. 409.

Stearns v. Martin, 4 Id. 227.

666a. The allowance of an amendment to pleadings is a matter of discretion, for the abuse of which only, can the appellate court interfere. *Gillan v. Hutchinson*, 16 Cal. 154.

Thornton v. Borland, 12 Id. 439.

Robinson v. Smith, 14 Id. 254.

667. If the discretion of courts in regard to allowing or refusing amendments be abused, or illegally exercised, an appellate court will interpose.

Cooke v. Spears, 2 Cal. 409.

668. The power of the court under this and other sections of the practice act should be liberally exercised to mold and direct its proceedings, so as to dispose of cases upon their merits in furtherance of justice and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right.

Roland v. Kreyenhagen, 18 Cal. 455.

Pierson v. McCahill, 22 Id. 127.

Butler v. King, 10 Id. 342.

McMillen v. Dana, 18 Id. 339.

Smith v. Yreka W. Co., 14 Id. 201.

669. A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the records.

Jessup v. King, 4 Cal. 331.

670. The court below has power to grant amendments whenever at any stage of the trial they are necessary to the purposes of justice, and this power should be liberally exercised to secure a fair and speedy trial on the merits.

Lestrade v. Barth, 17 Cal. 285.

Peters v. Foss, 16 Id. 357.

670a. Referees have no power to allow

parties to alter or amend pleadings after a case has been referred to them.

De la Riva v. Berreyesa, 2 Cal. 195.

Amendments to Complaint.

671. If the defendant demurs to the complaint it is an error for the court to refuse the plaintiff leave to amend his complaint before the decision on the demurrer.

Lord v. Hopkins, 30 Cal. 76.

672. Plaintiffs, after demurrer and before trial of the issue of law thereon, are entitled to amend as of course.

Barber v. Reynolds, 33 Cal. 497.

673. A complaint may be amended without leave before a summons is issued.

Allen v. Marshall, 34 Cal. 165.

674. Upon the remittitur of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so.

McDonald v. B. R. & A. Co., 15 Cal. 149.

675. If an attorney enters an appearance in a case for a person who is not named in the complaint as a party defendant, after the defendant named in the complaint has answered, and by stipulation, the answer on file is considered as the answer of the party for whom the attorney thus appears, the complaint should be amended by inserting the name of such party, and if not amended before an appeal is taken, the supreme court will direct the court below to allow the amendment, even if it affirms the judgment.

Baldwin v. Bornheimer, 48 Cal. 433.

676. An amended complaint must be served on all the adverse parties who are to be bound by the judgment, whether it materially affects them or not.

Elder v. Spinks, 53 Cal. 293.

677. If an order is made by the court striking names from the complaint, such order becomes a part of the judgment roll, and it is not necessary to amend the complaint.

Torney v. Pierce, 49 Cal. 303.

678. An order of court striking names from a complaint may be made without payment of costs. The court may exercise its discretion in making it, and if there is no abuse of such discretion, the order will not be disturbed.

Id.

679. If, at the close of a trial, the court asks the plaintiff if he desires to amend his complaint to make it conform to the proofs, and he declines to amend, and the court announces that if it becomes necessary, it will, of its own motion, amend the complaint to make it conform to the case made, and the suit is decided against the plaintiff and no amendment is made, the plaintiff can not afterward be allowed to treat the complaint as amended.

Carpentier v. Brenham, 59 Cal. 549.

679a. A court can not determine a case without regard to the **form of the pleadings**. *Id.*

680. When the plaintiff **mistakes his remedy** and brings an action at law for damages, and his proper remedy is a bill in equity for an accounting, and leaves out a necessary party, but inserts some averments in the complaint which entitle him to some measure of equitable relief, the appellate court will not dismiss the action, but will send the case back, with leave to amend the complaint. *Blood v. Fairbanks*, 48 Cal. 171.

681. Where a complaint is amended (under section 474 of the code of civil procedure) by inserting the **true name of a defendant**, sued by a fictitious name, **service of a copy of the amended complaint** on such defendant is not required, nor is he entitled to ten days in which to answer. Section 472 of the code of civil procedure has no application to such a case.

Brock v. Martinovich, 55 Cal. 516.

682. When a party is sued by a **fictitious name**, upon the ground that the plaintiff was ignorant of the name of the defendant, under the sixty-ninth section of the practice act, the ignorance of the name must be real, and not **willful ignorance**, or such as might be removed by mere inquiry, or a resort to means of information easily accessible.

Rosencrantz v. Rogers, 40 Cal. 489.

683. If the court, during the trial, grants **leave to file an amendment** to the complaint, and it is filed before the argument is concluded, and there is nothing in the record to show that the other party was not present and consenting, the amendment will not be disregarded in the supreme court.

Reynolds v. Hosmer, 45 Cal. 616.

684. Courts should be **liberal in allowing** amendments to pleadings, to the end that cases may be fully and fairly presented upon their merits. Motions to amend are not, however, to be granted as matter of course, but only when good cause is shown therefor.

Hayden v. Hayden, 46 Cal. 333.

685. The plaintiffs should be permitted, if they desire, to so amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed.

McDonald v. B. R. & A. Co., 15 Cal. 145.

686. It is error to refuse to allow a plaintiff to strike out a **claim for damages**, without regard to the purpose which may influence him.

Grass V. Co. v. Stackhouse, 6 Cal. 413.

687. If the complaint avers the ownership of land in the bed of and near the banks of a stream, and work done thereon to dig a canal and build a dam to use the waters of the stream, and is framed for a judgment to recover possession of the property from one who

is averred to have ousted plaintiff, if the plaintiff asks it, he should be allowed to amend his complaint by inserting therein averments of his **prior appropriation of water** and a diversion by defendant, with prayer for an injunction.

N. & S. Co. v. Kidd, 28 Cal. 673.

688. An amendment should be allowed to a complaint at the request of the plaintiff, so as to make it express the **cause of action** originally intended but ambiguously expressed, if the intention is manifest on the face of the complaint. *Id.*

689. Unless **new matter** inserted in an amended complaint is entirely foreign to the cause of action in the original complaint, the question will not arise on motion to strike out, whether the amendments in the amended complaint go further than is allowed by our code of procedure touching amendments. *Id.*

690. Amendments to **conform pleadings to facts** where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity, if his pleadings had been properly framed, an amendment should be allowed, or directed to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits; and whenever this is not done, it is error. *Connalley v. Peck*, 3 Cal. 82.

691. A party has a right to have his pleadings amended, so as to conform to the proofs.

Tyron v. Sutton, 13 Cal. 494.

692. A complaint may be amended after a **verdict** and before judgment, so as to conform to the verdict.

Hooper v. Wells, 27 Cal. 35.

693. The plaintiff sued in assumpsit to recover rent for premises, the possession of which he previously recovered by ejectment against the defendant. After a **trial and verdict**, which was set aside by the court, he amended his complaint, to make in form an action of trespass for mesne profits: *Held*, that it was erroneous, and should not have been permitted.

Ramirez v. Murray, 5 Cal. 222.

694. An amended complaint may be filed **without prejudice to an injunction**, ordered and issued on the original complaint.

Barber v. Reynolds, 33 Cal. 497.

695. After the **motion for a nonsuit**, the court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant; but if this is not done, the plaintiff can not recover.

Farmer v. Cram, 7 Cal. 135.

696. If the plaintiff sues upon one only or upon two of the causes of action mentioned in the **forcible entry and detainer act**, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the court on its

own motion, or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony.

Valencia v. Couch, 32 Cal. 339.

697. A motion to amend a complaint does not come too late because made after the plaintiff has closed his testimony and the defendant moved for a **nonsuit**. A motion to amend is always in time when it immediately follows an objection to the complaint or answer. *Id.*

698. It is not error for a court to allow pleadings to be amended so as to supply a defect or omission, even after the **commencement of a trial**.

Gavit v. Doub, 23 Cal. 78.

699. **Fraud** discovered after suit brought will entitle the party to amend his action so as to include it.

Truebody v. Jacobson, 2 Cal. 269.

Matoon v. Eder, 6 Id. 57.

700. It would be proper for the court to order the complaint to be amended in an action where the defendant is arrested, so that the question of fraud should be submitted to the jury, and a judgment entered in conformity to the facts found.

Matoon v. Eder, 6 Cal. 57.

Davis v. Robinson, 10 Id. 412.

701. **Petitions in railroad proceedings** may be amended.

Contra Costa R. Co. v. Moss, 23 Cal. 325.

702. Under our practice act a complaint can not be amended in the **supreme court** so as to make it correspond with the verdict. The **district court**, in a proper case before judgment, may direct the complaint to be so amended.

Hooper v. Wells, 27 Cal. 35.

703. When a final judgment on demurrer to the complaint sustaining the demurrer is reversed, the plaintiff has the right to amend, on application to the court below.

Phelan v. San Francisco, 9 Cal. 15.

704. The **supreme court can not amend a complaint** so as to make it correspond with the verdict.

Hooper v. Wells, 27 Cal. 11.

705. Under our practice act a complaint can not be amended in this court so as to make it correspond with the verdict. The district court, in a proper case, before judgment, may direct the complaint to be so amended. *Id.*

Amendments after Demurrer Sustained.

706. The party desiring amendment after demurrer sustained must make his **motion to the court**, and can not object on appeal that he was not permitted to amend when he made no offer.

Smith v. Yreka W. Co., 14 Cal. 201.

707. Where the complaint is defective, the court should sustain the demurrer, with

leave to the plaintiff to amend his complaint, and if the plaintiff then declines, **final judgment** should be given.

Gallagher v. Delaney, 10 Cal. 410.

708. The defense relied on in the answer in this case being invalid, it was not error to refuse permission to **amend after judgment** sustaining a demurrer to the answer.

Gillan v. Hutchinson, 16 Cal. 153.

709. Where a demurrer to a complaint is sustained in the court below, and plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the supreme court, if it affirm the judgment, can not grant plaintiff leave to amend his complaint. *People v. Jackson*, 24 Cal. 630.

710. If a demurrer to the complaint is sustained, the plaintiff is entitled to leave to amend the complaint, unless the complaint is so defective that it can not be made good by any amendment. *Lord v. Hopkins*, 30 Cal. 76.

712. Demurrer sustained, and plaintiff amends by making **two counts instead of one**. He can not, after trial, complain of error in sustaining the demurrer.

Gale v. Tuolumne W. Co., 14 Cal. 25.

713. To **test the ruling** on the demurrer, he should have gone to trial on the pleadings, where the judgment on demurrer left them. *Id.*

714. If evidence is objected to because the **defense** under which it is offered is **defectively pleaded**, the court should allow the pleading to be amended.

Carpentier v. Small, 35 Cal. 346.

Clark v. Phenix Ins. Co., 36 Id. 168.

715. Amendments should be allowed with great **liberality** in all stages of the proceedings, unless the opposite party would thereby lose an opportunity to fairly present his whole case. *Kirstein v. Madden*, 38 Cal. 158.

716. When it appears on the trial that there is a **variance** between the proof and the complaint, and an objection to the evidence on that ground is made by the defendant, the court will, if an application is made, allow the complaint to be amended.

Bell v. Knowles, 45 Cal. 193.

717. Where an **action to recover a personal judgment for a tax**, commenced in a justice's court, is **transferred** to a district court, an amended complaint may be filed in the district court, to enforce a lien on real estate for the tax.

People v. Nelson, 36 Cal. 375.

718. The court should not allow the **prayer for relief** to be amended after verdict, so as to ask for further relief, unless the facts averred and issues joined justify it, and all those issues to which the further relief demanded relate have been fully litigated and fairly determined, and the additional relief has been asked in proper time.

N. C. & S. Co. v. Kidd, 37 Cal. 282.

719. The granting, after verdict, of greater relief than that prayed for in the complaint, either with or without an amendment of the prayer, is a matter resting in the sound discretion of the district court, and the appellate court will not interfere with that discretion, unless it is made to appear that it has been unsoundly exercised. *Id.*

720. If the court below refuses to allow the prayer of the complaint to be amended after a verdict for the plaintiff and judgment entered, the presumption is that it acted correctly, and that there were no facts proved to warrant a different judgment than that prayed for. The party asking the amendment should show affirmatively that the facts proved within the issues made will justify a different judgment than that prayed for and given. *Id.*

721. If the relief prayed for is appropriate to the facts alleged, the defendant has a right to assume that the case will be tried in accordance with the theory of the prayer; and where the case is so tried, it would work injustice to allow the prayer for relief to be amended after verdict, by inserting a prayer for other and different relief, that might be brought within some of the issues, without regard to the question as to whether such issues were actually tried and determined. *Id.*

722. It is not an abuse of discretion for the court to refuse to allow the defendant to file an amended answer to a verified complaint, which is evasive, which tenders only an immaterial issue, and which he does not verify, nor propose to verify.

Shepard v. McNeil, 38 Cal. 72.

723. A denial by the court, on the objection of the defendant, of a motion to amend the complaint by substituting a proper party for one improperly sued, will be considered as made at defendant's instance and with his consent, and he can not subsequently complain of a misjoinder or non-joinder of parties.

Fulton v. Cox, 40 Cal. 101.

724. Where persons are sued by fictitious names, judgment against them will not be binding unless the complaint be amended, as provided by section 69 of the practice act, by inserting their true names, so as to allege that they are the persons charged.

McKinlay v. Tuttle, 42 Cal. 571.

725. Where persons sued and served under fictitious names appear and answer the complaint, such answer is not a waiver of an amendment of the complaint describing them by their true names.

Bohannon v. Hammond, 42 Cal. 227.

726. When a final judgment on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend, on application to the court below.

Phelan v. San Francisco, 9 Cal. 15.

727. When a demurrer to a complaint is properly sustained, with leave to amend, and the plaintiff declines to do so, the judgment will not be reversed on appeal in order to allow an amendment. There must be error to justify a reversal of a judgment.

Sutter v. San Francisco, 36 Cal. 112.

Amendments to Answer.

728. In an action upon a promissory note, the case having been at issue for nearly two years upon the plea of payment, the defendant (upon affidavits) moved for leave to file an amended answer, alleging want of consideration: *Held*, that the lower court properly exercised its discretion in refusing to allow this amendment.

Page v. Williams, 54 Cal. 562.

729. Where a judgment in favor of defendant had been reversed by the supreme court, on the ground that certain material evidence, which had been received in his favor, was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection: *Held*, that as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the court.

Pierson v. McCahill, 22 Cal. 127.

730. When a party admits in his answer, under oath, a material allegation of the complaint, and the case is tried, and a judgment rendered, and a new trial afterwards granted by the supreme court, on the return of the cause to the court below the defendant should not be allowed to amend his answer by changing the admission into a denial.

Spanagel v. Reay, 47 Cal. 608.

731. There is no error in refusing to allow an answer to be amended, when the amendment is unnecessary, and the defendant can introduce all his evidence under the original answer.

Ferrer v. Home Mutual, 47 Cal. 416.

SUPPLEMENTAL PLEADINGS.

Supplemental Complaint.

732. Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment and merely praying for a distribution; and the plaintiff subsequently filed a supplemental bill, setting forth that in the mean time he had become a judgment creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to plaintiff's judgment: *Held*, that it is no objection to the supplemental bill, that it prays for a different relief, and fails to bring in all the other creditors, who are alleged by the defense to be entitled to a ratable distribution.

Baker v. Bartol, 6 Cal. 483.

733. The gravamen of both bills is the indebtedness, and every supplemental bill is enlarged or altered by every **additional and pertinent fact**, and the plaintiff has the right to attack the assignment for fraud discovered since filing his original bill. *Id.*

734. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendant, and in consequence the character of the **judgment** which is sought, can not be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action.

Van Maren v. Johnson, 15 Cal. 308.

735. When suit is brought against a female, who subsequently married, her **husband** must be made a **co-defendant**. But this should be done, and an averment of the marriage be made by a supplemental complaint, and not by an amendment to the original. *Id.*

736. If the husband be made a party at the trial, upon suggestion of the marriage, in open court, with the consent of all parties, by an order of court, and the complaint is then and there amended by simply inserting the names of the husband and wife in place of the female defendant alone, and they then file an answer, it can not be for the first time objected in the supreme court, that a supplemental complaint should have been filed. *Id.*

737. The action being for services rendered the defendant, wife, previous to her marriage, the liability of the common property of the defendants, and the necessity of making the husband a party, arise from the subsequent marriage; and as the orders and proceedings of the court, however informal and irregular, show the true facts of the case, the judgment will be a bar to any future action against the defendants for the same cause. *Id.*

738. A supplemental complaint can not be **filed after final judgment**, or to set up a **new cause of action**. Such a right can be exercised only with reference to matter which may be consistent with and in aid of the case made by the original complaint, and which occurred between the filing and the original complaint and the trial or judgment in the action. *Gleason v. Gleason*, 54 Cal. 135.

Supplemental Answer.

739. Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the **plea of payment** *puis darrein continuance*. *Jessup v. King*, 4 Cal. 331.

740. The objection, if it be one, that there is a **misjoinder of parties plaintiff**, owing to the matters which have occurred pending

the action, must be taken by a **supplemental answer**, or it is waived.

Calderwood v. Peyser, 31 Cal. 333.

741. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises **pending the litigation**, evidence of this fact can not be introduced, unless it is pleaded as a defense in a supplemental answer.

McMinn v. O'Connor, 27 Cal. 246.

742. In actions to recover lands, title acquired by defendants, *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrien continuance*.

Moss v. Shear, 30 Cal. 467.

743. The defendant can not prove, on the trial of an action of **ejectment** for the purpose of showing that plaintiff's right of possession has terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or a supplemental answer. *Id.*

744. **New matter** must be specially pleaded; and, in ejectment, a **transfer of title** by the plaintiff, or a title acquired by defendant, pending the action, must be pleaded by supplemental answer, or it can not be given in evidence. *Id.*

McMinn v. O'Connor, 27 Cal. 246.

745. If a supplemental answer contains a **recital** that it was filed by leave of the court, and it is a part of the judgment roll brought up by the plaintiff on his appeal, the appellate court will presume that there was an order of court allowing it to be filed.

Roper v. McFadden, 48 Cal. 246.

746. Where property of the defendant had been attached, more than four months before the filing of a petition in bankruptcy by him, and had been released by the giving of an undertaking under section 555 of the code of civil procedure: *Held*, that, had the property not been released, the plaintiff would have been entitled to a judgment for the enforcement of his **attachment lien**, and that he was equally entitled to the benefit of the undertaking given as a substitute for the property; that it was, therefore, not error in the court to refuse the defendant leave to file a supplemental answer, which might deprive the plaintiff of the benefit of the undertaking. *Harding v. Minear*, 54 Cal. 502.

747. A motion to file a supplemental answer is addressed to the sound legal **discretion** of the court; and its ruling, in allowing it, will not be regarded as error, unless there should be an abuse of discretion. *Id.*

SUBSTITUTION OF PAPERS OR PLEADINGS.

748. The substitution of papers, or pleadings in a case, is always within the discre-

tion of the court, and no notice of the motion to apply for it need be given, when the notice of it can be of no use.

Benedict v. Cozzens, 4 Cal. 381.

SUPPLYING THE PLACE OF A LOST PLEADING.

749. If a pleading in a pending action is lost, its place can only be supplied by motion based on affidavits, showing what the lost pleading contained, and a service of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended as well as to enable him to controvert the affidavits submitted.

People v. Cazalis, 27 Cal. 522.

VERIFICATION OF PLEADINGS.

See VERIFICATION.

SUBSCRIPTION OF PLEADINGS.

750. An attorney in fact, who is not an attorney at law, can not sign his name to a complaint for his principal as "plaintiff's attorney," and an action so commenced is void, as instituted without authority by an entire stranger to the plaintiff.

Dixey v. Pollock, 8 Cal. 570.

CONSTRUCTION OF PLEADINGS.

Generally.

751. Substantial justice spoken of in the statute is substantial legal justice, to be ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notion of equity which may be entertained by each individual.

Stevens v. Ross, 1 Cal. 95.

752. That averment which bears most strongly against the pleader will be taken as true.

Bell v. Brown, 22 Cal. 671.

753. In pleading, doubtful language is construed most strongly against the pleader.

Moore v. Besse, 30 Cal. 570.

Triscony v. Orr, 49 Id. 612.

754. The common law rule, that a pleading must be taken strongly against the pleader where the language used is ambiguous, has no application when the pleader confesses that his pleading is ambiguous, and asks to amend it.

N. & S. Co. v. Kidd, 28 Cal. 673.

Chipman v. Emeric, 5 Id. 49.

755. The allegations of a complaint must be construed most strongly against the pleader. A complaint that alleges he is in possession in one place, and in another avers that he is not, shows no cause of action.

Dickinson v. Maguire, 9 Cal. 46.

756. The rule requiring the pleading to be most strongly construed against the

pleader does not require such a construction to be given (if it will reasonably bear a different one) as will make the pleading absurd.

Marshall v. Shafter, 32 Cal. 176.

Lorraine v. Long, 6 Id. 452.

757. The allegation of ignorance in making the necessary averments, or of insufficient conduct, in the prosecution of a former suit, does not constitute ground for relief in chancery.

Barnett v. Kilbourne, 3 Cal. 327.

758. It is not sufficient in a pleading to state in general terms that a valuation of property is "unjust, disproportioned, and unequal," without stating clearly and distinctly wherein the alleged valuation is "unjust, disproportioned, and unequal."

Guy v. Washburn, 23 Cal. 111.

759. If the complaint contemplated a certain end, it equally intended the use of all the necessary means.

Adams v. Woods, 8 Cal. 306.

760. The allegation, that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, was the allegation of a contract; and this, plaintiff is bound to establish, to enable him to succeed.

Sampson v. Shaeffer, 3 Cal. 196.

761. An allegation in a complaint that the parties kept a saloon for the purpose of gaming and selling liquors and cigars does not raise the presumption that the gaming was necessarily unlawful, or that the saloon was a common gaming-house, as the word might apply to lawful games, such as billiards, etc.

Whitley v. Flowers, 6 Cal. 630.

762. Where in an action on a promissory note, the defense set up is that the defendant executed said note as the consideration for a deed from plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein, the defendant, if he would avoid payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights.

Tissot v. Throckmorton, 6 Cal. 471.

763. When a word has two meanings in law, differing in degree merely, it will be understood in its larger sense wherever it occurs in legal proceedings, unless it appears to have been used in its narrower sense.

Miller v. Miller, 33 Cal. 353.

764. Where there are several defenses in an answer, an admission made in one is not an admission for all the purposes of the case, or for the sake of the plea merely.

Siter v. Jewett, 33 Cal. 92.

765. Whether an answer states a purely legal or an equitable defense must be determined by the answer itself, and not from the findings of the court.

Bodely v. Ferguson, 30 Cal. 511.

766. It is presumed that the pleader states his case as favorably for his side of the controversy as the facts will justify; and hence the rule that his pleading must be construed **most strongly against him**, and that its ambiguities must be resolved against him.

Rogers v. Shannon, 52 Cal. 99.

767. The complaint, on its face, must show that the plaintiff has the **better right**, and the objection that it does not state facts sufficient to constitute a cause of action may be taken at any stage of the controversy. *Id.*

768. Allegations of **affirmative matter** in the answer, not supported by proof, will not entitle the defendant to relief, and will be disregarded by the court. *Id.*

769. An averment in a complaint in an action upon an **assignment** of part of an entire demand in these words, "of which said assignment the defendants have had due notice," is not an averment that the defendants assented to the assignment.

Grain v. Aldrich, 38 Cal. 514.

770. In construing a pleading it is not permissible to take an **isolated sentence**, separated from its context, and give effect to it as an independent averment, unless upon the whole pleading it appears to have been so intended. *Farish v. Coon*, 40 Cal. 33.

771. The **whole pleading** must be construed together; and it is not proper to eliminate a single paragraph from an answer, and give effect to it as a denial, when it appears from the context and other portions of it that the denial was intended to be hypothetical. *Aleman v. Petaluma*, 38 Cal. 553.

772. An allegation in complaint "that said defendant executed to this plaintiff a promissory note," is equivalent to an allegation "that defendant made his note payable to plaintiff;" and an averment that defendant executed to plaintiff his note in writing, includes and imports a **delivery** of the same to the plaintiff. *Hook v. White*, 36 Cal. 299.

773. The allegation in a complaint that the plaintiff "is the owner" of the land sued for is in substance an allegation of **seisin in fee**, in "ordinary," instead of in technical language. *Garwood v. Hastings*, 38 Cal. 216.

774. In an action on account of services rendered, where the complaint alleges the services were rendered between **two specified days**, items occurring on the two days mentioned are not within the allegations of the complaint. *Todd v. Myers*, 40 Cal. 355.

775. An allegation in a complaint in equity to set aside a **judgment for a tax**, that no notice was given of the proceedings or any of them which resulted in the judgment for the tax, is an allegation of law and not of fact. *Stokes v. Geddes*, 46 Cal. 17.

776. An allegation in a complaint that the plaintiff "assumed to and did exercise acts of control over and possession of por-

tions" of a tract of land is not equivalent to an averment that the plaintiff had **actual possession** of the tract of land, or any part of it. *Brennan v. Ford*, 46 Cal. 7.

Allegations in the Complaint, When Admitted.

777. The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt and alleged facts attending the transaction which, if true, avoided its effect as payment by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted on the pleadings and plaintiff had judgment: *Held*, that the judgment was erroneous; that the allegations of the complaint in reference to the transaction claimed to operate as payment were not **material allegations** requiring a denial, and were not therefore admitted by the failure of defendant to deny them.

Canfield v. Tobias, 21 Cal. 349.

778. An allegation in a complaint, not material to the statement of the plaintiffs' cause of action, is not admitted by a failure on the part of the defendant to deny it in his answer. *Id.*

779. If a defendant in his answer admits a material allegation in a complaint, he is afterwards precluded from contesting it.

Howard v. Throckmorton, 48 Cal. 482.

780. If the complaint alleges that the defendant wrongfully and unlawfully entered upon a building and closed up several windows, a denial in the answer that the defendant **wrongfully and unlawfully** entered upon the premises and closed up the windows is an admission that the defendant closed up the windows.

Larney v. Mooney, 50 Cal. 610.

781. If the answer in **replevin** admits the value of the property averred in the complaint, evidence should not be admitted as to its value. *Tully v. Harloe*, 35 Cal. 302.

782. Evidence is not admitted to **controvert facts** admitted by the pleadings.

Patterson v. Sharp, 41 Cal. 133.

783. All evidence contrary to the admission of the pleadings should be disregarded; the admissions being binding on the party making them. *Hall v. Polack*, 42 Cal. 219.

784. Although a party is bound by the admissions contained in his pleadings, yet it is only the admissions in the pleadings upon which he goes to trial.

Meehan v. McKay, 37 Cal. 154.

785. Upon the trial, every material allegation of the complaint **not specially controverted** is to be taken as true, but if the defendant supposed he had denied material allegations, and the court sustained his view of the answer, the appellate court, when it reverses the judgment, may allow the court below to exercise its discretion in permitting the answer to be amended.

Fish v. Redington, 31 Cal. 186.

786. A **frivolous answer** is one which denies no material averment in the complaint, and sets up no defense; and when such an answer is filed the plaintiff may apply for judgment on the pleadings.

Hemme v. Hays, 55 Cal. 337.

787. Plaintiff declared on a **special contract** to pasture one hundred and forty-seven head of cattle at one dollar per head per month, for a given time, amounting to three hundred and forty-three dollars. Defendant, in his answer, admitted the contract so far as the number of cattle pastured were concerned, but alleged that they were to be pastured in a particular field, and that plaintiff did not pasture them in that field, but in another, where the pasturo was poor, and that by this breach of the contract he sustained five hundred dollars damages, which he claimed to recoup. The evidence was confined to the breach of the contract as alleged. The jury found for the plaintiff one dollar damages: *Held*, that the verdict was not supported by the evidence, and that if plaintiff obtained a verdict he was entitled to the full amount claimed in his complaint.

Seale v. Emerson, 25 Cal. 203.

788. Unless the answer denies the allegations of the complaint they are **admitted without further proof**, and constitute conclusive evidence of the extent of the damages claimed.

Patterson v. Ely, 19 Cal. 28.

789. The **failure to deny** a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader.

Blankman v. Vailejo, 15 Cal. 638.

Burke v. Table Mt. Co., 12 Id. 403.

790. A **specific denial** of one or more allegations is held to be an admission of all others well pleaded.

De Ro v. Cordes, 4 Cal. 117.

791. An **admission by an attorney** of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in an answer.

Taylor v. Randall, 5 Cal. 79.

792. Where the **admissions** in an answer **negative** its **general denials**, the latter may be disregarded, and judgment asked upon the former, where the complaint is verified, and the answer consists of such admissions and denials.

Fremont v. Seals, 18 Cal. 433.

793. When the action is upon an account, and defendant in his answer avers, in the form of reasons, for refusing payment when the account was presented to him before suit, that the principal portion was composed of items for printing done for clients, for which he never became personally bound, and that the portion for which he was personally liable "has, to the best of his knowledge and belief," been paid and satisfied, and therefore he pleads payment of the same: *Held*, that this is in substance a **denial of indebtedness** for a portion of the account, and a plea of payment for the balance; and that it is in effect an admission as to that balance of an original liability, and throws the burden of establishing payment upon the defendant. Caulfield v. Sanders, 17 Cal. 569.

794. A denial that property sued for is of the **exact value** alleged in the complaint is an admission of any lesser value.

Towdy v. Ellis, 22 Cal. 650.

795. The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiffs, will throw the **onus on defendant** in proving his affirmative allegations.

Thompson v. Lee, 8 Cal. 275.

796. If the complaint is sworn to, a **general denial** in the answer admits all its material allegations.

Pico v. Colimas, 32 Cal. 578.

797. An allegation in a sworn answer that "on the twenty-fourth day of March, 1862, the said French and Robinson, by deed duly executed, acknowledged, and recorded, conveyed said premises to this defendant for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum." Such denial is a mere denial that French and Robinson conveyed the premises, without denying the facts which constitute the conveyance; besides, it does not deny the conveyance, the material fact, but only a conveyance for a consideration. Under such denial the party making the averment is not required to offer his **deed in evidence** on the trial. The allegation of the answer is deemed admitted under the provisions of the statute. Landers v. Bolton, 26 Cal. 393.

798. Where certain allegations in a verified complaint are compound, embracing several particulars, and are **denied as a whole** in the language of the complaint, the allegations will be taken as admitted.

Blood v. Light, 31 Cal. 115.

799. After an admission of the indebtedness charged in a complaint in assumpsit, a denial of the alleged promise to pay is immaterial. From the **indebtedness admit-**

ted the law implies a promise to pay, and the denial of any express promise raises no issue that requires proof on the part of the plaintiff. *Levinson v. Schwartz*, 22 Cal. 229.

800. Where a complaint avers that plaintiff did certain work in consideration of a promise by the defendant, an answer denying that plaintiff did the work, but not claiming that it was done upon any other consideration than the promise, raises no issue, except as to the performance of the work, and requires no proof from plaintiff as to the consideration upon which it was performed. *Mathewson v. Fitch*, 22 Cal. 86.

801. If the damages claimed in the complaint are admitted, no proof is required.

Tuolumne R. Co. v. Patterson, 18 Cal. 415.

Dimick v. Campbell, 31 Id. 238.

802. Where a lessor sues to enjoin the lessee from taking the bricks from and destroying a brick building erected by the lessee on the lot leased, the tenant claiming the right to remove the building under the terms of the lease, and claims damages in the sum of one thousand dollars, and the answer makes no denial of the damages, and no proof thereof is offered, and the court, after hearing, grants the injunction, but refuses a judgment for damages: *Held*, that plaintiff was entitled to recover his damages; that such form of suit is an unobjectionable mode of concluding the entire controversy.

Jungerman v. Bovee, 19 Cal. 354.

New Matter.

803. For the purpose of determining whether new matter contained in an amended complaint is entirely foreign to the cause of action contained in the original complaint, the original complaint must receive liberal construction. *N. & S. Co. v. Kidd*, 28 Cal. 673.

Written Instrument, When Deemed Admitted as Genuine.

804. Section 53 does not extend to other parties than those who are alleged to have "signed" the instrument.

Heath v. Lent, 1 Cal. 411.

805. Where, in action against an administrator, the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary, under the statute, that the administrator should deny the signature of the intestate on oath. It must be proved. *Id.*

806. If the complaint contains a copy of the written instrument sued on, and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature.

Corcoran v. Doll, 32 Cal. 83.

Horn v. Vol. W. Co., 13 Id. 62.

Sac. Co. v. Bird, 31 Id. 66.

Burnett v. Stearns, 33 Cal. 468.

807. When it is found or admitted that the note upon which the suit is brought was made by the alleged maker, all the terms of the promise, including the kind of money in which payment is to be made, is to be ascertained by an inspection and construction of the instrument.

Burnett v. Stearns, 33 Cal. 468.

808. In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all.

Kidney v. Osborne, 14 Cal. 112.

When not Admitted.

809. Proceedings which are void, by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal.

People v. Hastings, 29 Cal. 449.

Effect of Admissions.

810. The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument.

Lee v. Evans, 8 Cal. 424.

811. No proof is required of facts admitted or not denied.

Patterson v. Ely, 19 Cal. 28.

Landers v. Bolton, 26 Id. 416.

Errors or Defects in Pleadings.

812. The seventy-first section of the practice act, requiring the courts to disregard errors not affecting substantial rights, applies to errors of description in a pleading as well as to errors in other respects.

Peters v. Foss, 20 Cal. 586.

813. Thus, where in an action on a verbal contract, the complaint alleged several distinct promises on the part of defendants which were denied by the answer, and on the trial the plaintiff introduced no proof, except as to one of the promises: *Held*, that this was not ground for nonsuit; that the provisions of the practice act above referred to require a relaxation of the common law rule respecting a variance, and that, it being apparent the defendants were not surprised or prejudiced by the failure of proof, the error in stating the agreement should have been disregarded. *Id.*

814. A judgment will not be reversed on the ground of variance between the pleadings and proof when the variance does not mislead the appellant to his prejudice.

Began v. O'Reilly, 32 Cal. 11.

815. The seventy-first section of the practice act, requiring imminent variances

between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be literally construed and carried out.
Id.

816. In an action against a **common carrier** for not complying with a contract to carry or deliver a draft, the complaint alleged that it was signed "John Q. Jackson;" the proof showed that it was signed "John Q. Jackson, agent;" *Held*, that the variance was immaterial.

Zeigler v. Wells, 28 Cal. 263.

817. If the answer sets up as a defense, in an action on a bill of exchange, a **total failure of consideration**, and the proof shows a **partial** only, the variance is not an available one under our practice.

Plate v. Vega, 31 Cal. 383.

818. If, in the progress of a trial, **evidence** is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, this **error is waived**, and the court may instruct the jury in relation to the whole field of inquiry covered by the evidence.

Boyce v. Cal. Stage Co., 25 Cal. 460.

819. The designation of a contract by an **improper term** can not be allowed to take away a substantial right where all the circumstances attending it are fully detailed.

Godeffroy v. Caldwell, 2 Cal. 489.

820. If a **policy of insurance** contains a clause that if the assured keep gunpowder, the same shall be void, and the complaint avers that the plaintiff faithfully complied with the terms of the policy, and the answer does not deny the same, nor set up as new matter the keeping of gunpowder as a defense, the fact that gunpowder was kept can not be insisted on as a defense.

Cassacia v. Phenix Ins. Co., 28 Cal. 628.

MOTIONS TO CORRECT OR STRIKE OUT PLEADINGS.

Irrelevant, Redundant and Immaterial Matter.

821. It is only irrelevant and redundant matter which may be stricken from a pleading by virtue of the provisions of section 453, code of civil procedure.

Jackson v. Lebar, 53 Cal. 255.

Complaint.

822. A complaint, whatever may be the character of relief sought, must state only issuable facts and not mere **matters of evidence**. Where this rule has been violated, a motion by defendant to strike out the irrelevant matter should be sustained.

Green v. Palmer, 15 Cal. 411.

Bowen v. Aubrey, 22 L.L. 563.

823. **Immaterial matter** should be stricken out.

Larco v. Casaneuava, 30 Cal. 560.

824. **Averments of deraignments** of title in a complaint in ejectment should be stricken out.

Id.; Willson v. Cleaveland, 30 Cal. 192.

825. Every **fact not essential** to the claim or defense, should be stricken out.

Green v. Palmer, 15 Cal. 411.

826. A motion, made to strike out portions of a complaint that does not **specifically point** out the objectionable matter, is too general, and the court might properly deny the motion on that ground.

People v. Empire M. Co., 33 Cal. 171.

827. **Superfluous matter** in a complaint, when inserted by itself, should be struck out or disregarded, as surplusage.

Boles v. Cohen, 15 Cal. 150.

828. Where the **husband and wife** are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife as plaintiff was mere surplusage, and not a defect of parties under the code, and might have been stricken out on notice, if insisted.

Warner v. Str. Uncle Sam, 9 Cal. 697.

829. If a complaint be based upon a **written contract**, a correct copy of which is attached to and made a part of the complaint, and if the averments of the complaint put a false construction in law upon the terms of the contract, the complaint will not for that reason be bad, but the erroneous allegations will be regarded as surplusage.

Stoddard v. Treadwell, 26 Cal. 204.

830. Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action.

N. & S. Co. v. Kidd, 28 Cal. 673.

831. **Allegations** in a complaint which are **absurd**, and the truth of which is impossible, and which are inconsistent with other allegations in the same complaint, may be disregarded as surplusage.

Sacramento v. Bird, 31 Cal. 66.

833. Where certain material averments of the plaintiff's complaint were so defectively denied that, upon motion, such denials might properly have been **stricken out as sham** and irrelevant, yet without such objection made thereto the plaintiff introduced proof at the trial in their support: *Held*, that by introducing said proof the plaintiff **waived** all objections to the sufficiency of said denials, and the court properly refused an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of said trial. Tynan v. Walker, 35 Cal. 634.

534. If the plaintiff had regarded said

denials as insufficient, and desired to take advantage of the fact, he should have moved to strike them out on the ground that they were sham and irrelevant. Under the provisions of section 50 of the practice act, denials contained in an answer, which do not explicitly traverse the material allegations of the complaint, may be stricken out, on motion, as sham and irrelevant. *Id.*

835. It is error in the court to strike out a counter claim in an answer, without a motion being made for that purpose.

Curtis v. Sprague, 41 Cal. 55.

836. A replication, setting up the statute of limitations to a counter claim contained in an answer, does not authorize the court to strike out the counter claim. *Id.*

837. A demurrer to a replication, filed to a counter claim set up in an answer, is not equivalent to a motion to strike out the counter claim. *Id.*

838. A motion to strike out portions of a pleading admits only those averments contained in said portions which are well pleaded.

O. & V. R. Co. v. Plumas, 37 Cal. 354.

839. An averment of a fact constituting the plaintiff's cause of action can not be said to be irrelevant or redundant to itself.

Jackson v. Lebar, 53 Cal. 253.

840. It is error to refuse to allow a plaintiff to strike out a claim for damages without regard to the purpose which may influence him. This is a privilege which is never denied, whether the question be one of jurisdiction or otherwise.

Grass V. M. Co. v. Stackhouse, 6 Cal. 413.

Answer.

841. In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified, may be stricken out on motion; and application for judgment, as upon a default, may be made at the same time.

Drum v. Whiting, 9 Cal. 422.

842. Inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, but can not avail in resisting a motion to strike out, and for judgment after the answer is filed. *Id.*

843. A verified answer which in any part contains a distinct denial of a fact material to plaintiff's recovery, can not, whatever its defects, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings.

Ghirardelli v. McDermott, 22 Cal. 539.

844. An answer denying a conclusion of law should be stricken out on motion as irrelevant, and plaintiff is entitled to judgment on the pleadings, even if there is an

averment in it, that the action is not prosecuted in the name of the real party in interest, and that another person owns the note.

Wedderspoon v. Rogers, 32 Cal. 569.

845. Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defenses ought not to be struck out.

Wallace v. B. R. Co., 18 Cal. 461.

846. In a proceeding against a board of supervisors, in its corporate capacity, to procure a writ of mandate, the answer of one or more than one of the supervisors in his or their own name or names, whether as supervisor or otherwise, can not be regarded as the answer of the board, and, on motion, will be stricken from the files of the court.

People v. Sups. S. F., 27 Cal. 655.

847. In such case the answer should be in form the answer of the board in its aggregate capacity. *Id.*

848. In such case, if an answer is filed in due form as the answer of the board, the presumption is that it is the answer of the board; and the fact that it was sworn to by one member of the board does not make it his answer, nor is it necessary that such answer should aver that the board by resolution adopted it. *Id.*

849. In such case, if two answers are filed, each in form the answer of the board, the court may ascertain which is the return of the majority. *Id.*

851. If the defendant files his answer at the same time he does his demurrer, the court, after overruling the demurrer, has no right to strike out an answer which raises a defense, because the defendant fails to pay the plaintiff twenty dollars, required by a rule of court to be paid for the privilege of answering when a demurrer is overruled.

People v. McClellan, 31 Cal. 101.

852. If an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it can not then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.

Abbott v. Douglas, 28 Cal. 295.

853. An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment roll. *Id.*

854. If the answer has the signature of the attorney of record, and that of an associate attorney attached to it, the court will not strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority.

Willson v. Cleaveland, 30 Cal. 192.

Answer Filed after the Time for Answering Expired.

855. An answer filed without leave of court after the time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity.

Bowers v. Dickerson, 18 Cal. 420.

856. The court in its discretion may strike it out or retain it, or permit another to be filed; but plaintiff can not, as of right, have such answer struck out. For these purposes defendant is not in default until his default has been actually entered in accordance with the statute. *Id.*

857. When plaintiff moves on affidavit to strike out a defense as "sham," the affidavit of defendant that his defense is *bona fide* will defeat the motion.

Gestorfs v. Taaffe, 18 Cal. 385.

See *Weidenspoon v. Rogers*, 32 Cal. 569, where all the authorities are collected.

858. A demurrer can not be stricken out on motion as a sham and irrelevant defense. A demurrer can be disposed of in no other way than by the regular mode.

Larco v. Casaneuva, 30 Cal. 560.

Insufficient Denials.

860. Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham.

Gay v. Winter, 34 Cal. 153.

861. If some of the denials are deemed good and the others bad, he may move to strike out the latter. Answers consisting of denials, which do not explicitly traverse the material allegations of the complaint, are sham and irrelevant within the meaning of the statute. *Id.*

862. The complaint alleged the making of a note and the indorsement thereof, and the answer was a general denial in the terms of the old general issue in assumpsit, that the defendant undertook and promised, in manner and form, etc.: *Held*, that the plaintiff would have been entitled to judgment on a motion in the court below to strike out the answer as a nullity.

Grogan v. Ruckle, 1 Cal. 193.

863. If any fact not essential to the claim or defense—in other words, any except issuable facts be stated—the adverse party may move to strike out the unessential parts.

Green v. Palmer, 15 Cal. 411.

864. Unless now matter, inserted in an amended complaint, is entirely foreign to the cause of action in the original complaint, the question will not arise on motion to strike out, whether the amendment in the amended

complaint go further than is allowed by our code of procedure touching amendments.

N. & S. Co. v. Kidd, 28 Cal. 673.

Inconsistent Defenses.

865. If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system.

Uridias v. Morrell, 25 Cal. 31.

Klink v. Cohen, 13 Id. 623.

Election of Counts.

866. When the defendant is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint with the notice of his election.

Willson v. Cleveland, 30 Cal. 192.

JUDGMENT ON THE PLEADINGS.

867. If an answer in abatement is found true, the judgment should not be in bar, but that the suit abate.

Larco v. Clements, 36 Cal. 132.

868. Whenever the answer fails to deny any of the material allegations of the complaint in such form as to put the same in issue, the plaintiff is entitled to judgment upon the pleadings.

Doll v. Good, 38 Cal. 287.

869. In a suit on an undertaking as a substitute for property ordered to be levied upon by virtue of a writ of attachment, where the complaint states all the facts necessary to constitute a cause of action, and such facts are substantially admitted or not sufficiently denied in the answer, the plaintiff is entitled to judgment on the pleadings.

Fitzgibbon v. Calvert, 39 Cal. 261.

870. In an action to quiet title, where the answer admits that the plaintiff is in possession of a portion of the premises sued for, and denies his possession of the remainder, the plaintiff can not recover judgment upon the pleadings for that portion of the premises not admitted to be in his possession.

Espinosa v. Gregory, 40 Cal. 58.

871. Where facts showing the illegality of a contract sued upon are sufficiently alleged in the answer, the plaintiff can not recover upon the pleadings, although such facts are not pleaded or insisted upon as a defense.

Prost v. More, 40 Cal. 347.

872. If the complaint be sufficient, judgment may be rendered on the pleadings where the answer expressly admits the material facts stated in the complaint, or leaves them undenied, or merely sets up new matter in defense which is found substantially insufficient to debar or defeat the action.

Felch v. Beaudry, 40 Cal. 439.

873. Where a motion is made by the plaintiff for judgment on the pleadings, if the defendant intends to abandon his answer and substitute another one in its stead, he must make his application for leave before judgment is ordered; if he wait till after the time, a denial of the application involves no abuse of the discretion of the court. *Id.*

874. Where the original answer presents no defense, and judgment is rendered on the pleadings on motion of the plaintiff, it is an abuse of its discretion for the court to refuse leave to the defendant to file a sufficient amended answer. *Id.*

875. The ground upon which a motion made by plaintiff for judgment on the pleadings proceeds in any case is that his complaint is sufficient to warrant it, and that the answer presents nothing, either by way of denial or of new matter, to bar or defeat the action. *Id.*

876. If the allegations of the complaint are not denied in the answer, the plaintiff, if he desires judgment on the pleadings, should move for it before introducing evidence to support the complaint.

Tevis v. Hicks, 41 Cal. 123.

877. If, in an action to enjoin the destruction of a ditch, the complaint avers the ownership by plaintiffs of the ditch for the conveyance of water, and that the ground over which it passes was vacant and unoccupied when it was dug, and that plaintiffs have used it for years for mining purposes, and the answer does not deny these allegations, nor set up any prior right of the defendants to the ground over which it passes, nor any claim or right of defendants to destroy it by reason of any custom, the court should not, by its judgment, limit or restrain the right of the plaintiffs in the use of its ditch, but on the pleadings should enjoin the defendants from destroying or interfering with the same, regardless of the testimony.

Gregory v. Nelson, 41 Cal. 278.

878. If the complaint on a promissory note, without being verified, contains a copy of the note, and avers that it has not been paid, a general denial in the answer puts in issue the facts of payment, and the plaintiff is not entitled to judgment on the pleadings.

Davanay v. Eggenhoff, 43 Cal. 395.

879. If the answer contains new matter, which, if true, would entitle the defendant to judgment, and the parties stipulate that "all, if any, new matter pleaded in avoidance shall be taken as proven," the stipulation entitles the defendant to a judgment. *Pond v. Davenport, 45 Cal. 225.*

880. In an action to decide a contest concerning the rights of parties to purchase state lands, wherein the complaint is insufficient to authorize a judgment for plaintiff,

and the answer sets up affirmative matter requiring proof, and the cause is submitted on the pleadings without the introduction of any evidence: *Held*, that the cause stands as though it had been submitted on the complaint alone, which, though insufficient to entitle the plaintiff to relief, can not of itself be made the basis of affirmative relief to the defendant.

Rogers v. Shannon, 52 Cal. 99.

881. The defendant in such case may have judgment for costs. *Id.*

882. Judgment can not be rendered on the pleadings, on motion of the plaintiff, if the answer contains a denial of the material allegations of the complaint, even if the answer sets up a special defense, separately stated, which admits the allegations denied.

Amador v. Butterfield, 51 Cal. 526.

883. If the answer contains a denial of the material facts alleged, as a cause of action in the complaint, and a special defense, stated separately, the plaintiff is not entitled to a judgment on the pleadings, even if the entire cause of action is confessed in the special defense. *Nudd v. Thompson, 34 Cal. 39.*

RULES APPLICABLE TO PARTICULAR ALLEGATIONS, SUBJECTS, PERSONS, CAUSES OR FORMS OF ACTION, AND DEFENSES.

Account.

884. The complaint in this case alleging that plaintiff and defendant are members of a joint stock company known as the "Miner's ditch company;" that defendants exclude plaintiff from participation in the business or benefit from it; that they have received large sums of money from the same, and refuse to account or pay him anything, etc., entitles plaintiff to a relief by a decree affirming his interest, and directing an account.

Smith v. Fagan, 17 Cal. 178.

885. In an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint, and proved at the trial.

Bushnell v. McCauley, 7 Cal. 421.

886. A complaint in an action for an accounting, touching the affairs, rents, and proceeds of a water ditch, and for a sale of the property and a division of the proceeds, which first avers in general terms a copartnership between plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient to constitute a cause of action, either for a dissolution and settlement of

the affairs of a partnership, or for a partition. *Bradley v. Harkness*, 26 Cal. 69.

887. If the complaint counts only on a balance due upon an open, a mutual, and current account, the plaintiff can not recover a sum due on a special contract in relation to a matter not included in the mutual account. *Hopkins v. Orcutt*, 51 Cal. 537.

Agency.

888. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as agent of the defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer.

Cochran v. Goodman, 3 Cal. 244.

889. If the complaint charges that the defendant maliciously and violently assaulted the plaintiff and struck him on the head with a heavy club, and the answer admits that the defendant struck the plaintiff with a "fence pole," it is an admission that the defendant struck the plaintiff substantially as charged, but not an admission of the alleged malice accompanying the blow.

Baker v. Hope, 49 Cal. 598.

Assignment.

890. Where a party sets up in his pleadings an assignment to him of a contract made with another, he must allege a probative transfer, and the character of it.

Stearns v. Martin, 4 Cal. 227.

Arrest.

890a. Complaint, in cases of, see ARREST AND BAIL.

Attorney.

891. In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained. But if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error.

Covillaud v. Yale, 3 Cal. 108.

892. In proceedings in bankruptcy, the legal title to the property of the bankrupt vests in the assignee, and in an action brought by the assignee to recover the assets of the bankrupt, it is not necessary to aver in the complaint, the bankruptcy of the bankrupt, nor the appointment of the plaintiff as assignee; but it is sufficient to allege that the plaintiff owns the property. The facts by which the assignee acquired the property are not ultimate, but probative facts.

Dambmann v. White, 48 Cal. 439.

Bills of Exchange and Promissory Notes.

Complaint.

893. In an action against the maker of a note, or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay.

Montgomery v. Tutt, 11 Cal. 307.

894. A declaration is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice.

Lightstone v. Laurencel, 4 Cal. 277.

895. An indorser of a note payable on demand, no demand being made until thirteen months after the indorsement to plaintiff, is *prima facie* not liable. The delay is unreasonable. In such case, facts to excuse the delay are an essential part of the complaint, and if not averred therein, it is insufficient. *Jerome v. Stebbins*, 14 Cal. 457.

896. A complaint in an action commenced after the death of the husband, on a note and mortgage executed by the husband and wife, during the life of the husband, does not state a cause of action, unless it aver that the husband in his life-time failed to pay the note.

Brown v. Orr, 29 Cal. 120.

897. In an action on a promissory note, an allegation in the complaint that no "part of said note, principal or interest, has been paid," is a sufficient averment of a breach.

Jones v. Frost, 28 Cal. 245.

898. In a complaint upon a promissory note, an allegation of its non-payment is material, and if omitted, the complaint is demurrable. The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law.

Frish v. Caler, 21 Cal. 71.

899. If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial.

Corcoran v. Doll, 32 Cal. 82.

900. In a complaint on a promissory note, it is not necessary that a consideration should be specially alleged. If there is no consideration, the defendant should set up the want of it as a defense.

Winters v. Rush, 34 Cal. 136.

902. The complaint in an action on a promissory note set out in *hæc verba* and averred "that said note had not been paid, nor any part thereof," etc.; the answer thereto denied that said note had not been paid, and further denied "that there is due to the plaintiff on said note any sum of money or anything." *Held*, that said denials were of immaterial averments only; that said answer

raised no issue, and might properly have been stricken out on motion as **sham** and irrelevant. *Hook v. White*, 36 Cal. 299.

903. In an action on a promissory note by an indorsee, the fact of the **indorsement** only need be pleaded to show title in the plaintiff, and an averment in the answer that the plaintiff is not the legal owner or holder of the note is but a legal conclusion, and raises no issue of fact; and so an averment in the complaint that plaintiff is the owner and holder of the note and entitled to receive the money due thereon, presents no issuable fact, and will be treated as **surplusage**.

Poorman v. Mills, 35 Cal. 118.

905. A complaint on a promissory note should allege that the **note remains due and unpaid**. Without such allegation it does not state facts sufficient to constitute a cause of action.

Davanay v. Eggenhoff, 43 Cal. 395.

Answer.

906. The failure to make **presentment** at the place named would not discharge the debt, but could only be pleaded in defense as to the question of costs and damages.

Montgomery v. Tutt, 11 Cal. 307.

907. Where a complaint, in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note: *Held*, that the averment of **partnership** was immaterial, and that plaintiff was entitled to judgment on the pleadings.

Whitehall v. Thomas, 9 Cal. 499.

908. The execution of the notes, not the copartnership of the defendants at the time, constituted the material averment. *Id.*

909. It is no **defense** to a note, given by one partner to the other for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of the partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note.

Case v. Maxey, 6 Cal. 276.

910. As such a division has nothing to do with the **consideration** of the note, it can not be set up as a counter claim or defense to the action on the note. *Id.*

911. If the defendant has been deceived in the division of the stock, he should file his bill for a **discovery and account**. *Id.*

912. When such defense was set up in the answer in an action on the note: *Held*, that all of the answer, except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out. *Id.*

913. The fact that one of two obligors of a joint and several promissory note delivered to the payee, at the time of its execution, certain property, with instructions to sell it and apply the proceeds to the payment of the note, which property was received by the payee upon the terms specified, does not operate as **payment** of the note, or work a suspension of the right of the payee to enforce its payment by suit against the other obligor, according to its terms; and where to such action by the payee the defendant, by way of defense, set up in answer said facts, and, in addition, that the plaintiff had never returned said property nor accounted for the same or the proceeds of the sale thereof: *Held*, that said matters constituted no defense.

Hook v. White, 36 Cal. 299.

914. Where, as a **separate defense**, and disconnected with any averment that the money was her separate property, it is averred that before the commencement of the action defendant had fully paid and discharged the note by payment thereof to the wife of the payee, the averment is as insufficient to bar the action, as a plea that the defendant had paid the money to any other stranger who had no authority to receive it.

Felch v. Beaudry, 40 Cal. 439.

915. Where the payor of a note is not the trustee of the wife of the payee nor charged with the care of her estate, it is no defense in action to recover on the note, that the consideration mentioned therein was a conveyance of the **separate property** of the wife, and that her husband was endeavoring to defraud her out of it by recovering for himself in such action. *Id.*

916. The fact that, contemporaneously with a promissory note, a **parol agreement** was made, that the note should be payable only out of the surplus arising from the sale of goods assigned to the payor, as security for a debt due him, it appearing no such surplus has arisen, is no defense in a suit on the note.

Guy v. Bibend, 41 Cal. 322.

917. An answer to a complaint on a promissory note, which denies that the note remains unpaid, and that anything remains due thereon, raises an issue which devolves on the plaintiff the **onus** of proving **non-payment**, by production of the note or otherwise. *F. & M. B. v. Christensen*, 51 Cal. 571.

918. An answer to a complaint on a note which avers that the note was satisfied on the day it became due by payment to the original holder without notice of any assignment, raises an issue, even if the suit is brought by an assignee. *Id.*

919. The doctrine of *Grogan & Lent v. Ruckle*, 1 Cal. 158, that where an action is brought by an indorsee against the maker of a promissory note, it is not necessary that

the latter should deny the **indorsement** under oath, reconsidered and affirmed.

Grogan v. Ruckle, 1 Cal. 193.

920. A party is not required to deny an indorsement under oath.

Young v. Bell, 4 Cal. 201.

921. An answer to suit on a promissory note by the **assignee**, which sets up as one defense, first, that the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" instead of the word "order;" second, that the defendant paid the note before assignment; third, note was assigned to plaintiff after maturity, etc.: *Held*, sufficient as a defense.

Sherman v. Rollberg, 11 Cal. 39.

922. If the complaint in an action by the assignee of a promissory note against the maker avers that the note was assigned to the plaintiff for a valuable consideration before maturity, and is sworn to, an answer which denies that the note was for a valuable consideration indorsed and delivered by the payee to the plaintiff before maturity, or at any other time, does not put in issue the fact of the assignment before maturity; but if it puts in issue anything, it is only the allegation that the assignment was made for a valuable consideration.

Morrill v. Morrill, 26 Cal. 288.

923. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a **surety**, he can not set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest.

Kritzer v. Mills, 9 Cal. 21.

924. Where, in an action on a **lost note**, a verified complaint alleges that on a particular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time.

Castro v. Wetmore, 16 Cal. 379.

925. Where, in an action on a **lost note**, the complaint, verified, alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Id.*

926. If the complaint, not verified, set out the note, and avers **assignment** thereof by payee to plaintiff; answer, general denial: *Held*, that the answer does not admit, but denies the assignment, and hence, the plaintiff must prove it, and is not entitled to judgment on the pleadings.

Hastings v. Dollarhide, 18 Cal. 390.

927. In defense to an action on a promissory note, it is not sufficient to plead, in general terms, **want of consideration**, and that the note was obtained by fraud; the answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud.

Gushee v. Leavitt, 5 Cal. 160.

928. It is not a good plea to allege that a note sued on is the **property of another**, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff. *Id.*

929. Where the pleadings are verified and the complaint contains an allegation that the note in suit was assigned by the payee to the plaintiff for a valuable consideration by an instrument in writing, the fact of the **assignment** is not put in issue by a denial that the assignment was in writing and for a valuable consideration.

Randolph v. Harris, 23 Cal. 561.

930. If the complaint in a suit on a note avers that the defendant made and delivered the note to the plaintiff, and that the plaintiff is still the **owner and holder**, the allegation that plaintiff is the owner and holder is but a conclusion of law, and an answer denying it, but admitting the other allegations of the complaint, raises no material issue.

Wedderspoon v. Rogers, 32 Cal. 569.

931. Where, to an action upon a promissory note, an **agreement of composition** between the debtor and his creditors, including the plaintiff, is relied upon as a defense, such agreement must be specially pleaded, and can not be considered under a plea of accord and satisfaction by the giving of new notes. *Smith v. Owens*, 21 Cal. 11.

932. If a defendant would resist the payment of a promissory note, given for mining stock, on the ground that the seller made **fraudulent representations**, as to the value of the mine, the answer should set up the defense, and aver either that the stock was valueless to either party, or that the defendant had offered to return it and rescind the contract. *Gifford v. Carvill*, 29 Cal. 389.

Breach, Assignment of.

933. A complaint, alleging that the defendants sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a warranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, should have contained an assignment of the breach of the guaranty.

Dabovich v. Emeric, 7 Cal. 209.

Certiorari.

934. A complaint which avers that plaintiff

iff is the owner of a ferry franchise over a stream, and that the board of supervisors have granted license to another person to establish a ferry within less than one mile of plaintiff's ferry, without having published the notice required by statute; and that such ferry is not required by public convenience, nor rendered necessary by the intervention of any creek or ravine; and that the reason given by the board, in their minutes, for granting the license, was, that no legal excuse was shown why it should not be granted, states sufficient facts to authorize the issuance of a writ of certiorari.

Murray v. Mariposa, 23 Cal. 492.

See CERTIORARI.

Claim and Delivery.

935. If the complaint, in an action to recover the possession of personal property, avers that the "plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner, and entitled to the possession of the property." Richardson v. Smith, 29 Cal. 529.

936. In an action for the recovery of personal property, the complaint alleged ownership and a taking by defendant; and the defendant in his answer denied the ownership, and justified the taking, under an execution issued to him as sheriff, against one L.: *He'll*, that the defendant was not bound to anticipate the case of the plaintiff, or to assume that he claimed as vendee of L., and that the answer averred all that was necessary to make up the material issue.

Grum v. Barney, 55 Cal. 254.

937. In an action for the claim and delivery of personal property, the plaintiff should not state in his complaint the particular facts upon which he claims the title and right of possession to be in him, and wrongful detention, and also aver the particular facts upon which his title and right of possession are claimed; a denial of the first averments is sufficient, without a denial of the latter. Nudd v. Thompson, 34 Cal. 39.

938. The allegation that the defendant "has failed, refused and neglected so to return" the property sued for, is not an averment of the special and formal demand and refusal to deliver, required in actions of this kind.

Campbell v. Jones, 38 Cal. 507.

939. Under our practice, in an action for taking and carrying away goods, an allegation in the complaint, that the defendant took and carried away the goods, is equivalent to an averment that the defendant converted the goods to his own use.

Hutchings v. Castle, 48 Cal. 152.

940. A complaint in trover for taking personal property must aver a conversion of the same. An averment that the defend-

ant unlawfully, fraudulently, willfully, and maliciously took the property is not an averment of a conversion.

Triscony v. Orr, 49 Cal. 612.

941. In an action of trover brought by an administrator to recover the value of personal property belonging to the estate and converted by the defendant, an averment in the complaint, that the estate owned and possessed the property, is equivalent to an averment that the administrator owned and possessed it. Ham v. Henderson, 50 Cal. 367.

942. An averment in a complaint that a defendant unlawfully took personal property is a mere averment of law, and an averment that he fraudulently took it, without stating the facts which constitute the fraud, is not a statement of an issuable fact. Id.

See CLAIM AND DELIVERY.

Common Carriers.

943. In an action to recover damages against a common carrier of passengers for a refusal to carry plaintiff, it is not necessary to allege a tender of the fare. It is sufficient to allege that plaintiff was ready and willing to pay the defendant such sum of money as it was legally entitled to charge.

Tarbell v. C. P. R. Co., 34 Cal. 616.

944. A complaint which does not state the date of the draft, which was lost by a common carrier, the amount for which it was drawn, the time when it was payable, or to whom payable, is insufficient.

Zeigler v. Wells, 23 Cal. 179.

Common Counts.

945. The common counts can not be united in one count as one cause of action, without any specification of the sums due upon each several cause.

Buckingham v. Waters, 14 Cal. 146.

Cordier v. Schloss, 18 Id. 576.

946. The promise to pay alleged in the common count in assumpsit, was a mere conclusion of law from the facts stated, and need not be averred under the new code, which requires only the facts to be stated.

Wilkins v. Stidger, 22 Cal. 231.

947. A count, in the ordinary form of counts in *indebitatus assumpsit*, for goods sold and delivered, and money paid and expended, is sufficient, under our system of practice. If the allegations are deemed too general, the defendant can apply for and obtain an order upon the plaintiff to furnish a bill of particulars.

Freeborn v. Glacier, 10 Cal. 337.

Magge v. Kast, 49 Id. 151.

Conditions Precedent.

948. In pleading title to land, under an act of the legislature which prescribes conditions upon the performance of which the title may

be secured, it is necessary to aver a performance of all the acts required by the statute.

People v. Jackson, 24 Cal. 630.

949. A general averment of the performance of conditions precedent is sufficient in cases of contract, but, in all other cases, the facts showing a performance must be specially pleaded. *Id.*

950. The plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and canceled such security upon B. executing a bond in their favor, the condition of which was that B. should pay to the plaintiffs such amount, not exceeding four thousand dollars, as should be found due to them from M. after sale of certain goods and the winding up of the accounts of M. with the plaintiffs, the payment of which bond was guaranteed by the defendant under the same conditions expressed therein: *Held*, in an action on the defendant's guaranty, that the want of an averment in the complaint of the winding up of the accounts of the plaintiffs with M., or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint.

Mickle v. Sanchez, 1 Cal. 200.

951. An allegation that the plaintiff has fully performed on his part all conditions of the contract is an allegation of performance sufficiently explicit under section 60 of the practice act.

C. S. N. Co. v. Wright, 6 Cal. 258.

952. Where the payment of a promissory note is, by agreement of parties, made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made.

Rogers v. Cody, 8 Cal. 324.

953. Where A. sold a lot of land to B. and delivered possession, and in a written contract respecting the same it was stipulated, among other things, that in the event that B. should be dispossessed by legal judgment at any time within three years, A. should pay back to B. two thousand dollars; and should suit be brought against B. for the lot, then B. should notify A. of it, in order to enable him to assist in the defense of the title: *Held*, that the giving of the notice by B. to A. of the institution of suit against B. for the lot, was indispensable to enable B. to recover of A. on such contract.

Bensley v. Atwill, 12 Cal. 231.

954. In a suit on such contract, B. should aver that he had been evicted after notice to A. The payment of the money is dependent on this fact. *Id.*

955. In an action on a claim against a county, the plaintiff must aver all the matters required by the statute in relation to

his presentation of the claim to the board of supervisors, and their rejection of the same. An averment that the claim has been duly presented and rejected is not sufficient.

Rhoda v. Alameda, 52 Cal. 350.

956. A general allegation in a pleading of the performance of a condition precedent is insufficient, except in cases of contract, when it is authorized by statute. *Id.*

957. In a suit in equity to set aside a judgment by default on a return by the sheriff of personal service, on the ground that defendant in fact was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to his defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof he was to be released from the debt for which the action was brought: *Held*, that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered or was, or has been at any time, ready or willing to perform the same.

Gibbons v. Scott, 15 Cal. 284.

958. In pleading title to land under an act of the legislature which prescribes conditions upon the performance of which the title may be recovered, it is necessary to aver a performance of all the acts required by the statute.

People v. Jackson, 24 Cal. 632.

959. If the contract sued on is executory, and each party has something to perform before the other can be placed completely in default, the party seeking to enforce it against the other must aver in his complaint a performance, or tender of performance, or a readiness to perform, on his part.

Barron v. Frink, 30 Cal. 486.

Osborne v. Elliott, 1 Id. 337.

960. A general averment of the performance of conditions precedent is sufficient in cases of contract, but, in all other cases, the facts showing a performance must be specially pleaded.

People v. Jackson, 24 Cal. 632.

Conspiracy.

961. Where two or more persons are sued for a joint wrong done, it may be necessary to prove a previous combination between them in order to secure a joint recovery; but it is not necessary to aver this previous combination in the complaint, and, if averred, it is not to be considered as of the gist of the action.

Herron v. Hughes, 25 Cal. 560.

See Dreux v. Domec, 18 Cal. 83.

Contract.

962. A complaint which states the facts of the case in ordinary and concise language is not demurrable, because such statement

shows that the plaintiff is entitled to recover upon two different legal grounds.

Mills v. Barney, 22 Cal. 240.

963. Under the forms of pleading at common law, the vendee of chattels sold with a warranty of title could, on a breach of the warranty, recover damages in assumpsit, or he might sue in an action on the case for deceit, if there had been deceit, as well as warranty of title; but, in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had occurred, and in the latter, that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false.

Miller v. Van Tassel, 24 Cal. 458.

964. A complaint for breach of a contract must state a breach in unequivocal language.

Moore v. Besse, 30 Cal. 570.

965. In an action to recover damages for breach of a contract, it is sufficient, so far as a demurrer is concerned, to aver in the complaint the contract, the breach complained of, and general damages.

Barber v. Cazalis, 30 Cal. 92.

966. In an action against the owner of a building to enforce a mechanic's lien thereon, brought by a party who has furnished materials to the contractor for the construction of the building, the defendant, in order to avail himself of a breach of the contract by the contractor, must make it a part of his defense by proper averments in his answer.

Blethen v. Blake, 44 Cal. 117.

967. In an action for breach of promise of marriage, the interposition of a defense that the character of the plaintiff is unchaste, even if unsuccessful, ought not, *per se*, to aggravate the damages, unless it is interposed in bad faith, from malice, wantonness, or recklessness.

Powers v. Wheatley, 45 Cal. 113.

968. The fact that the vendor of land is not within the jurisdiction of the court, is no defense to an action, in his name, for the purchase money, although the vendee has not yet received his deed, and is not entitled to it by the terms of the sale, until all the purchase money is paid.

Rourke v. McLaughlin, 38 Cal. 196.

969. The law of pleading requires the complaint on a simple contract to state the particular consideration for the defendant's promise declared on.

Moore v. Waddle, 34 Cal. 145.

970. This rule has its exceptions, as in cases of bills of exchange and promissory notes, where the consideration is implied. *Id.*

971. In declaring on a specialty, the general rule is that no consideration need be alleged, except when the performance of the consideration is a condition precedent. *Id.*

972. When the plaintiff sets out in his complaint the contract sued on in the terms in which it is written, and then puts a false construction on its terms, the allegation repugnant to its terms should be regarded as surplusage.

Love v. S. N. L. Co., 32 Cal. 639.

973. Where in an action for the breach of a contract in writing, under seal, made between defendant and G., and G. assigned the contract to plaintiff by a writing indorsed thereon, not under seal, and not expressing the consideration for said assignment, of all which the defendant had due notice, but the complaint alleged said assignment to have been made for a valuable consideration: *Held*, that this was sufficient to show that the interest of G. in the contract passed to plaintiff, and authorized him to maintain an action thereon in his own name.

Moore v. Waddle, 34 Cal. 145.

974. In a suit for the recovery of the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land, the defendant, in his answer, denied that the plaintiff was lawful owner, or that he had any title to the land: *Held*, that to have enabled him to rescind the contract, the defendant was bound to aver and show a paramount title in another, and that failing in this, his defense to the action was defective.

Thayer v. White, 3 Cal. 228.

975. In order to rescind a contract for the sale of land, on the ground that the vendor can not perform it, because he has no title to the land, it is necessary for the vendee to aver and show an outstanding paramount title in another. *Riddell v. Blake*, 4 Cal. 264.

976. In an action to rescind a sale of real estate, on the ground of fraudulent representations, security, averred in the complaint to have been given for the purchase money will be presumed to be adequate unless the contrary is expressly averred.

Purdy v. Bullard, 41 Cal. 444.

976a. In order to recover possession of premises on the ground of rescission of contract the plaintiff must allege a repayment or tender of the amount paid by the defendant at the execution of the contract.

Bohall v. Diller, 41 Cal. 532.

977. In an action to compel defendant to execute a deed of real estate held by him, the complaint alleged that the property was purchased by plaintiff of one C., and by agreement with defendant was conveyed directly to him as security for a debt, he to make a deed to plaintiff upon its payment, and that the debt was subsequently paid and the deed demanded; but the complaint failed to aver that defendant, upon the demand, refused, or at any other time has refused to execute the deed: *Held*, that the failure to aver refusal is fatal to the action, and may

be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Dodge v. Clark, 17 Cal. 586.

978. Where the contract must be in writing under a statute, yet it is not necessary in the complaint to show that fact.

Wakefield v. Greenwood, 29 Cal. 599.

979. Where in reducing an agreement to writing, a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it, or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject-matter can not be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing.

Pierson v. McCahill, 21 Cal. 122.

980. Where the complaint sets out a contract for the performance of work, and alleges that the completion of the work was "prevented," the action is upon the contract—part performance and prevention.

Cox v. McLaughlin, 52 Cal. 500.

981. In such a case, the fact that the complaint does not allege damages by reason of loss and profits on the whole job does not change the character of the pleading, nor the proofs necessary to sustain it. Unless prevention is proved and found, the plaintiff is not entitled to recover. Id.

982. A contract in writing may be declared on according to its legal effect, or in *hæc verba*. Where the contract is made part of the complaint, it must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege in the mode of pleading by averment, and where the contract is of such character, it is more consistent with the mode of pleading prescribed in the practice act, to declare on it *in hæc verba*.

Joseph v. Holt, 37 Cal. 250.

983. The complaint alleged that the plaintiffs entered into a contract with the S. & M. R. R. Co. (afterward merged into and consolidated with the defendant) for the construction of a tunnel—the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company, and for the purpose of defrauding the plaintiffs, omitted certain work from his estimates. Upon the trial, the plaintiffs offered to prove that he did extra work, on the promise of the engineer (subsequently ratified by the president of the company), that they should be paid for it, as for similar work under the contract: *Held*, that as the plaintiffs had not sued for extra work, but for work

done under the original contract, the evidence was not admissible.

Hinkle v. S. F. & N. P. R. Co., 55 Cal. 627.

984. If the defendant justifies an alleged trespass on the plaintiff's land, under a contract made with a superintendent of streets to grade a public street, and annexes a copy of the contract to his answer, and the plaintiff fails to file an affidavit denying the contract, its genuineness and due execution are admitted, and it is error to exclude it as evidence, when offered without proof of its execution and genuineness.

Sloan v. Diggins, 49 Cal. 38.

985. The admission of the genuineness and due execution of a contract, a copy of which is annexed to an answer, by a failure to file an affidavit denying it, is an admission that the contract is what it purports on its face to be, and that the matters recited in it are true, and that it was executed and delivered by the parties who signed it, and in the capacity in which they appear to have acted. Id.

986. An averment in a complaint that a contract was signed by C., chairman of the board of supervisors, under authority from the board, is not demurrable on the ground of uncertainty because not averring directly that C. was chairman of the board and had authority to make the contract.

Babcock v. Goodrich, 47 Cal. 488.

987. If a contract for the erection of a county jail is attached to, and made a part of a complaint, and the court-house is to be erected on a block of land at O., the county seat, it is a sufficient averment that the block of land is at the county seat. Id.

988. An averment in a complaint that a county seat has been removed is sufficient, without setting forth all the proceedings resulting in the removal, such as the petition for an election, an election, etc. Id.

989. If a complaint avers that a county seat has been removed from one place to another, and there is an old act fixing the county seat in the former place, the court, in support of the averment, will take judicial notice of the fact that the county seat may have been removed by an election to the latter place, under the law allowing such removals. Id.

990. As against the plaintiff, the presumption is that his complaint correctly states the contract which was the cause of action. Johnson v. Moss, 45 Cal. 515.

991. If a contract is made with two persons jointly, and one of them sues on it as a several contract with him, the defendant can not take advantage of the non-joinder of the other party to the contract, unless he pleads it. Trenor v. C. P. R. Co., 50 Cal. 222.

992. In a complaint for damages for violation of a contract containing mutual

covenants, it is not necessary for the plaintiff to state the facts showing the performance of conditions precedent on his part, but he may state generally that he duly performed all the conditions on his part. *Griffiths v. Henderson*, 49 Cal. 566.

993. In an action to recover money alleged to be due on a contract, an allegation that the sum sued for is now due is a mere conclusion of law.

Doyle v. Phoenix Ins. Co., 44 Cal. 264.

994. In an action on the lease to recover from the lessee taxes paid by the lessors, and which were levied on the property during the last six months of the term, the complaint, in order to show a **breach of the covenant**, should contain an averment that during the six months the lessee had received as rents and profits from the property a sum sufficient to pay the monthly rent and taxes, and if the sum received be not sufficient to pay all the rent and taxes, it should at least be averred that some amount was received by the lessee during the six months, which would be applicable to the taxes.

Salisbury v. Shirley, 53 Cal. 461.

995. If a complaint avers that a contract was made for the **sale of real estate**, it is not necessary to aver that it was in writing, for the presumption is that it was in writing.

McDonald v. M. V. H. Ass., 51 Cal. 210.

996. A **finding of fact** that a contract was made to sell real estate need not state that the contract was in writing, for it is presumed to be in writing. *Id.*

997. In case of a breach of contract to convey land, the complaint must allege a **tender of a conveyance**.

Bohall v. Diller, 41 Cal. 532.

998. An averment in a complaint, that an **agreement was made to sell land**, is sufficient, without alleging that it was in writing and signed. If denied, the proof must show that it was in writing and signed.

Vassault v. Edwards, 43 Cal. 458.

999. In an action on a **contract to pay money**, the complaint must allege that the defendant has not paid the indebtedness for the recovery of which the action is brought. An allegation that the whole thereof is now due, is not sufficient.

Roberts v. Treadwell, 50 Cal. 520.

Contract Builders.

1000. Under the rules of pleading established by the code, the party to a written contract for the erection of a building who has performed his part of it by the erection of the same, can bring an action against the other party who has failed to fulfill for work and labor done and performed; but the complaint must aver the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-per-

formance by the other party, and the damages thereby sustained. If, by the terms of a contract, the party who has failed to fulfill was to execute his note for the money due, payable at a future day, his failure to do so should be averred, for the ground of action against him is his failure to execute the note.

O'Connor v. Dingley, 26 Cal. 11.

1001. In such case, if there has been any variation from the terms of the written contract in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied. *Id.*

1002. A complaint on a written contract, concerning the building of a house, in which the defendant agrees to pay all bills against the house, or litigate the same before paying them if he deemed them unjust, must aver a breach of the condition. It is not sufficient to merely aver that the defendant has failed to pay. *Fisher v. Pearson*, 43 Cal. 472.

1003. If, in such action, the contract contains a clause by which the defendant agrees to pay all bills against the house, for which the plaintiff has not made himself personally liable, the complaint to recover such bills must aver that the plaintiff had not made himself personally liable for them. *Id.*

Corporations.

Complaint.

1004. The allegation that plaintiff is a corporation organized and existing under the laws of the state is sufficient to establish the legal capacity to sue.

Cal. S. N. Co. v. Wright, 6 Cal. 258.

1005. A **note** was executed by the defendant, payable to the "board of trustees of the Sonoma academy or their successors in office," and specified that "no change in the name, character, or management of the said academy" should affect the liability of the payor. The complaint of the "Cumberland college" stated that the plaintiff was a corporation, and the same institution of learning formerly known as the "Sonoma academy;" that the academy was, after its establishment, changed to "Cumberland college," and that the note was the property of the plaintiff: *Held*, that this complaint showed a good cause of action in the plaintiff.

Cumberland College v. Ish, 22 Cal. 641.

1006. In suit against a municipal corporation on its **bonds**, the complaint sets out the bonds; avers the defendant to be a corporation; that the corporation made and delivered the bonds upon good consideration, under an ordinance passed by the proper agents of the corporation, having authority for that purpose, and that defendant has failed to pay: *Held*, that the complaint shows, *prima facie*, a liability on the part of the corporation; and that it was not necessary to set out the or-

dinance, or the vote, or other proceedings of the corporate agents, or give any further description of the agents of the corporation.

Underhill v. Sonora, 17 Cal. 172.

1007. A complaint in an action brought by a justice of the peace against a county for services rendered as justice for the county, which merely alleges that the plaintiff, as justice of the peace, performed services at the request of the district attorney for the county, in cases wherein the people of the state were plaintiffs to the amount of three thousand two hundred dollars, "and that the defendant thereby became and is liable to pay the said sum," does not state facts sufficient to constitute a cause of action.

Miner v. Solano, 26 Cal. 115.

1008. The right to sue a county is not limited to causes of tort, malfeasance, etc.; but is given in every case of account after presentation to, and rejection by, the board of supervisors. The complaint must aver such presentment.

Price v. Sacramento, 6 Cal. 234.

1009. In an action against a county the complaint must show that the claim has been first presented to the board of supervisors, and been by them rejected.

McCann v. Sierra, 7 Cal. 123.

1010. A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the act of 1861, fails to state a cause of action, unless it avers that the plaintiff had attempted to come to an agreement with the board of supervisors as to the amount of damages sustained, and could not agree with the board as to such amount.

Lincoln v. Colusa, 28 Cal. 602.

Answer.

1011. The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint which are presumptively within his own knowledge, applies to municipal corporations.

Gas Co. v. San Francisco, 9 Cal. 453.

1012. There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant; but this court can make no distinction, because the code makes none.

Id.

1013. In an action against a corporation to recover dividends which have accrued on its stock, if the plaintiff avers "that from a date named, she was, has been, and still is, the owner in her own right, and as her separate property, of the stock" the answer raises an issue if it denies that, at the date named, "the plaintiff was, has since been, or still is, the owner in her own right, and as her separate property," of the stock. The qualification of the denial by the words "in

her own right and as her separate property" are mere surplusage.

Dow v. G. & C. M. Co., 31 Cal. 629.

1014. Where the answer in a suit against a corporation on its note relies simply on the want of power of the corporation to issue notes, the defendant can not afterward object that the plaintiff has not shown that the officers executing the note were empowered by the corporation to do so.

Smith v. Eureka F. M. Co., 6 Cal. 1.

Co-tenants.

1015. In an action by a tenant in common against his co-tenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues, and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues, and profits amount to eighty-four thousand dollars, is insufficient to support the action.

Pico v. Columbet, 12 Cal. 414.

1016. In such complaint there are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account; and, viewed in this light, the complaint is fatally defective in not averring that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged.

Id.

1017. In a complaint to obtain partition of land, a general allegation that "the premises can not be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff relies, to obtain a particular mode of partition.

De Uprey v. De Uprey, 27 Cal. 329.

1018. A complaint in partition is good which is silent upon the subject of the mode of partition.

Id.

1019. A complaint in an action for partition must aver that the co-tenants hold and are in possession of real property as joint tenants or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years; and if these averments are not made, it does not state facts sufficient to constitute a cause of action.

Bradley v. Harkness, 26 Cal. 69.

1020. An averment in a complaint, where there are several plaintiffs, that the plaintiffs own seven tenths of certain real estate,

raises the legal **presumption** that they own it as tenants in common.

Reynolds v. Hosmer, 45 Cal. 616.

Damages.

1021. When **treble damages** are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute.

Chipman v. Emeric, 5 Cal. 239.

1022. If the plaintiff, in an action to recover possession of a mare, and damages for her detention, claims damages because the animal has lost flesh in consequence of having been kept upon short pasture, and because she was detained during the breeding season, these facts must be **specially averred** as the ground of damages.

Stevenson v. Smith, 28 Cal. 102.

1023. A jury can not give **compensation for loss of time**, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.

Dabovich v. Emeric, 12 Cal. 171.

1024. A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable **water ditch** for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendant's ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth, and rubbish, and breaking said plaintiff's ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiff's damage of three thousand dollars, and thereof they bring suit, is sufficient.

Tuol. W. Co. v. C. & S. Co., 10 Cal. 193.

1025. In an action for damages for maliciously suing out a writ of **attachment**, and causing the same to be levied on the property of the plaintiff, the complaint must aver that the writ was sued out and prosecuted without probable cause.

King v. Montgomery, 50 Cal. 115.

1026. Damages which do not legally result from the **breach of contract** can not be recovered, unless they are specially claimed and set forth in the pleading; thus, damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and, in an action by his vendor against him, can not be recouped from the plaintiff's

claim, unless such damages are especially alleged and set forth in the answer.

Cole v. Swanston, 1 Cal. 51.

1027. When damages are **special** and do not necessarily accrue from the act complained of, the facts out of which they arise must be specially averred in the complaint or they can not be recovered.

Stevenson v. Smith, 28 Cal. 102.

1028. In an action for the breach of a contract, the want of any **averment of special damage** can not be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. For the breach of a contract an action lies, though no actual damages be sustained.

McCarty v. Beach, 10 Cal. 461.

1029. In an action under the statute for causing, by wrongful act, the death of a person, **funeral expenses** are not recoverable, except as special damages, if recoverable at all, and must be specially pleaded.

Gay v. Winter, 34 Cal. 153.

1030. In an action for damages for **personal injury** sustained by the plaintiff from a railroad car, it is not necessary to aver in the complaint that the plaintiff sustained the injury without any fault on his part.

Robinson v. W. P. R. Co., 48 Cal. 409.

1031. In an action for damages, for injury caused by defendant's street cars, an allegation by plaintiff that defendant had no **lawful right to lay its track**, or run its cars on that portion of the street where the injury was done, is not irrelevant or immaterial.

Schierhold v. N. B. & M. Co., 40 Cal. 447.

1032. In an action against the **owners of a mine**, to recover damages for an injury sustained by an employee, if the complaint avers that the injury was caused by the **negligence** and want of skill of the **engineer**, and that the superintendent had full power to control the working of the mine, and employed and discharged all the men at his discretion, it must also allege that the defendants were negligent in employing the superintendent, or it does not state a cause of action. Collier v. Steinhart, 51 Cal. 116.

1033. In an action for damages the plaintiff must **allege** in his complaint that he has sustained **damages**, in order to sustain a judgment for damages.

Bohall v. Diller, 41 Cal. 532.

1034. Damages, in excess of its value, for the destruction of a book, containing a **subscription list**, can not be recovered, when the complaint does not allege special damage.

Nunan v. San Francisco, 38 Cal. 689.

1035. There is no necessary connection between the destruction of an **account book** and the loss of a debt therein charged. Id.

1036. If, in an action brought by a laborer against his employer to recover dam-

ages for an injury sustained by the **employer's carelessness**, the employer relies for a defense upon the fact that such injuries were caused by the negligence or improper conduct of a **fellow-servant**, an averment to that effect should be made in the answer. An averment that the plaintiff's injury was not caused by his own negligence does not raise such issue.

Conlin v. S. F. & S. J. R. Co., 36 Cal. 404.

1037. If the plaintiff sues to recover damages for **flowing sand and sediment upon land** averred in the complaint to be his, and the answer denies that plaintiff owns the land, and that defendant wrongfully flowed the sand and sediment upon the land, without denying that he caused the same to flow upon the land, it does not admit that defendant caused such material to flow upon the plaintiff's land. In such case the plaintiff's ownership of the land is put in issue.

Wood v. Richardson, 35 Cal. 149.

1038. In an action for damages caused by the sale of the plaintiff's real estate under an **execution** issued on an erroneous judgment, afterwards reversed, it is not necessary in the complaint to make a direct averment of the existence of the property, if that fact appears by necessary inference drawn from the facts stated. Reynolds v. Hosmer, 45 Cal. 616.

See DAMAGES.

Demand.

1039. A verified complaint, which in stating a special demand essential to the cause of action, contains only the general averment that "defendants, though often requested, have refused," etc., is sufficient in this respect unless demurred to for want of certainty. If not demurred to, the defective averment is cured by verdict and judgment, and the objections can not be raised for the first time in the appellate court.

Mills v. Barney, 22 Cal. 240.

Description of Real Property.

1040. Section 58 of the practice act, that "in an action for the recovery of real property, such property shall be described, with its **metes and bounds**, in the complaint," is directory only, for a failure to comply with which the complaint is liable to a special demurrer; but if the complaint describes the premises sufficiently otherwise to identify them according to the general rules on this subject, the plaintiff may after verdict take judgment, and the court can not set it aside on motion of defendant on account of this defect of pleading.

Buckman v. Whitney, 19 Cal. 300.

1041. Where a complaint in ejectment describes the land thus: "All that certain tract or parcel of land situated in Napa county, consisting of a pre-emption claim of

one hundred and sixty acres of land, commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging, and being about five miles from Napa city in a northerly direction." *Held*, that the description is sufficient to support a judgment for plaintiff. *Id.*

1042. Where a declaration describes land by a **certain name**, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. Castro v. Gill, 5 Cal. 40.

Stanley v. Green, 12 Id. 148.

1043. A complaint in ejectment, describing the premises as "lot No. 1 in block No. 23, as per plot of the town of Red Bluff land corporation, in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying the county in which they are situated by the terms "in said county," referring to the designation "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to **identify with certainty** the property.

Doll v. Feller, 16 Cal. 432.

1044. A description of real property in a complaint in **ejectment**, giving one of the lines bounding the premises as running due west to the source of a designated creek, is not sufficient and indefinite as to sustain a demurrer on the ground of its alleged insufficiency. If there be in fact more than one source of the creek, that fact can not be taken advantage of by demurrer. It can only be matter for proof on the trial.

Carpentier v. Grant, 21 Cal. 140.

1045. A description of premises in a complaint as follows: "Commencing at a point in the Walnut creek, three hundred yards north of the Mount Diablo base line; thence running due east two miles; thence due south to a point; thence due west to the source of said Walnut creek; and thence down said creek to place of beginning." *Held*, to be **sufficient** on demurrer. *Id.*

1046. Where the complaint designated the tract of land as known by the name of "La Jota," heretofore granted by the Mexican government: *Held*, sufficient.

Yount v. Howell, 14 Cal. 467.

1047. Where the land is described as the "Forks House ranch, valued at one thousand five hundred dollars; said ranch situated about twelve miles north and easterly from Michigan Bluffs, about one and a half miles southerly and easterly from Damascus." *Held*, sufficient. People v. Leet, 23 Cal. 163.

1048. If the description of the demanded premises does not appear upon the face of the complaint to be insufficient, it is a **question of fact** for the court or jury whether

the description in the same will apply to the land sought to be recovered.

Moss v. Shear, 30 Cal. 468.

1049. Monumental lines or points control such as are described by **course and distance** only. The intention of the parties should be ascertained by a consideration of the entire description.

Piercy v. Crandall, 34 Cal. 334.

1050. The mining claim, being a claim on a river bar, is sufficiently described in the complaint. *Grady v. Early*, 18 Cal. 108.

1051. The statute of 1861, requiring real estate, in actions to recover **taxes**, to be described in the complaint with the same particularity as in actions of ejectment, only applies to actions in which the real estate is made a party defendant.

People v. Leet, 23 Cal. 161.

1052. In an assessment for taxes, a description of a tract of land by name is sufficient. *Id.*

1053. When the complaint avers that the property was **duly assessed** by the assessor of a district or county (naming it), it is not necessary to further aver that the property was situated within the jurisdiction of the assessor. *Id.*

1054. If the complaint, in an action to recover judgment for taxes assessed on land and improvements thereon, describes the land assessed by giving its name and metes and bounds less certain lots sold out of the same, without giving the location and boundaries of the lots sold, the complaint is fatally defective. *People v. Mariposa*, 31 Cal. 196.

1055. In forcible entry and detainer, a description of the land, sufficiently definite to enable the administration of substantial justice, is all that is required in actions before justices of the peace.

Hernandez v. Simon, 4 Cal. 182.

1056. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the north-westerly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres), "the said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. This judgment for plaintiff followed the description in the complaint. Defendant appeals: *Held*, that the variance

in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 73.

1057. The description of the land was as follows: "That tract or parcel of land situated in the county of Santa Barbara, and known as the Rancho Sespe, granted by the Mexican nation to Don Carlos Antonio Carillo, by grant dated November 29, 1833, and bounded and described as follows: Bounded by the Mission San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues, a little more or less:" *Held*, that upon the face of the pleadings the description was sufficient.

More v. Del Valle, 28 Cal. 170.

Divorce.

Complaint.

1058. The charge of **adultery** should be stated with reasonable certainty as to time and place, so as to enable the defendant to prepare to meet it on the trial.

Conant v. Conant, 10 Cal. 249.

1059. Where, in a suit for divorce brought by the wife, she charged in her complaint that adultery had been committed by her husband whilst she was living with him "at the city of San Francisco, at divers times, with persons to the plaintiff unknown;" and adultery committed since she ceased to live with him "at the said city of San Francisco, with divers other persons, whose names are to the plaintiff unknown:" *Held*, that the complaint was demurrable, but that the defendant, by failing to demur, waived the objection so far as the want of specification of the acts constituting the charge is concerned. *Id.*

1060. The statute has not altered any of the ordinary rules of pleading for cases of divorce, except that nothing can be taken by admission or default. The object of this exception is to prevent collusion between the parties, and when this is accomplished the ordinary rules apply. *Id.*

1061. If the complaint in an action to obtain a divorce avers the **marriage** of plaintiff and defendant, and the answer does not deny the averment, it is an admission of the fact for the purposes of the trial, and the marriage need not be proved.

Fox v. Fox, 25 Cal. 587.

1062. The plaintiff must aver and prove, though not denied, that he or she has been a **bona fide resident** of this state six months before making the application for a divorce. *Bennett v. Bennett*, 28 Cal. 599.

1063. It must affirmatively appear in the complaint that the husband was the owner of property sufficient to provide the **necessaries of life**, and neglected so to do, where the application is made on the ground of the **willful neglect** of the husband, for the period of three years, to provide the common necessities of life, having the ability to provide the same.

Washburn v. Washburn, 9 Cal. 476.

1064. In the absence of an allegation in a complaint for divorce, that there is **common property**, the presumption would be that there was none.

Kashaw v. Kashaw, 3 Cal. 312.

1065. It is proper to declare, for the information of the court, in what the common property consists, its nature, and value. *Id.*

1066. The statute which prescribes what shall be common property as between husband and wife, and how it shall be divided in case of a divorce, is a mere regulation of a right of property, and does not provide a new cause of action. A complaint for relief under this statute need not therefore comply with the rules governing the forms of pleadings in statutory actions.

Gimmy v. Doane, 22 Cal. 635.

1067. The failure of a complaint, in an action for a **division of common property**, to state with sufficient particularity the facts showing the character of the property, is a defect of form which must be objected to by demurrer. *Id.*

Answer.

1068. The doctrine of **recrimination or compensatio criminum**, applicable in suits for divorce, and the several offenses which, by the statute, constitute grounds for divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. Conant v. Conant, 10 Cal. 249.

1069. To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant. *Id.*

1070. In an application by the wife for a divorce, on the ground of the willful neglect of her husband, and his failure to provide her with the necessities of life, for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit.

Washburn v. Washburn, 9 Cal. 475.

Ejectment.

Complaint.

1071. In actions to recover real property, the complaint need not state the **residence** of either of the parties. The statute provides for the trial in certain counties, and

the situation of the premises, not the residence of the parties, determines the county.

Doll v. Feller, 16 Cal. 432.

1072. Under our system of pleading the plaintiff in the action to recover possession of real estate is not limited to any particular **form of complaint**, but the form may be adapted to the facts desired to be put in issue. Plaintiff may allege that he is seised of the premises, or of some estate thereon, in fee, for life or for years, or he may aver a former possession and ouster; but whatever is put in issue and determined is conclusive and final. Caperton v. Schmidt, 26 Cal. 479.

1073. Plaintiff may aver **title** in general terms; but if he attempt to set forth in his complaint a specific deraignment of his title, he must aver every fact that he could be required to prove in order to recover. And where one of the links in his chain of title, as set out in the complaint, is a will, the complaint must aver that the will has been admitted to probate.

Castro v. Richardson, 18 Cal. 478.

1074. The plaintiff must aver either **title or possession**. The mere taking from the land a portion of the herbage growing thereon is not sufficient to give a right of possession. Steinback v. Fitzpatrick, 12 Cal. 295.

1075. Where the plaintiff in ejectment avers that the land sued for is known by the name of "**La Jota**," heretofore granted to plaintiff by the Mexican government, and the patent issued thereon refers to the grant, the proceedings before the land commission and the United States court for confirmation, these **recitals in the patent** support the averment of title through the grant.

Yount v. Howell, 14 Cal. 465.

1076. A complaint which avers an **ownership and seisure in fee** in the plaintiff of the demanded premises, and an **ouster** by the defendant on a day named, before the commencement of the action, is sufficient, without the further averment that the plaintiff is the owner in fee at the commencement of the action.

Salmon v. Symonds, 24 Cal. 266.

1077. An allegation that the plaintiff, on a day named, "**was possessed of**" certain lands therein described, "**which said premises the said plaintiff claims in fee simple absolute,**" is an allegation of **title in the plaintiff** to the premises in fee simple absolute.

Marshall v. Shafter, 32 Cal. 176.

1078. It is not necessary to aver an **ouster** by the defendant. An averment of a wrongful withholding of the possession by the defendant is equivalent to an averment of an ouster. *Id.*

1079. To enable the plaintiff to recover on **prior possession**, he must allege and prove an actual ouster.

Watson v. Zimmerman, 6 Cal. 46.

1080. The want of such an allegation in the complaint is a defect which can not be cured by a default taken through the mistake or inadvertence of defendant's counsel.

Id.

1081. Where the ouster was alleged to have taken place in June, 1856, while the title of plaintiff was alleged to have accrued only in May, 1850: *He'd*, that if this were not a clerical error, it is a defect which can not be taken advantage of after verdict.

Coryell v. Cain, 16 Cal. 567.

1082. Complaint need not state the exact time of the alleged ouster, especially where no claim is made for damages, and no recovery had for them, the allegation in this case as to time of ouster, being "on or about December 12, 1857."

Collier v. Corbett, 15 Cal. 183.

1083. In ejectment, a variance between the alleged seisin and right of possession of plaintiff, and the date of the conveyance to him, is immaterial, if the latter be previous to the commencement of the action. Right of possession in plaintiff, and occupation by defendant at that time, are sufficient.

Stark v. Barrett, 15 Cal. 361.

1084. The date at which plaintiff's right accrued, or defendant's occupation began, are material only with reference to the claim for *mesne profits*.

Id.

1085. A complaint in ejectment need not aver title in the plaintiff, but an averment of his prior possession, and an ouster, is sufficient.

Norris v. Russell, 5 Cal. 249.

1086. The allegation of possession, at the time of the ouster complained of, is a sufficient allegation of title to sustain the declaration.

Hutchinson v. Perley, 4 Cal. 33.

1087. A complaint in ejectment averring prior possession in plaintiff, entry and ouster by defendant, and that he is still in possession, is sufficient.

Bales v. Cohen, 15 Cal. 150.

1088. Under the allegation of ouster, a holding over by the defendant may be shown.

Garrison v. Sampson, 15 Cal. 93.

1089. Where plaintiff relies not on the possessory act of the state, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property.

Coryell v. Cain, 16 Cal. 567.

1090. A party relying on the possessory act of the state must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing

an actual inclosure, or actual possession of the whole claim.

Id.

1091. In this case the complaint should only have averred that on some day designated plaintiffs were possessed of the land, describing it; that while thus possessed, defendant entered upon the same and ousted them, and has ever since withheld the possession from them to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster.

Id.

1092. A complaint should not set out the *mesne conveyances* through which plaintiff derains title. These are matters of evidence, not of pleading, and should be stricken from the complaint on motion.

Id.

1093. The fact that a complaint in ejectment, in addition to describing the premises by metes and bounds, also designates them as one half of a certain pre-emption claim taken up by one Morris, from whom plaintiffs traced title in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute, does not make it essential to plaintiffs' recovery as against a defendant in possession, that they should allege in their complaint, and on the trial prove such facts as will bring them within the provisions of the pre-emption laws of the United States, or the possessory act of this state. The designation of the property as part of a pre-emption claim does not preclude the claimants from relying upon any other source of title than the United States or the state.

Id.

1094. Where the plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege such possession, and the entry, ouster and continued withholding by the defendants. Such allegations are proper when they correspond with the facts, but they are not essential. In this state possession does not always accompany the legal title, as the statute authorizes a sale and conveyance of land held adversely by a third person.

Payne v. Treadwell, 16 Cal. 220.

1095. There is no necessity of negating the possible rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right, defendant must show it affirmatively in his defense.

Id.

1096. The only facts necessary to be alleged are that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact, and that defendant was in their possession at the commencement of the action, and withholds the possession from plaintiff. The *seisin* is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyance from a paramount source of title, or by evidence of prior possession.

Id.

1097. An allegation that the possession of defendant is wrongful or unlawful is not the statement of a fact, but of a **conclusion of law**. The words are mere **surplusage**, and though they do not vitiate, they do no good. *Id.*

1098. In an action to recover the possession of real property, none of the technical allegations peculiar to the old action of **ejectment** are necessary. *Id.*

1099. The complaint in this case, **ejectment**, is sufficient within the rules laid down in *Payne v. Treadwell*, 16 Cal. 220. See facts. *Haight v. Green*, 19 Cal. 113.

1100. A complaint with **general averments** in the usual form, is sufficient, without a specific averment of the facts. To set out the facts connected with the title, and the wrongful acts of the defendant, would produce confusion without benefit. *Garrison v. Sampson*, 15 Cal. 93.

1101. Where the allegations of a complaint in the district court are, that the plaintiff was in possession, and **lawfully entitled to the possession**, at the time he was evicted by the defendant: *Id.*, that the complaint must be treated as a declaration in ejectment. *Ramirez v. Murray*, 4 Cal. 293.

1102. Complaint may be for **two separate and distinct pieces of land**; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. *Boles v. Cohen*, 15 Cal. 150.

1103. A complaint averring that plaintiff was in actual possession of the premises by **inclosure and cultivation**; that defendant, on a certain day, entered upon the same, and ousted the plaintiff, and defendant is still in possession, is sufficient. *Boles v. Weifenback*, 15 Cal. 144.

1104. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an **injunction** restraining the commission of **trespass** in the nature of waste, pending the action; but the grounds of equity interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544.

1105. Nor is a complaint in such action sufficient which fails to aver a **continued adverse holding** by the defendant. *Steinback v. Fitzpatrick*, 12 Cal. 295.

1106. Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still facts sufficient must be pleaded to **show the plaintiff's right to recover**, and it will not do to state conclusions of law in place thereof. *Payne v. Treadwell*, 5 Cal. 310.

1107. In real actions, it is necessary for the defendant to allege, and if traversed, prove a **seisin** in himself, or his ancestors

through whom he claims; and in general it is also necessary to aver that he was seized by taking the esplies or profits. *Id.*

1108. *Goodwin v. Stebbins*, 2 Cal. 103, so far as it holds that the averment that plaintiffs "were lawfully entitled to the possession of the premises," was an allegation of a material fact, and hence sufficient, not law.

Payne v. Treadwell, 16 Cal. 220. *Payne v. Treadwell*, 5 Cal. 310, in which the averment of the complaint was that plaintiffs had "lawful title as owners in fee simple of the premises," and "that the defendant is in possession, and unlawfully withholds the same," so far as it decides that a more particular statement of "the circumstances" of defendant's possession or withholding is necessary, overruled. *Id.*

1109. In **ejectment for mineral lands**, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings: *Held*, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an **actual and meritorious possession** and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 100.

1110. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Id.*

1111. Matters of evidence and unnecessary matters of description of demanded premises should be stricken out of a complaint to recover possession of land. *Willson v. Cleveland*, 30 Cal. 192.

1112. A complaint in ejectment should not state the evidence, but only the **ultimate facts** constituting the cause of action. *Deputy v. Williams*, 26 Cal. 309.

1113. Averments in the complaint of the facts constituting a **derangement of title** are but averments of evidence, and are not

admitted by a failure to deny them in the answer. *Siter v. Jewett*, 33 Cal. 92.

1114. If the complaint contains averments of the facts constituting a derangement of title in a certain manner, and the answer contains a counter averment that the title was derived in a different manner, this counter averment is a denial, if it is alleged that the facts are not otherwise than averred in the counter statement. *Id.*

1115. The averment in a complaint, by a purchaser at a sheriff's sale of a tract of land, against the tenant in possession, for rents accruing during the period allowed for redemption, that "the money paid and agreed to be paid by the defendant to the defendant in the execution, as the rental of the premises, was one hundred and fifty dollars per month, payable monthly," and that "payment had been demanded and refused," is a sufficient allegation that rent is due. *Webster v. Cook*, 38 Cal. 423.

1116. The allegation that the rent was "payable monthly" is not an averment that it was payable in advance. *Id.*

1117. An allegation of the value of the use and occupation, rents, and profits of the premises for the period during which defendants were in the wrongful possession and excluded plaintiff, is sufficient to charge defendants, without any averment that they received such rents and profits. The terms "rents and profits" are not used in the present case in a technical sense. The whole averment is, in effect, only that the value of the use of the premises while plaintiffs were wrongfully excluded, was the amount stated. *Patterson v. Ely*, 19 Cal. 28.

1118. If the complaint in ejectment is in the usual form and avers that the plaintiff is the owner in fee of the demanded premises and has been ousted by the defendant, and the answer admits that the defendant is in possession, and avers that he owns the fee, and then proceeds to deraign his title from a sale of the demanded premises made by an administrator under an order of the probate court, the answer is not a denial of the plaintiff's ownership unless the title passed by the administrator's sale; and if the administrator's sale was void, the plaintiff's title is admitted by the answer. *Pryor v. Madigan*, 51 Cal. 178.

1119. If the plaintiff, in his complaint, alleges that he is the owner of and entitled to the possession of an undivided one half of certain personal property, an allegation in the answer that the defendant is the owner, coupled with an admission that he is in possession, puts in issue the title of the plaintiff. *Miller v. Brigham*, 50 Cal. 615.

1120. If a complaint in ejectment contains immaterial and irrelevant allegations which would be stricken out on motion,

the defendant, in his answer, need not controvert them. *Doyle v. Franklin*, 48 Cal. 537.

1121. It is not necessary in a complaint in ejectment, in order to entitle the plaintiff to recover on the ground of having acquired a title to the demanded premises by five years' adverse possession, to aver an adverse possession of five years.

Gillespie v. Jones, 47 Cal. 259.

1122. In such case, an averment that the plaintiff's grantor had been in possession for more than five years before the commencement of the action is superfluous. *Id.*

1123. In a complaint to recover possession of land, it is sufficient to aver that the plaintiff owns the same, and that the defendant is in possession adversely to the plaintiff, and withholds the same.

Keller v. Ruiz de Ocana, 48 Cal. 638.

1124. Under an averment of ownership in fee and of right to the possession at the commencement of the action, the plaintiff may prove any facts which would entitle him to recover at that time.

Gillespie v. Jones, 47 Cal. 259.

1125. The decision in the case of *Payne & Dewey v. Treadwell*, 16 Cal. 242, as to the form of the complaint in an action of ejectment, affirmed.

McCarthy v. Yale, 39 Cal. 585.

1126. An allegation of an estoppel by a former judgment has no place in a complaint in ejectment. *Clink v. Thurston*, 47 Cal. 21.

1127. The want of an allegation of actual ouster in a complaint in ejectment is a defect which can not be cured by a default taken through the mistake or inadvertency of defendant's counsel.

Watson v. Zimmerman, 6 Cal. 46; *Id.* 174.

Payne v. Treadwell, 16 Cal. 243.

Answer.

1128. The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises.

Arguello v. Edinger, 10 Cal. 150.

1129. Equitable defenses may be interposed to the action of ejectment, but the defendant in such cases becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the court into a legal right to the premises, or such as will stop the plaintiff in the prosecution of the action.

Lestrade v. Barth, 19 Cal. 660.

Estrada v. Murphy, *Id.* 248.

Weber v. Marshall, *Id.* 447.

Downer v. Smith, 24 *Id.* 124.

Blum v. Robertson, *Id.* 146.

1130. Where H. and others enter into possession of land under an agreement with N. that he will pay for their improvements provided it be afterwards established that the premises belonged to him, and subsequently, N. having received a patent, upon confirmation of his grant, brings ejectment: *Held*, that defendants can not set up as a defense this agreement to pay for their improvements, their remedy being a direct action on the agreement.

Norris v. Hoyt, 18 Cal. 217.

1131. In ejectment for an interest in a mining claim, the answer being a general denial, defendant can not defeat the action by showing the claim to be partnership property. Any rights defendant may have in the premises, growing out of the partnership, must be asserted in equity, particularly as the legal title in this case is in plaintiff. *Lowe v. Alexander*, 15 Cal. 296.

1132. An answer in ejectment setting up an equitable defense is in the nature of a bill in equity, and must contain its essential averments. The defendant then becomes an actor with respect to the matter alleged by him, and his defense must be of such a character as may be ripened by the decree of the court into a legal right to the premises, or as will estop the prosecution of the action of the plaintiff. The equitable defense is, therefore, first to be passed upon by the court, and until it is disposed of, the assertion of the legal remedy is in effect stayed. Upon the determination of the court upon the relief prayed by the answer, the necessity of proceeding with the action at law will depend. When it does proceed, the legal title will control its result.

Estrada v. Murphy, 19 Cal. 248.

1133. If a defendant in an action of ejectment desires to avail himself of an equitable defense as a bar, he must set it up in his answer with the same particularity which is observed in a bill of equity.

Downer v. Smith, 24 Cal. 114.

1134. If the defendant, in an action of ejectment, relies on an equitable title to the demanded premises as a defense, it must be pleaded, and the answer setting it up must, in substance at least, possess all the elements and essential qualities of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the court into a legal title to the premises, or such as will estop the plaintiff from the prosecution of the action.

Blum v. Robertson, 24 Cal. 127.

1135. Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief.

Lorraine v. Long, 6 Cal. 452.

1136. An equitable defense interposed in

ejectment should contain in substance all the elements of a bill in equity.

Miller v. Fulton, 47 Cal. 146.

1137. In ejectment, an equitable defense that the defendant gave the plaintiff a deed of the demanded premises, absolute in form, but that the deed was intended as a mortgage to secure a debt, should be set up in the form of a cross-complaint, or separate defense, and should contain an offer to redeem, and ask for affirmative relief by having the legal title restored to the defendant. *Id.*

1138. When an equitable answer is interposed to an action of ejectment, said answer, being a bill in equity, can only be interposed where the parties to the action are such as would be required to a bill in equity seeking the same relief.

Lestrade v. Barth, 19 Cal. 660.

1139. Where there are several defendants, to entitle them to separate verdicts, they should set forth with specific description the parcels which they severally occupy or claim.

Patterson v. Ely, 19 Cal. 28.

McGarvey v. Little, 15 Id. 31.

1140. If the defendant in ejectment desires to defend for only a portion of the premises, and to limit his liability for mesne profits in a corresponding proportion, he must frame his answer accordingly, and specify the portion of the premises for which it is intended to defend, and disclaim as to the balance.

Guy v. Hanly, 21 Cal. 397.

1141. Defendants may answer separately or demand separate verdicts.

Winans v. Christy, 4 Cal. 70.

1142. In an action of ejectment, one of the material allegations of the complaint is that the plaintiff was the owner and entitled to the possession at the time of the alleged entry by defendant, and under a direct denial of this averment the defendant may show that, previous to his entry, a title which once existed in the plaintiff had been lost by abandonment or forfeiture.

Bell v. Brown, 22 Cal. 671.

1143. Where the strict legal title is not involved, and the plaintiff relies upon a right to recover, founded upon naked possession, the defendant, under the general issue, without pleading abandonment, may prove an abandonment of the premises by the plaintiff before the defendant's entry.

Willson v. Cleaveland, 30 Cal. 192.

1144. If, in ejectment, the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action, need not be specially denied.

Hawkins v. Reichert, 23 Cal. 534.

1145. The averments of possession and ouster, in this case, were held to be insufficiently denied. *Smith v. Doe*, 15 Cal. 100.

1146. An allegation, in a verified com-

plaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is **not sufficiently denied** by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiff, because such denial admits entry and ouster.

Busenius v. Coffee, 14 Cal. 91.

1147. Where, in such case, the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title.

1148. Where, in an action of ejectment, the complaint did not directly aver a seisin or ownership of the premises by plaintiff, but alleged that the plaintiff, by location, survey and certain other acts, acquired possession; and the answer denied these acts, except the survey, and denied that plaintiff acquired possession by location, "or in any other manner:" *Held*, that the allegation of prior possession was sufficiently denied by the answer.

La Rue v. Oppenheimer, 20 Cal. 517.

1149. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact, not in issue by the pleadings, but affecting the whole case.

Powell v. Oullahan, 14 Cal. 115.

1150. A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set out an outstanding title in a third person.

Gregory v. Haynes, 13 Cal. 591.

1151. A defendant in ejectment who desires to set off the value of his improvements against the mesne profits must assert his right by proper averments in his answer, or he is precluded from doing so at the trial.

Moss v. Shear, 25 Cal. 44.

1152. An allegation in an answer of the defendant in ejectment, of title in himself, does not constitute new matter, and is only equivalent to a general denial of title in the plaintiff.

Marshall v. Shafter, 32 Cal. 176.

1153. An answer in an action of ejectment, where both parties claim under a common grantor, may set up as a defense a legal title in defendant; and also a verbal contract made by plaintiff's grantor to convey, and an entry under, and a subsequent purchase by plaintiff, with notice.

Bodley v. Ferguson, 30 Cal. 511.

1154. In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put at issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of the plaintiff's rights, had possession," etc. This denial might be true, and yet the defendant be in possession. The defendant was called on to answer, not only the character of the possession, but the fact of possession.

Burke v. Table Mt. Co., 12 Cal. 403.

1155. The complaint charged that on a day mentioned the plaintiffs were lawfully seised and possessed, and had the right of possession of a certain tract of land, and that defendants afterwards entered into and upon the said tract, and ousted plaintiffs therefrom. The answer in response to these allegations averred that the defendant was not guilty of the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof: *Held*, that the answer raised no issue.

Schenk v. Evoy, 24 Cal. 104.

1156. The complaint in ejectment was filed on the twenty-seventh day of January, and averred that the defendants were in possession of the demanded premises. The answer was filed on the eighth day of February, and the only response to this averment was as follows: "This defendant further says that he is not in possession of the lands and tenements described in the complaint, or any part thereof:" *Held*, that the allegation of the complaint must be taken as confessed.

Id.

1157. Plaintiffs in their complaint, verified, averred "that they now are and for several years last past have been the owners in fee simple absolute, and in possession, and rightfully entitled to the possession of" land (describing it). Defendant denied "that the plaintiffs now are and for several years last past have been the owners in fee simple or otherwise, or in the possession (except as hereinafter alleged), or entitled to the possession of the land and premises described in the complaint: *Held*, that the allegations that the plaintiffs own the premises in fee simple absolute, and that they were in possession at the commencement of the action, are not denied.

Reed v. Calderwood, 32 Cal. 109.

1158. When a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by defendants by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or confessing them, should state distinctly and positively new matter sufficient to avoid them.

Ladd v. Stevenson, 1 Cal. 18.

1159. Matter strictly defensive must be

pleaded, or the defendant will be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor.

Ayres v. Bensley, 32 Cal. 620.

1160. If, in ejectment, the answer of the defendant is a mere denial of the allegations contained in the complaint, the defendant is not entitled to prove that he has been for five years in the **adverse possession** of the demanded premises.

McCreery v. Duane, 52 Cal. 262.

1161. If the defendant in ejectment relies on the fact that the **plaintiff's right** to the possession has **expired** during the pendency of the action, he must plead it in a **supplemental answer**.

Foscalina v. Doyle, 47 Cal. 437.

1162. The defendant in ejectment need only defend against the **material allegations** in the complaint; that is, the allegations material to constitute a complaint in ejectment.

Doyle v. Franklin, 48 Cal. 537.

1163. An averment in an answer, in ejectment, that the plaintiff's grantor had made a **prior sale** to the defendant, amounts only to a denial of the plaintiff's title, and the plaintiff need not answer it.

Thompson v. Thompson, 52 Cal. 154.

1164. The general rule that **estoppel** by a former judgment must be pleaded does not apply where no opportunity to plead the estoppel is given.

Clink v. Thurston, 47 Cal. 21.

1165. In ejectment the **recital in the answer** of the series of facts through which the defendant claims a right to the land, are mere averments of evidence, and amount to no more than a general denial. Id.

See EJECTMENT.

See 1095, 1118-20.

Embezzlement.

1166. A complaint alleging that the defendant collected and received certain money, as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of **fraud**.

Porter v. Hermann, 8 Cal. 619.

1167. The complaint should state the facts that constitute the **fiduciary capacity**, as well as its nature and extent. Id.

1168. It is necessary, in such a case, to charge not only that defendant received the money as agent, but that he **converted** it in the course of his employment as such. Id.

1169. Where the character or capacity in which a party is alleged to have acted is **essential** to the charge of fraud, that charac-

ter or capacity must be averred in direct and positive terms, or the charge must fall. Id.

1170. A charge in the alternative can not be cured by verdict, nor by a judgment by default. Id.

1171. The allegation is, in substance, that the defendant collected the money as agent, or, if not as agent, then as attorney in fact. Id.

Estoppel in Pais.

1172. A party must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity. Davis v. Davis, 26 Cal. 38.

1173. A technical estoppel only is required to be specially pleaded, which is only by deed to the party pleading, or to one under whom he claims, or by matter of record. Hostler v. Hays, 3 Cal. 302.

Executors, Administrators, Guardians, etc.

1174. The failure of the plaintiff to allege in his complaint in a suit on a claim secured by a mortgage, its presentation and rejection by the **administrator**, is an objection that the complaint does not state facts sufficient to constitute a cause of action.

Hentsch v. Porter, 10 Cal. 555.

1175. Though an administrator be described in the caption of the complaint as administrator, yet the facts show that it is not sought to charge him as administrator, and no relief is sought against the estate: *Held*, that the objection that he is sued in his **representative capacity** is untenable.

People v. Houghtaling, 7 Cal. 348.

1176. A complaint alleging that the testator was seised and possessed of certain premises at the time of his death, on the nineteenth of July, 1855, and that the plaintiffs were appointed the executors of his last will and testament, without averring in direct terms, either previously or subsequently, the fact of the **testator's death**, or that he left a last will and testament, is defective as a pleading. Halleck v. Mixer, 16 Cal. 574.

1177. The complaint here, averring that plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have been ever since in the possession of the premises, is not demurrable on the specific ground that it does not show that plaintiffs are the executors of F., or have any authority to maintain the action, though it is subject to other objections. The complaint should state the death of F.; his leaving a last will and testament; the appointment therein of the plaintiffs as executors, the probate of the will, the issuance of letters testamentary thereon to the plaintiffs, and their qualification and entry upon the discharge of their duties as executors. Id.

1178. The executors had the right to in-

stitute the action under the general authority conferred upon them by the statute. No special authorization from the probate court is requisite in such cases. *Id.*

1179. A complaint in an action brought by an administrator, who has been appointed after the **resignation of a former administrator**, is sufficient, if it avers the issue of letters to the former administrator, that he qualified and entered upon the discharge of the trust, that he resigned, and his resignation was accepted by the probate court, and that the plaintiff was afterwards appointed administrator, and qualified, and that letters were issued to him.

Lucas v. Todd, 28 Cal. 182.

1180. One in the possession of personal property as administrator can bring an action in his own name against a wrong-doer for its wrongful conversion, without setting forth, in the complaint, his official and representative capacity. An allegation in the complaint that the plaintiff sues as administrator is surplusage.

Munch v. Williamson, 24 Cal. 167.

1181. If an administrator brings action against a former administrator of the same estate and his sureties, and, in his complaint, states the proceedings resulting in the appointment of the former administrator, his removal, and the appointment of the plaintiff, and then avers that the former administrator was afterwards cited to render an account, and rendered one; and that the court settled the account, and rendered a final decree, in which it found that he was indebted to the estate in a sum named; and the defendants, in their answer, deny that there had been a final settlement of the accounts, or that a final decree had been entered in the probate court upon such settlement, the denials are sufficient to defeat a motion for judgment on the pleadings, even if the denials are coupled with an allegation that an appeal to the supreme court has been taken from the only decree rendered.

Craig v. Bateman, 49 Cal. 71.

1182. Where a party is sued as administrator, the complaint must allege the appointment of an administrator, and that the party sued was acting in that capacity, otherwise the judgment would not be binding on the estate of the intestate.

Barfield v. Price, 40 Cal. 535.

1183. When a party sues as executor, the complaint must contain the proper allegations to show that he is entitled to sue in that capacity. *Id.*

1184. Where the complaint avers title as administrator, a default admits it.

Peck v. Strauss, 33 Cal. 678.

Failure of Consideration.

1185. A county warrant drawn by the auditor, directing the treasurer to pay to

H. E. Co. nine hundred and sixty-five dollars for services as county printer, was for a valuable consideration indorsed by H. E. Co. to F., and by F. transferred to plaintiff for nine hundred and sixty-five dollars, paid by the latter. The warrant was, in fact, illegal and valueless, and payment being for this reason refused by the treasurer, plaintiff instituted the present action against H. E. Co. and F. to recover back the amount paid by him, setting up in the complaint the foregoing facts, and that defendants, at the time of their transfers, represented that the warrant was valid, and would be paid on presentation: *Held*, on demurrer, that the complaint stated a cause of action, and that on the facts alleged plaintiff was entitled to recover from defendants the money which he had paid for the warrant.

Keller v. Hicks, 22 Cal. 557.

Ferry.

1186. In an action to recover damages by the owner of a licensed ferry, against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use, or that of his family; and the omission of those allegations was fatal.

Hanson v. Webb, 3 Cal. 237.

Forcible Entry and Unlawful Detainer.

1187. A complaint in forcible entry and detainer should not contain allegations respecting the defendant's appropriation of personal property.

Gillam v. Sigman, 29 Cal. 637.

1188. The complaint in an action of forcible entry need not pray for treble damages, to warrant the court in trebling them.

Hart v. Moon, 6 Cal. 161.

1189. In an action of forcible entry and detainer the value of the rents and profits of the premises is not required by the statute to be stated in the complaint, and without such statement may be awarded as damages.

Holmes v. Horber, 21 Cal. 55.

1190. In forcible entry and detainer it is optional with plaintiff either not to claim any damages, or to claim only such as arise from loss of rents, or from waste, or from both. There is no such connection between the rents and profits and waste committed as to require the damages from the loss of the one and the commission of the other to be united in the same demand.

Hicks v. Herring, 17 Cal. 566.

1191. Under the twelfth section of our forcible entry and detainer act, plaintiff is not compelled to claim damages for waste and injury or for rents and profits. He may

simply claim possession; and in a subsequent suit, may recover damages for waste committed pending the action of forcible entry and detainer. *Id.*

See **FORCIBLE ENTRY.**

Foreclosure of Mortgage.

Complaint.

1192. An action will not lie on the mere recital in a mortgage of the existence of the debt. In an action upon the promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient.

Shafer v. B. R. & A. Co., 4 Cal. 294.

1193. In foreclosing a mortgage containing a stipulation that the mortgagee should be entitled to all costs, including counsel fees not exceeding five per cent. of the amount due, it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, as the counsel fees thus stipulated to be paid were not the cause of action, but, like costs, a mere incident to it, and might be fixed by the court, at its discretion, not exceeding the five per cent.

Carriere v. Minturn, 5 Cal. 435.

Gronfier v. Minturn, 5 Id. 492.

1194. In an action to foreclose a mortgage, an allegation that a party who is made a co-defendant with the mortgagor, has, or claims to have, some interest in or claim upon the mortgaged premises, is sufficient without averring the character of the interest.

Anthony v. Nye, 30 Cal. 401.

1195. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud on plaintiff; that O'D. in taking said deed acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to declare such trust, and execute a deed of the property to plaintiff; that, on

account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D.; that said trust be declared; that he execute a deed to plaintiff; that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or, that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then plaintiff have judgment against H. and wife on said notes; that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: *Held*, that the demurrer is not well taken; that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit, a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages; *held, further*, that O'D. can not set up either the invalidity of the mortgages given by H. and wife, who release errors, or the title acquired by him from them, and that he holds the property in trust for plaintiff.

De Leon v. Higuera, 15 Cal. 433.

1196. The notes and mortgages in this case were properly admitted in evidence, against the objections of O'D., as showing the history of the transaction, and his connection with the property, as also the consideration of the last mortgage, which was given as security for money then loaned, and for the money previously loaned, and secured by three previous mortgages on the same land.

Id.

1197. In an action on a note, and to enforce the lien of a mortgage given to secure its payment, where other parties besides the mortgagor are made defendants on the ground that they have or claim an interest in the mortgaged property, a general allegation in the complaint that such parties have or claim to have some interest in the property is all that is required.

Poett v. Stearns, 28 Cal. 226.

1198. The averment in the complaint that the plaintiff is the owner of the note and mortgage in suit, is a sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note.

Rollins v. Forbes, 10 Cal. 299.

1199. If the complaint in a foreclosure suit avers that the mortgage was executed by

the defendant (thereby making it by averment a legal mortgage), and also sets out a copy of the same, and it appears on its face not to be a legal as distinguished from an **equitable mortgage**, the averment may be rejected as surplusage.

Love v. S. N. L. W. & M. Co., 32 Cal. 639.

1200. The reasonable construction of an allegation in a complaint, that "plaintiff furnished materials between the sixth day of April, 1862, and the twenty-eighth day of June, 1862," is that plaintiff commenced furnishing the materials on the sixth day of April, and continued furnishing the same from time to time up to June 28th.

McCrea v. Craig, 23 Cal. 522.

1201. Where the plaintiff, being the owner of an undivided one half of a tract of land, mortgaged his interest therein to A., and subsequently, with his co-tenant, conveyed the land to B. and C., two thirds to one and one third to the other, by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due the plaintiff filed his bill against B. and C., to compel a foreclosure and payment: *Held*, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay off the mortgage before bringing his action.

Abell v. Coons, 7 Cal. 105.

1202. Where a judgment is rendered against A. and his sureties, and A. and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B., a surety not joining in the mortgage, to satisfy the judgment, and afterwards is voluntarily released: *Held*, that no action can be maintained on the mortgage; for the **levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied.**

People v. Chisholm, 8 Cal. 29.

1203. An allegation in a complaint to foreclose a **chattel mortgage**, that the furniture and upholstery were furnished for and used in the furnishing of the hotel in the city and county of San Francisco, known as the "Willows," is not an allegation that the goods were used in a "hotel," nor that they were used in a building called the "Willows," nor that the "Willows" was a hotel.

Stringer v. Davis, 30 Cal. 318.

1205. In an action to enforce **specific liens** and equitable rights against an estate, it is not necessary to allege a presentment of the claim.

Fallon v. Butler, 21 Cal. 24.

1206. The plaintiff, in an action to **redeem** a mortgage, need not allege or prove a tender of the amount due upon the mortgage debt previous to the commencement of action. Daubenspeck v. Platt, 22 Cal. 330.

1207. Section 58 of the practice act, relating to the description of land, does not apply to actions for the foreclosure of mortgages.

Emeric v. Tams, 6 Cal. 153.

1208. Whenever a subsequent mortgagee files a bill to **redeem the former mortgage**, or to redeem the former and to foreclose his own, he may allege and show that the claim of the prior mortgagee has been exaggerated, or any other kindred fact which will increase the fund.

Carpentier v. Brenham, 40 Cal. 221.

1209. A complaint in an action against an administrator, to enforce the lien of a mortgage, need not aver that **notice to creditors** has been published, but must aver the presentation of the mortgage claim for allowance.

Harp v. Calahan, 46 Cal. 222.

1210. An allegation in a complaint, in an action brought against an administrator to enforce a mortgage given by the intestate, that the administrator waived the **presentation of the mortgage claim** for allowance, is irrelevant.

Id.

1211. It is a cardinal rule that the pleading of the party to whom relief is granted must be sufficient to warrant the relief.

Sigourney v. Zellerback, 55 Cal. 431.

1212. In an action to foreclose a mortgage, a complaint in **intervention** was filed, setting up a contract between the plaintiff and the defendant Zellerback (the mortgagor's grantee); whereby the former agreed to execute to the latter an assignment of the note and mortgage in suit (and of another note and mortgage), and to place the same, with the instruments assigned, in escrow with one P.; the latter, thereupon, to give his notes to the plaintiff for specified sums and assignment, and instruments assigned to remain in the hands of P. as security for the payment of the notes, until Z. should deliver to him, as collateral security for the notes, certain shares of stock, and then to be delivered to Z.; the complaint in intervention further alleging full performance of the contract by Z., and the conveyance of the mortgaged premises by him, with warranty against incumbrances to the intervenor, and praying that the notes and mortgages be decreed to be delivered up and canceled, or, if the court held the mortgage to be still in effect, that the stock delivered by Z. to P. should be first sold, and the proceeds applied on the mortgage. Z. answered the original complaint, setting up the same facts as the intervenor, but suffered default to the complaint in intervention. The court found that such a contract had been made, and that Z. had made and delivered to the plaintiff his notes, and had delivered to P. certain shares of stock of the kind, but not of the quantity required by the contract, and that the stock had not been accepted by the plaintiff in

satisfaction of the contract, and decreed that the stock should first be sold and the proceeds applied on the mortgage, and that the mortgaged premises should be sold for the balance only: *Held*, that the allegations of the complaint were insufficient to sustain the judgment; and *held, further*, that (without re-reference to the sufficiency of the complaint) the plaintiff had no lien upon the stock, the same not having been accepted by him, and that, therefore, this was not a case for a marshaling of securities in favor of the intervenor. *Id.*

Answer.

1213. Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant on the understanding that if the money was repaid in six months, with interest, plaintiff was to reconvey, and does not specifically deny that the money was loaned: *Held*, that it virtually admitted the loan.

Lee v. Evans, 8 Cal. 424.

1214. The allegation in the answer, that unless the money was returned, the property should remain in the plaintiff, does not change the nature of the contract. This is the usual form of a mortgage. *Id.*

1215. In this case, as the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure this bond, the denials in the answer being literal and conjunctive, the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond. See facts stated.

Blankman v. Vallejo, 15 Cal. 638.

See FORECLOSURE.

Forfeiture, Plea of.

1216. In an action of ejectment to recover mining claims, an answer to the complaint which avers that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendant's entry, is insufficient, in not setting forth the rules, customs, etc.

Dutch Flat Co. v. Mooney, 12 Cal. 534.

1217. The facts should be stated so as to enable the court to determine whether the forfeiture did accrue. The averment of forfeiture is a legal conclusion, upon which no issue can be taken. *Id.*

Former Action Pending.

1218. To support a plea in abatement, founded on the pendency of a prior action,

it is necessary to show that process was issued in such action.

Primm v. Gray, 10 Cal. 522.

1219. Where, on a plea in abatement to the entire action, that another suit for the same cause of action was pending at the time of suit brought, if the proof shows that the first suit is only for part of the same matter sued for in the second suit, the plea fails. *Thompson v. Lyon*, 14 Cal. 39.

1220. If an answer sets up a former suit, pending between the same parties, in abatement of the action, and has annexed to it a copy of the record of the former suit, the annexation of this copy does not do away the necessity of a trial and the introduction of the record in evidence. The question can not be determined on the pleadings, but there must still be proof of the former suit. *People v. De la Guerra*, 24 Cal. 73.

1221. The defense of a prior *lis pendens* is available only where the plaintiff, at least, in both actions is the same.

O'Connor v. Blake, 20 Cal. 312.

1222. A plea to abate an action by reason of another action pending is not good unless it shows that the pending action was brought for the same cause as the one in which the plea is interposed.

Calaveras Co. v. Brockway, 30 Cal. 325.

See DEFENSES.

Fraud.

Complaint.

1223. A bill in equity, to obtain relief on the ground of fraud, is not sufficient if it charge fraud in general terms, but the facts constituting the fraud should be stated.

Kent v. Snyder, 30 Cal. 666.

Castle v. Bader, 23 Id. 75.

1224. A complaint in equity, to have a deed, absolute on its face, reformed so as to become a deed of trust, which avers that the deed does not express the trusts and conditions upon which it was agreed the property should be transferred, but that such conditions were by the defendants fraudulently suppressed, without any statements of what acts of fraud were practiced, does not state facts sufficient to constitute a cause of action. *Id.*

1225. In a bill to set aside certain conveyances of real estate as fraudulent against creditors, there is no necessary inconsistency in averring the grantee to be a fictitious person, and that the deed to him, or in his name, was made to hinder and defraud creditors. *Purkitt v. Polack*, 17 Cal. 327.

1226. Plaintiff sues defendants for partition of certain property. The court ordered a sale of the property and distribution of the proceeds; after the sale, G. files a petition, stating that he is the creditor of one F.

M. Harris (not plaintiff), and has an attachment lien on the interest of said F. M. Harris, in the property sold; that said property, in fact, belonged to F. M. Harris, and that any conveyances of the same from him to plaintiff were merely colorable, for the use and benefit of F. M. Harris, and made to hinder, delay, and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff; court refused: *Held*, that there was no error; that the petition of G., being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, is insufficient in this, that there is no allegation of the **insolvency** of F. M. Harris, and that the charges of fraud are too general, and do not state the specific facts constituting the fraud.

Harris v. Taylor, 15 Cal. 348.

1227. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value; plaintiff sold his interest in this claim to defendant for greatly less than its value: *Held*, that in a suit by plaintiff against defendant to **set aside this sale for fraud** and for an account, etc., an averment that defendant is indebted to plaintiff on an account in a sum greater than that paid by defendant for the mining, is in effect an offer to place defendant in *statu quo*, as per the rule of law. Watts v. White, 13 Cal. 321.

1228. A complaint in equity, filed for the purpose of **setting aside a grant**, on the ground that it was obtained by fraud, must state specifically and definitely the facts constituting the fraud.

Oakland v. Carpentier, 21 Cal. 642.

1229. In an action brought to vacate a patent for land on the ground that its issuance was procured from the government by false suggestions, fraudulent concealments, and by **misrepresentations**, the acts of fraud and misrepresentation on which the general charge is based must be specified in the complaint, or it will not state facts sufficient to constitute a cause of action.

Semple v. Hager, 27 Cal. 163.

1230. A complaint in an action in the name of the people on the relation of a private individual, to cancel a patent for a tract of land issued by the state to the defendant, which merely avers that the relator is seised and possessed of the land, and that his title was derived from the state of California under and by virtue of the location of a school warrant made under and in accordance with the provisions of an act of the legislature; that said location was duly and properly made, and in all respects according to the provisions of said act, does not state facts sufficient to constitute a cause of action.

People v. Jackson, 24 Cal. 630.

1231. If a complaint avers that the defendant, by false representations as to the value of **mines**, induced the plaintiff to purchase the same and pay a sum of money therefor, and that the defendant gave plaintiff a deed therefor and received the consideration, and also claims general damages exceeding the consideration, and avers an offer to redeem the deed, it is an action in common law parlance, *ex delicto* and not *ex contractu*, and the averment of an offer to return the deed is not an averment of a rescission of the contract, nor of an offer to rescind.

Aherns v. Adler, 33 Cal. 608.

1232. If the plaintiff in his complaint claims damages for a fraudulent sale of mines to him, and avers an offer to return the deed given to him, an amendment, striking out the offer to return the deed, does not change the issues tendered in the complaint. *Id.*

1233. A creditor who has purchased land of the debtor at sheriff's sale, and obtained a **sheriff's deed** therefor, in a complaint to cancel a deed given by the debtor to defraud him before judgment was recovered, need not aver that the debtor was **insolvent** when he made the deed.

Hager v. Shindler, 20 Cal. 47.

1234. The complaint in a suit in equity brought by the judgment creditor, who has a sheriff's deed of land, to set aside and cancel a deed of the same, given by the judgment debtor before the recovery of judgment to defraud the creditor, need not aver that the plaintiff has exhausted his remedy at law by issuing an execution and having it returned *nulla bona*. *Id.*

1235. Where a bill in equity is filed to cancel a deed which avers that the grantor deposited the same with a **third person**, to be by him delivered to the grantee upon the order of the grantor or his agent, and that before the agent gave the order, the grantor directed the third person not to deliver the deed, but does not aver that the third person intends or threatens to deliver the deed to the grantee, or that he will disobey the instructions of the grantor, the bill does not state facts sufficient to constitute a cause of action.

Fitch v. Bunch, 30 Cal. 208.

1236. To obtain aid of chancery to **vacate a judgment**, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. If he relies on fraud and deception practiced on the court in managing, procuring, and giving evidence, he must show that by such practice he was defrauded of his opportunity to defend, and that his defense would otherwise have been effectual.

Riddle v. Baker, 13 Cal. 205.

1237. The complaint, the suit being to set aside a judgment of H., L. & B. v. Erwin, after setting out minutely the proceed-

ings adopted by them in having the clerk enter up the judgment, then avers that "said proceedings and circumstances under which said judgment was entered up by said clerk render the same void in law, the said clerk having no power or jurisdiction to enter said judgment under the circumstances and in the manner stated, and that the same is fraudulent as against this plaintiff, and tends to his great and irreparable injury;" that W., attorney of H., L. & B., was a party to the fraud; that the judgment was without consideration, was false, covinous, and fraudulent, and that E. is insolvent, states facts sufficient to constitute a cause of action, and W., being charged as a party to the fraud, is properly joined as defendant.

Crane v. Hirshfelder, 17 Cal. 467.

1238. In order to set aside a judgment or conveyance on the ground of fraud, it is not sufficient to aver in general terms that such judgment or conveyance was fraudulent, but the facts and circumstances constituting the alleged fraud must be set forth.

Castle v. Bader, 23 Cal. 75.

1239. Where a judgment by confession is attacked by a creditor as fraudulent against him, on the ground that the object of the debtor and the judgment creditor was to assist the debtor in forcing a compromise with his other creditors rather than to enforce the judgment, the complaint must plead this ground of objection to the judgment. A general averment that the intent was to hinder, delay, and defraud, is insufficient.

Meeker v. Harris, 19 Cal. 278.

1240. Such general averment of fraud will not put the adverse party on his defense.

Id.

1241. Where a creditor files a bill to cancel and set aside a judgment rendered against his debtor, on the ground that it is fraudulent, and to reach the property of the debtor and have it applied in satisfaction of his demand, the complaint must aver, either that the plaintiff has acquired a lien on the property he seeks to reach, or that he has recovered a judgment upon which an execution has been issued, and returned no property found.

Castle v. Bader, 23 Cal. 75.

1242. A complaint in an action to set aside a judgment which contains no averment showing that relief could not have been obtained on motion, may be deniable, but if defendant fails to demur, and answers on the merits, and the fact supplying the defect appears in the record, the objection is waived.

Bibend v. Kreutz, 20 Cal. 109.

1243. In an action to recover personal property, where the defendant justified as sheriff under a judgment and execution against the plaintiff's vendor, whose property the answer alleged the goods to be, the court, on the ground that fraud had not been specially pleaded, excluded from the evi-

dence the judgment roll under which the defendant justified, and also evidence tending to show that the sale by the judgment debtor, under which the plaintiff claimed, was not followed by an actual and continued change of possession: *Held*, that the defendant was not bound to anticipate the case of the plaintiff, or to assume under whom he would claim title, and that the ruling of the court was therefore erroneous.

Humphreys v. Harkey, 55 Cal. 283.

1244. When the cause of action stated in the complaint is for relief on the ground of fraud, and is stated to have accrued more than three years before the commencement of the action, the complaint should aver that the acts constituting the fraud had been discovered within three years; but if the replication contains this averment, and this issue is tried without objection, the irregularity in the manner of presenting the issue will be disregarded.

Boyd v. Blankman, 29 Cal. 19.

Answer.

1245. The circumstances constituting fraud must be set up.

Gushee v. Leavitt, 5 Cal. 160.

Gifford v. Carvill, 29 Id. 589.

People v. San Francisco, 27 Id. 656.

1246. A case where it was held the answer sufficiently presented the question of fraud.

Lamott v. Butler, 18 Cal. 32.

1247. Answer set up that the note was given for the land, fencing and building materials; that plaintiff falsely represented that there was building material for building a barn; that this material was so insufficient in quantity that it cost six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good: *Held*, that defendant having taken possession under the contract, and retaining it, can not set up representations, fraudulent or otherwise, as to fences, they being, in this case, part of the freehold; *held, further*, that a special demurrer being put into the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for lumber, but for the value of lumber contracted for, and not delivered, and this at the time of contracting.

Kinney v. Osborne, 14 Cal. 112.

1248. The answer is also fatally defective, in not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity of lumber.

Id.

1249. Where an answer contains only a general allegation of fraud, and the trial of the issue of fraud thus presented proceeded to its conclusion without objection by plaintiff,

iff as to its sufficiency, or objection to evidence, on that ground, offered by defendant in support of the issue of fraud; under these circumstances an **objection to the answer**, that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, comes too late, and will not be considered on appeal.

King v. Davis, 34 Cal. 100.

1250. An answer seeking to avoid a contract, by reason of fraudulent **misrepresentations** of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matter of fact of which defendant was ignorant, and not of law. People v. San Francisco, 27 Cal. 636.

Goods Sold and Delivered.

1251. A declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the **sale or delivery** of the articles to the defendant, nor show in what place or what manner the indebtedness accrued, whether on account of the defendant or that of another.

Mershon v. Randall, 4 Cal. 324.

1252. Where the complaint *in hæc verba*, set forth the bill of sale, it was held to remedy a defect in the **description of the quantity** of the goods sold.

Cochran v. Goodman, 3 Cal. 244.

1253. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as the agents of defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Id.*

1254. A complaint for goods sold, which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action.

Abadie v. Carrillo, 32 Cal. 172.

1255. In a complaint for goods sold and delivered, the ordinary form of a count in **indobitatus assumptit** is sufficient.

Magee v. Kast, 49 Cal. 141.

Heirship.

1256. An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship.

Castro v. Arnesti, 14 Cal. 38.

Husband and Wife.

1257. A complaint by husband and wife to recover the homestead conveyed away by the deed of the husband alone, must aver either that the premises were occupied as a

homestead at the date of the conveyance, or that they had not been previously abandoned. Harper v. Forbes, 15 Cal. 202.

1258. In an action for the division of the **common property** of husband and wife after a decree of **divorce**, the plaintiff, to bring herself within the provisions of the act "defining the rights of husband and wife," passed April 17, 1850, must affirmatively state such facts as give her the right to the property under the act.

Dye v. Dye, 11 Cal. 163.

1259. It is not material where the **marriage was solemnized**, if the parties afterwards, and after the passage of the act, resided and acquired the property here. *Id.*

1260. In suit against the wife for her **separate debt**, for which she was liable *in personam* before coverture, the complaint need not set out any separate property of the wife. Bostic v. Love, 16 Cal. 69.

1261. Where husband and wife are sued for **rent** claimed on a lease made by plaintiff to the wife, plaintiff and the wife being tenants in common of the property: *Held*, that the wife can be liable only as **sole trader** under the statute; and that the complaint must aver facts requisite to establish her liability in that character, and that the allegation that she "was doing business as a *feme-sole*, with the consent of her husband," is insufficient. Aiken v. Davis, 17 Cal. 119.

1262. It is immaterial whether a conveyance to the wife was made with or without a **fraudulent intent**; that in either case it is unavailing against the **mortgage**, because the inference from the language of the complaint that the conveyance was upon purchase and during marriage, and consequently that the property was common property, is not negated by any averment that the property was transferred to her before marriage, or was a gift to her, or in exchange for her separate property.

Kohner v. Ashenauer, 17 Cal. 578.

1263. A complaint drawn in the name of a husband and wife, to recover on a **note** given to the female plaintiff, if it contain no averment that the plaintiffs were husband and wife at the time the note was given, is not bad on demurrer on the ground of a **misjoinder** of parties plaintiff.

Frost v. Harford, 40 Cal. 165.

1264. The **coverture** of a defendant does not render a **personal judgment** against her void. If she relies on coverture as a defense, she should plead it.

White v. Adams, 52 Cal. 435.

Injunction.

1266. A complaint which states that the defendant has agreed to furnish the plaintiff with a certain quantity of water for irrigation, and is about to enter into other contracts

for the delivery of water to other persons, whereby the defendant will have contracted for the delivery of more water, in the aggregate, than the capacity of his ditch will enable it to supply, does not state facts which entitle the plaintiff to an injunction, for the reason that it does not show that the plaintiff has been or will be injured.

Bk. of Cal. v. F. C. & I. Co., 53 Cal. 201.

Insurance.

1267. If an insurance policy provides that it shall be void if the interest of the assured is other than the entire **sole ownership**, a complaint on the policy which describes the property insured as the plaintiff's property, and avers that he had an interest in it, and all thereof, as the owner thereof, and says "all thereof being the property of the plaintiff," contains sufficient allegations of ownership.

Ferrer v. Home Mutual, 47 Cal. 416.

1268. If a policy of insurance requires the assured, in case of loss by fire, to produce a **certificate of a magistrate**, notary public, or commissioner, that he has examined the circumstances attending the loss, and knows the character of the assured, and believes he has, without fraud, sustained the loss, as a **condition precedent** to a recovery for a loss, an allegation in a complaint "that the plaintiff duly fulfilled all the conditions of said insurance respectively on his part," is a sufficient allegation of having procured such certificate.

Id.

1269. An averment in a complaint on a policy of insurance, that the loss sued for was caused by **fire**, and not by the falling of any building, is equivalent to an averment that it was not caused by a fire which ensued from the falling of a building.

Id.

1270. A complaint that alleges an unconditional contract on the part of the defendant for a consideration specified, to insure the **hotel and furniture** of the plaintiff against loss by fire for a stated period of time, and a loss by fire within the life of the contract, which the defendant has failed to pay, notwithstanding the request of the plaintiff, states a cause of action, and will be held good on demurrer.

Clark v. Phoenix Ins. Co., 36 Cal. 168.

1271. In an action on an insurance policy, by the terms of which the loss is to be estimated, and paid sixty days after due notice and proof of the same made by the assured, an allegation in the complaint that the plaintiff performed all the conditions on his part in the policy to be performed, and gave the defendant due notice and proof of the fire and loss, and demanded payment, does not show that sixty days had elapsed after proof and notice before bringing suit, and the complaint does not state a cause of action.

Doyle v. Phoenix Ins. Co., 44 Cal. 264.

Judgments, How Pleased.

Complaint.

1272. In an action on a judgment obtained in another state, where the transcript of the judgment shows the jurisdiction of the court on its face, it is not necessary to aver **jurisdiction**. Low v. Burrows, 12 Cal. 181.

1273. A judgment creditor, made such by **confession** of judgment, who seeks to reach money of the judgment debtor in the hands of junior judgment creditors, upon the ground that he has a prior lien upon the same, must aver in his complaint that at the time his judgment was rendered, the amount for which it was rendered was unpaid and due.

Denver v. Burton, 28 Cal. 549.

1274. In pleading the judgment of a probate court, it being a court of limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. (The rule is altered by statute of 1858, p. 95, ch. 120.) Smith v. Andrews, 6 Cal. 652.

1275. The law presumes nothing in favor of the jurisdiction of **justices' courts**, and a party who asserts a right under the judgment of a justice, must **affirmatively show** every fact necessary to confer such jurisdiction.

Swain v. Chase, 12 Cal. 283.

1276. A complaint which avers that the defendant made his note; that the plaintiff commenced an action on the note and obtained judgment, and that no part of the note or judgment has been paid, states a cause of action on the judgment and not on the note, and does not state **two causes of action**. Anderson v. Mayers, 50 Cal. 525.

1277. A party to an action who relies on a judgment as an **estoppel** or justification, and in pleading it undertakes to avail himself of the provisions of the act which releases him from pleading the facts which conferred jurisdiction on the justice to render it, must comply strictly with the terms of the act. Young v. Wright, 52 Cal. 407.

1278. The terms "**duly rendered**" and "**duly given or made**," when applied to a judgment, are not equivalent.

Id.

1279. In a complaint, in an action brought on a judgment, it is unnecessary to aver that an **execution** has been issued on the judgment, and an unsuccessful effort made to collect it.

King v. Blood, 41 Cal. 314.

1280. To constitute a valid defense to such an action, it must be shown that the appeal had the effect to suspend the judgment appealed from, or of **staying the execution** thereof.

Taylor v. Shew, 39 Cal. 536.

Answer.

1281. If two Mexican grants are so confirmed at different times as to overlap each other, and the owner of the one confirmed

last is a party to the proceedings confirming the other, and the owner of the one confirmed first becomes a party to the proceedings resulting in the last confirmation, and fails to set up the first confirmation as a bar to having this grant confirmed so as to cover the same land, he can not afterwards attack the last decree in a collateral proceeding.

Sample v. Wright, 32 Cal. 650.

1282. The court of sessions granted a license to defendant to run a ferry. This grant was resisted by plaintiff, who took an appeal to the district court, which affirmed the grant; which judgment remained unversed. This action was brought to recover damages from defendant for running the ferry, the plaintiff alleging that the license was illegally granted: *Held*, that the judgment of the district court was a bar to this action, and that that judgment could not be impeached collaterally.

Webb v. Hanson, 3 Cal. 103.

1283. The answer to a suit on a note set up by defendant's discharge in insolvency. Plaintiff demurred to the answer, on the ground that it did not allege that the note was described, set forth and included in defendant's schedule: *Held*, that the demurrer was not well taken; that under section 59 of the practice act, it was sufficient to allege in the answer that a judgment had been duly rendered, discharging defendant from the demand sued on; and that whether the demand was sufficiently described was matter of evidence to be determined at the trial by inspection of the record.

Hanscom v. Tower, 17 Cal. 518.

1284. In an action upon a judgment, the judgment debtor may set up in bar of a recovery matters which were a proper ground of defense in the original action, accompanied with a showing that he was prevented from availing himself of the defense in the former action by his ignorance of the facts on which it rested, and that this ignorance was not imputable to any negligence or laches on his part.

Spencer v. Vigneaux, 20 Cal. 442.

Justification.

1285. An answer justifying a trespass on the ground of official duty should aver that the defendant is an officer, and what his official duty is. If there are other defendants, and the answer is intended to apply to them, it should state that they entered in aid of the officer.

Pico v. Colimas, 32 Cal. 578.

Libel and Slander, How Pleaded.

Complaint.

1286. Words which on their face appear to be entirely harmless may, under certain circumstances, convey a covert meaning wholly different from the ordinary and natu-

ral interpretation usually put upon them. To render such words actionable it is necessary for the pleader to aver that the author of the libel intended them to be understood, and that they were in fact understood by those who read them in their covert sense.

Maynard v. F. F. Ins. Co., 34 Cal. 48.

1286a. If it is intended to charge in a complaint that such words were used in an offensive sense, such as engaging in a riot to unlawfully invade the possessions of another, and were so understood by those who read them, there must be a colloquium in the complaint to show in what sense the words were libelous.

Clarke v. Fitch, 41 Cal. 472.

1286b. A colloquium in a complaint for a libel can not be supplied by an innuendo. The colloquium states the extrinsic facts to show the libelous meaning of the words and the innuendo applies the words to these facts.

Id.

1287. A complaint for a libel, in which the words alleged to be libelous, are not libelous *per se*, sufficiently avers that the words were intended by the defendant to be understood, and were understood by those who read them, to impute dishonesty to the plaintiff, if it avers that the defendant, intending to injure the plaintiff, falsely and maliciously published the libelous words, thereby meaning and wishing to have it understood, that the plaintiff was dishonest; and that the libel was read by the acquaintance of the plaintiff and business men, who, by reason thereof, are unwilling to employ the plaintiff, and believe that he is dishonest and unfit to be trusted.

Id.

1288. When words which are not libelous *per se* contain a covert meaning which makes them libelous, it is necessary for the plaintiff to aver in his complaint that the words were intended by the defendant to be understood as imputing wrong-doing to the plaintiff, and that they were, in fact, so understood by those who read them.

Id.

Answer.

1289. To constitute a justification in an action for libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the fact detailed can only avail in mitigation of damages.

Thrall v. Smiley, 9 Cal. 529.

Malicious Prosecution.

1290. In an action for malicious prosecution, only the substantial matter constituting the action, that is, facts, and not the evidence of facts, need be set out.

Dreux v. Domec, 18 Cal. 83.

1291. An action of conspiracy for unjustly prosecuting a party also lies, but

probably differs in form at least from an action for malicious prosecution. The gist of an action of conspiracy is the "conspiracy," the combining of two or more to do an unlawful and injurious act, and acquittal or termination of the prosecution is necessary to maintain the suit. *Id.*

1292. In suit against three defendants for malicious prosecution, the complaint averred that "defendants contriving and maliciously intending to injure the plaintiff," etc., falsely, maliciously, and without probable cause, procured him to be indicted for murder: *Held*, that the complaint sufficiently avers a joint agency on the part of defendants in instituting the prosecution. *Id.*

Mandamus.

1293. Averments in a complaint, that the orders allowing an account, and directing the auditor to draw his warrant for the same, "were duly given and made," are sufficient to show the jurisdiction of a board of supervisors to direct a county warrant to be issued, and that there was money in the treasury, and that a tax had been levied, and that no debt had been created when the account was allowed, which, added to the salaries of the officers, equaled the aggregate revenue. *Balcock v. Goodrich*, 47 Cal. 488.

See **MANDAMUS.**

Marriage.

1294. Where the plaintiff averred in her complaint, in suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, when she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes, she thenceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful, and affectionate wife should do: *Held*, that these were insufficient averments of the existence of a marriage, and that the facts averred were only *prima facie* evidence of a marriage.

Letters v. Cady, 10 Cal. 533.

See *People v. Anderson*, 26 Cal. 129.

Mechanic's Lien.

1295. In an action to enforce a mechanic's lien for seventy-six dollars, where the answer averred that the value of the labor "was not over the sum of fifteen dollars or twenty dollars:" *Held*, that it was a denial that the value of the labor was seventy-six dollars, and that the answer should not be stricken out. *Way v. Oglesby*, 45 Cal. 655.

1296. In an action to foreclose mechanic's lien against defendants, alleged in the complaint to be partners under the firm name of the San Geronio fluming company, the San Geronio fluming company, a corpora-

tion, answered, setting up the fact of their incorporation, and alleging title to the property; and judgment was rendered for the sale of the property: *Held*, that the corporation had not been made a party to the suit, and that the judgment as to it was erroneous.

Roussseau v. Hall, 55 Cal. 164.

Reynolds v. Hall, 55 Id. 164.

Bolen v. San Geronio F. Co., 55 Id. 164.

1297. If the complaint, in an action to enforce a lien on a mining claim for work and labor, avers that the plaintiff performed labor on the mine at the request of the defendant, an answer denying that the labor was performed at the request of the defendant is not a denial that the work was performed on the mine.

Bradbury v. Cronise, 46 Cal. 287.

1298. In such an action, a denial in the answer that the plaintiff has a lien on the mine is only a conclusion of law and not a denial of a fact. *Id.*

1299. The general denial puts in issue only issuable facts, and where, in an action to enforce a mechanic's lien, the complaint alleges that the defendant has or claims an interest in the land which is subject to the lien, this allegation is wholly immaterial, and a general denial does not amount to a disclaimer of such interest, but only puts in issue the fact that it was subject to the lien.

Elder v. Spinks, 53 Cal. 293.

Mistake.

1300. In an action to set aside a former judgment between the same parties on the ground of mistake, if the complaint fails to make explanation of the mistake, or the causes which produced it, it fails to set forth facts sufficient to constitute a cause of action.

Douglas v. Brooks, 38 Cal. 670.

Money Had and Received.

1301. A count in a complaint for money had and received, which does not allege a demand, is demurrable.

Reina v. Cross, 6 Cal. 29.

1302. A complaint in the old form for money had and received is proper when a recovery is sought of money which defendant has received and refused to pay on demand to the plaintiff who is entitled to it.

Stanwood v. Sage, 22 Cal. 516.

1303. An action for money had and received to the use of plaintiff lies, whenever the defendant has in his hands money of plaintiff's which in equity and conscience he has no right to retain; and this, whether there be or not any contract or privity between the parties.

Kreutz v. Livingston, 15 Cal. 344.

1304. A count in a complaint in the old form of assumpsit, for money had and re-

ceived, in which the **promise** is laid of a day more than two years prior to the commencement of the action, is demurrable on the ground that it shows the demand to be barred by the **statute of limitations**.

Keller v. Hicks, 22 Cal. 457.

1305. If **subscriptions** of money in aid of a college, made to a finance committee, passed by operation of law to a corporation afterwards formed, the complaint, in an action to recover a subscription, should aver that fact.

Christian Col. v. Hendley, 49 Cal. 347.

Money Loaned.

1306. The declaration was for money loaned, and set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, but did not aver that after paying the draft he canceled it, and delivered it up to the defendant: *Held*, that the defects were fatal in this form of action. Lambert v. Slade, 3 Cal. 330.

Money Paid, Account Stated.

1307. A complaint stating that whereas said defendant was justly indebted to plaintiffs in the sum of three thousand dollars, for money paid, laid out, and expended for the use and benefit of said defendant, and at his special instance and request, to wit, at, etc., and on the first day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiffs on an account then stated between them, and the said defendant being so indebted to the plaintiffs, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiffs to pay the same, etc., and that said sum is due and unpaid, sufficiently states a cause of action. De Witt v. Porter, 13 Cal. 171.

New Promise.

1308. In actions upon written instruments for the payment of money, as promissory notes, the date being shown, shows the period when the right of action accrues. In such cases any new promise which has been made, renewing or continuing the contract, should be alleged.

Smith v. Richmond, 19 Cal. 481.

1309. In an action to recover a **debt against an insolvent** which has been discharged, but revived by a new promise, the complaint is always upon the original demand, and nothing is alleged of the new promise. If the discharge is pleaded, the new promise may be given in evidence by the plaintiff. *Id.*

1310. The doctrine of numerous authorities that the new promise in such cases constitutes the **real cause of action**, and that

the original contract is only the consideration for the promise: *Held*, to be unsound. The true view is held to be that the action is upon the original demand, and that the new promise is only evidence that the statute does not operate as a bar to its prosecution. *Id.*

1311. The same rule holds where a new promise is relied on to obviate a discharge in insolvency, pleaded to an action upon a promissory note or other contract for the payment of money. The action in such cases is founded upon the original contract, and the new promise is only a waiver of the defense furnished by the discharge. *Id.*

Contra, McCormick v. Brown, 36 Cal. 180.

1312. Complaint avers in substance that defendant **made his note**, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff therein in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc., * * * defendant, by virtue of * * * proceedings in insolvency, etc., * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby **revived said obligation**, etc.: *Held*, that the complaint does **not** set up **two causes of action**; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement.

Smith v. Richmond, 15 Cal. 501.

1313. A complaint upon a promissory note, the collection of which is barred by the statute of limitations, contains a cause of action, if it alleges that the defendant has some time within four years of the day the suit was commenced "in writing, acknowledged and promised to pay the note." Such allegation imports that the defendant signed his name to the writing.

Porter v. Elam, 25 Cal. 291.

Nuisance.

1314. **Special damages** to private person, from nuisance in obstructing a public highway, must be particularly stated in the complaint. The means by which the damages were caused must be alleged in the complaint.

L. T. Co. v. S. & W. W. R. Co., 41 Cal. 562.

1315. In an action by the owner of a toll road against another for damages caused by obstructing the public highway leading to his road, the plaintiff must allege that his right to collect tolls has been disturbed, or it will be presumed that he has received no injury by reason of the obstruction. *Id.*

1316. In an action to abate a nuisance

and for damages, founded on section 249 of the practice act, plaintiffs charged in their complaint that the alleged nuisance was caused by the erection and maintenance by defendants of a dam across a canyon, on which plaintiffs' mining claim was situated, and below their claim, by which the outlet for the water and tailings from their claim was obstructed to such an extent as to render its working impracticable. To which the defendants replied, admitting in effect the erection of the dam and its effect upon the work of the plaintiffs, but denying plaintiffs' title to the mining ground or their right to work the same, and alleging that the ground worked by plaintiffs is in fact a part of their claim, and that the dam was erected for the purpose of working their claim, which could not be worked without it: *Held*, by the court, that to enable the plaintiffs to recover they must show: First, that they owned the ground claimed by them; second, that the dam prevented their working it to advantage; third, alternatively, that defendants had no title to the bed of the canyon; or, if they had, that their right was acquired subsequently to that of the plaintiffs, or, if prior, that the dam was not needed to enable defendants to work to advantage.

Stone v. Bumpus, 40 Cal. 423.

1317. In an action to abate a nuisance, a complaint which fails to allege that the plaintiff possessed the right to use the canyon, the obstruction of which constituted the nuisance, is radically defective. *Id.*

Officer.

1318. In an action against an officer for a trespass committed through his deputy, it is not necessary to state the official character of the defendant in the complaint, or to charge the trespass as having been committed through a deputy.

Hirsch v. Rand, 39 Cal. 315.

1319. There is no rule of pleading which requires a party who sues an officer to recover back money illegally exacted from him, to aver in his complaint the precise amount of money which was illegally exacted, but he may recover an amount less than that stated in the complaint.

Meek v. McClure, 49 Cal. 623.

Partition.

1320. The complaint in partition must set forth specifically, so far as known to the plaintiff, the interests of all persons in the premises sought to be partitioned; and if the defendant has two deeds, each purporting to convey an undivided two thirds of the property, and one of them was given as a substitute for the other, that fact must be averred, and if not averred, the plaintiff can not prove it. Miller v. Sharp, 48 Cal. 394.

Partnership.

1321. If the complaint, in an action to dissolve a partnership and settle its accounts, avers a loss, borne exclusively by plaintiff, and asks for judgment for defendant's proportion, and the evidence shows a profit realized by plaintiff in one transaction, as well as a loss borne by him in another, the account taken should credit the defendant with his part of the profit realized, as well as charge him with his proportion of loss sustained. Clark v. Gridley, 41 Cal. 119.

1322. In such case, if the plaintiff has settled with the defendant for his part of the profit realized, it is incumbent on the plaintiff to show that fact on the trial.

Clark v. Gridley, 41 Cal. 119.

Quieting Title to Lands.

Complaint.

1323. In an action to quiet title against parties claiming from the same source of title through a prior unrecorded conveyance, it is necessary to aver want of notice of the conveyance.

Lawton v. Gordon, 34 Cal. 36.

1324. A complaint must state that the plaintiff was in possession at the time of the commencement of the action.

Pralus v. Jefferson M. Co., 34 Cal. 558.

Brooks v. Calderwood, 34 Id. 663.

1325. In an action brought under section 738 of the code of civil procedure, to determine an adverse claim to real property, it not essential that the complaint should aver the plaintiff to be the owner in fee; and it will be sufficient if it appears that the plaintiff claims an interest in the land, and that the defendant asserts a claim of title adverse to the plaintiff's claim.

Stoddard v. Burge, 53 Cal. 394.

1326. In such an action, when the plaintiff claims under a deed from the defendant absolute in form, it is not bad pleading to state that fact in the complaint. *Id.*

1328. Where plaintiffs alleged that by reason of defendants' adverse claim, "they were greatly embarrassed in the use and disposition of their mining claims," and "that thereby their value was greatly depreciated:" *Held*, a sufficient averment of injury.

Pralus v. P. M. Co., 35 Cal. 30.

1329. In an action to remove a cloud upon title, the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, should be stated in the complaint.

Hibernia S. & L. S. v. Ordway, 38 Cal. 679.

1330. But when the instrument which constitutes the cloud is a tax deed, which, under the statutes of this state, is declared to be *prima facie* evidence of title, the name

of the instrument is sufficient for the purpose of showing an apparent validity. *Id.*

Answer.

1331. If the answer in an action to quiet title admits plaintiff's ownership in fee simple and possession, the rightfulness of the possession follows the admission, and even if plaintiff went into possession by leave of defendant's tenant he is not estopped from denying defendant's title.

Reed v. Calderwood, 32 Cal. 109.

1332. If the complaint alleges that the plaintiff has been in the adverse possession of land for four years, and the answer, which is filed one month after the filing of the complaint, denies such adverse possession for a longer time than four months previous to the filing of the same, it is equivalent to a denial that the plaintiff has been in possession for a period exceeding three months prior to the filing of the complaint.

Garvey v. Willis, 50 Cal. 619.

1333. If, in an action to quiet title to real estate, the plaintiff, in his complaint, alleges that he is the owner of, and in possession of the property, and sets out a copy of the deed under which he claims, an answer which denies that he is the owner of, or in possession of the property, except as a tenant in common with the defendant, and alleges that the deed was not intended as a conveyance, but merely to enable the grantee to sell the property, and that the grantor subsequently conveyed to the defendant three fifths undivided of the premises, contains a defense, and the plaintiff is not entitled to judgment on the pleadings. *Id.*

1334. In an action to quiet title, where the defendant relies upon title in himself, a cross-complaint is unnecessary; and, if one is filed, it will not entitle the defendant to have the issues arising thereon first tried.

Wilson v. Madison, 55 Cal. 5.

Sheriff.

Complaint.

1335. A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which set out that the sheriff was in possession of a certain execution against plaintiff, J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. No damage has, or can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at sale could acquire no right to

the property, nor could the plaintiff suffer any injury. *Kendall v. Clark*, 10 Cal. 17.

1336. In an action against a sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he can not recover in this action.

Killey v. Scannell, 12 Cal. 73.

See 30 Cal. 190.

1337. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the sheriff's malfeasance.

Ghiradelli v. Bourland, 32 Cal. 585.

1338. If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. *Id.*

1339. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed and recorded, does not state a cause of action on the bond. *Id.*

1340. A complaint where there is more than one plaintiff, in an action to recover damages for the alleged seizure of goods, which avers that the defendant took and carried away "certain goods, chattels, and effects, of and belonging to said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiffs; but would be sustained by proof that the plaintiffs owned the property as partners, or as tenants in common, and that their respective interests therein were very unequal.

Pelberg v. Gorham, 23 Cal. 349.

See also 10 Cal. 520.

1341. In an action against a sheriff for special damages, resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, when there is no allegation in the complaint of title, nor any averment that, in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits: *Held*, that such complaint is insufficient.

Knight v. Fair, 12 Cal. 206.

1342. In an action against a sheriff for seizure and conversion of the plaintiff's property taken under process against a third person, a demand upon the defendant prior to the bringing of the suit is not necessary to a recovery. *Ledley v. Hays*, 1 Cal. 160.

1343. In an action against a sheriff for

damages for a failure to return an execution, if the complaint avers only its receipt by him, and that he has collected the money, and has failed to return the execution, this court will not assume, upon a failure to deny the allegations of the complaint, that the sheriff has failed to pay the money to the plaintiff. *Hoag v. Warden*, 37 Cal. 522.

Answer.

1344. In an action brought against a sheriff for property attached by him, he may plead the property to have been in possession of defendant in the suit. In such a case, it is not necessary that the defendant should specially plead **want of notice and demand** in order to make such a defense.

Killey v. Scannell, 12 Cal. 73.

1345. If, in justification by the sheriff under an attachment, judgment, and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such **justification**. *Walker v. Woods*, 15 Cal. 66.

1346. Where, in an action against the sheriff for taking goods, he justifies under an **attachment against a third person**, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued thereon, *held* to be sufficient.

Towdy v. Ellis, 22 Cal. 650.

1347. An answer justifying the **seizure of personal property** by virtue of a writ of attachment issued against a person, other than the plaintiff, does not state facts constituting a defense, if it fails to allege that the defendant in the attachment suit was the owner of the property.

Richardson v. Smith, 29 Cal. 529.

1348. An officer, in order to justify the seizure of property in the possession of a **stranger to the writ** which he has executed, must plead specially such justification. He can not justify under a general denial of the allegations of the complaint.

Glazer v. Clift, 10 Cal. 303.

See *Coles v. Soulsby*, 21 Cal. 47, where the authorities are collected and commented on.

1349. In an action of **replevin** against a sheriff, he must justify not only with the execution, but with the judgment itself, whenever he takes property which is in the **possession of a stranger** to the writ; or, in other words, whenever the stranger's possession is such as would prevent the debtor himself from retaking the possession.

Kuox v. Marshall, 19 Cal. 617.

1350. In an action against a sheriff for a violation of his duty in the service of an attachment, if he relies on matters occurring after its issuance and operating as a **dissolution** of the same, such matter must be **specially pleaded**.

McComb v. Reed, 28 Cal. 281.

Sole Trader.

1351. A complaint, in an action to recover a debt from a married woman, which charges that she is a sole trader under the statute, is sufficient, without any averment of facts showing that the debt was contracted in the particular business which she had declared her intention to carry on.

Melcher v. Kuhland, 22 Cal. 522.

Specific Performance.

1352. In an action to compel a conveyance of land under an agreement of sale, an averment that the plaintiff has been ready and willing, and has offered to accept a conveyance according to the agreement, and to pay the balance of the purchase money, is not an averment that he tendered the purchase money. *Englander v. Rogers*, 41 Cal. 220.

1353. In the absence of a special demurrer on the ground of ambiguity, if it appear from the general framework of the complaint that the action is for specific performance, it will be so considered, though the complaint be obnoxious to criticism for want of perspicuity. *Heinlen v. Martin*, 53 Cal. 321.

Stamp.

1354. A complaint upon a written instrument need not allege that such instrument is stamped. *Hallock v. Jaudin*, 34 Cal. 167.

Statutes.

Complaint.

1355. In an action brought upon a promise of the defendant to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing. *Wakefield v. Greenhood*, 29 Cal. 597.

1356. When a pleader wishes to avail himself of a statutory privilege, or right given by particular facts, he must show the facts. Those facts which the statute requires as the foundation of the right must be stated in the complaint.

Dye v. Dye, 11 Cal. 163.

People v. Jackson, 24 Id. 630.

Himmelman v. Danos, April T., 1868.

Answer.

1357. A plaintiff's recovery can not be barred by the statute of frauds, unless the **statute be pleaded**.

Osborne v. Endicott, 6 Cal. 149.

*Statute of Limitation.**Complaint.*

1358. Facts taking a case out of the provisions of the statute of limitations must be **specially set out** in the complaint.

Wormouth v. Hatch, July T., 1867.

1359. A defendant who desires to avail himself of the statute of limitations as a bar to the action, must plead the statute. A **failure to plead** it is a **waiver** of the same.

People v. Broadway W. Co., 31 Cal. 33.

1360. Under our system, the rule is the same in law and equity; and if it appears upon the face of the complaint that the action is barred, and no facts are alleged **taking the demand from the operation of the statute**, the complaint is defective and demurrer lies. Smith v. Richmond, 19 Cal. 476.

1361. If plaintiff alleges **fraud** to have been committed more than three years before the commencement of his action, to bring himself within the exception of the statute he must allege the fact of a **discovery** of the fraud at a period bringing him within the exception.

Sublette v. Tinney, 9 Cal. 423.

Boyd v. Blankman, 29 Id. 20.

Carpentier v. Oakland, 30 Id. 444.

1362. But if the replication contains this averment, and this issue is tried without objection, the irregularity in the answer of presenting the issue will be disregarded.

Boyd v. Blankman, 29 Cal. 20.

Answer.

1363. To suit on account, defendant averred that "each and every item of said account, prior to the tenth day of March, 1859, is barred by time; and he pleads and relies upon the statute of the state of California, entitled 'an act defining the time of commencing civil actions,' approved April 22, 1850, in bar of an averment of a conclusion of law." *Held*, that a plea of the statute of limitations must **aver the facts** which bring the demand within the operation of the statute, as that the alleged cause of action has not accrued within certain designated years previous to filing the complaint.

Caulfield v. Sanders, 17 Cal. 569.

1364. Where a party desires to avail himself of the statute, which provides that no action for the recovery of any **estate sold by an executor or administrator**, shall be maintained by any **heir** or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale, he must plead it. The objection that the action is barred can not be taken to the admissibility of evidence, when the statute has not been pleaded.

Meek v. Hahn, 20 Cal. 620.

1365. If the complaint in an action against an administrator avers that the intestate received plaintiff's money in his life-time, to keep the same for plaintiff as the depository thereof until the same should be demanded of him, and that the money remained in the intestate's hands at the time of his death, subject to the plaintiff's order, an answer which sets up as a defense that the cause of action did not accrue to plaintiff within **two years next before the death of the intestate**, and that the same is barred by the statute of limitations, does not raise an issue in the case. Schroeder v. Jahns, 27 Cal. 274.

1366. Where, to **ejectment on a patent** to plaintiffs for land from the **United States**, defendants pleaded possession in themselves, and the parties through whom they claim, for five years before the commencement of the action, on the fourth of March, 1860, but admitted the issuance of the patent on the nineteenth of February, 1865: *Held*, that the plea is of no avail, because the admission shows plaintiffs were seised of the premises within the five years.

Fremont v. Seals, 18 Cal. 433.

1367. A party relying upon an adverse possession of five years of land owned by himself and the adverse party as **tenants in common**, must allege by pleading facts from which it will affirmatively appear that his possession was of an adverse and hostile character, otherwise his possession of the land, though exclusive, will be deemed according to his right and in support of the title in common. Lick v. Diaz, 30 Cal. 65.

1368. The party claiming a **right to the use of water** by five years' adverse possession must set up the same as a defense in his answer, and if he does not, he loses the right to introduce evidence in support of it, and to have the court instruct the jury in relation to it.

American Co. v. Bradford, 27 Cal. 360.

1369. A defendant who claims the benefit of an act for the limitation of actions, which applies only to a particular class of cases, must **plead it specially**. A plea of the general statute of limitations is not sufficient.

Howell v. Rogers, 47 Cal. 291.

1371. An answer which avers that "if plaintiffs ever had any right or title to their claims, or to any portion thereof, they are barred by the statute of limitations, as they, the defendants, have been in **quiet and peaceable possession** of the same, adversely to these plaintiffs, for a period over five years," is not a good plea to the statute of limitations.

Table Mt. T. Co. v. Stranhan, 31 Cal. 387.

1372. An answer stating that the cause of action has not accrued within five years is sufficient for five years, and for any period of limitation named in the statute less than five years. Boyd v. Blankman, 29 Cal. 19.

1373. A plea of the statute of limitations, which states that the plaintiff was not seised or possessed of the land within five years before the commencement of the action, is **fatally defective** in not stating that neither plaintiff, his predecessor, nor grantor, was thus possessed. Such plea should also state that the defendant has been for five years before the commencement of the action in the adverse possession of the land.

Sharp v. Daugney, 33 Cal. 505.

1374. When the practice act required a replication to new matter set up in the answer, and the defendant pleaded five years' adverse possession, the plaintiff, if he claimed under title derived from the Mexican government, could not prove that the proceedings for a final confirmation were still pending, or that five years had not elapsed since a **final confirmation**, unless he stated the same in his replication. Vassault v. Seitz, 31 Cal. 225.

1375. A defendant relying on the statute of limitations should not allege **matter of law**, but the facts which bring him within the statute. Boyd v. Blankman, 29 Cal. 20.

1376. The general allegation in answer, that the action is **barred by the statute** prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the statute of limitations.

Schroeder v. Jahns, 27 Cal. 274.

1377. If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made in the answer. Smith v. Richmond, 19 Cal. 476.

1378. Statutes of limitation **do not act retrospectively**; they do not begin to run until they are passed, and consequently can not be pleaded until the period fixed by them has fully run since their passage.

Nelson v. Nelson, 6 Cal. 430.

1379. When the plea of the statute is claimed as a mere legal right, it **must be pleaded in the first instance**, and has no day of grace thereafter.

Cooke v. Spears, 2 Cal. 409.

1380. If a defendant fail to plead the statute of limitations at the proper time, he will not be permitted to **amend** his answer, so as to introduce the plea, unless it be in furtherance of justice. Id.

1381. The plea of the statute of limitations is not favored unless in aid of justice; but the court should allow it to be pleaded at any time, when justice will be attained thereby. Id.

1382. The defense of the statute of limitations is a **personal privilege** of the debtor, which he may assert or waive at his option; but it must be set up in some form, either by demurrer or answer, or it will be deemed to have been waived.

Grattan v. Wiggins, 23 Cal. 16.

1383. The defense of the statute of limitations can not be made by a **demurrer** which states in **general terms** that the complaint does not state facts sufficient to constitute a cause of action. Brown v. Martin, 25 Cal. 82.

1384. In order to enable a party to avail himself of the defense of the statute of limitations by demurrer the statute should be distinctly stated in the demurrer. Id.

1385. In this state the statute of limitations applies equally to **actions at law and suits in equity**. It is directed to the subject-matter, and not to the form of the action, or to the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties.

Lord v. Morris, 18 Cal. 482.

Boyd v. Blankman, 29 Id. 20.

Demurrer.

1387. The defense of the statute of limitations may, in our practice, be presented by **demurrer**, where it appears from the complaint that the period of limitation has elapsed since the plaintiff possessed the right of action, and no facts are alleged taking the demand from the operation of the statute. Mason v. Cronise, 20 Cal. 211.

1388. The party relying upon the statute of limitations by demurrer must **specialy point out the objection** in his demurrer, or it will be disregarded.

Farwell v. Jackson, 28 Cal. 105.

1389. Where one only of several defendants appears and demurs, and the demurrer is sustained, it is error for the court to give judgment in favor of the defendant who does not appear. Id.

Tax Title.

1390. Whenever a tax title is specially set forth in the pleading, it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with. This necessity is not obviated by the provisions making the tax deed proof of certain facts.

Russell v. Mann, 22 Cal. 131.

1391. In pleading a tax title it is necessary to aver those facts which sections 18 and 22 of the revenue act of 1857 require to be stated in the tax deed. Id.

1392. A pleading setting up a tax title must aver distinctly for what year the tax was assessed, and failing to do so, it is demurrable. Id.

1393. It will not be inferred that a tax was levied for a certain year from an averment that in that year the assessor entered the levy on the assessment roll. Id.

Taxes and Assessments.

1394. In an action for the collection of **delinquent taxes**, under the act of May 17, 1861, the complaint must aver the fact of the failure of the tax collector to collect the delinquent tax, by reason of his inability to find, seize, or sell property belonging to the delinquent. *People v. Pico*, 20 Cal. 595.

1395. No action can be maintained under said act for a tax on **real estate**, unless the assessment has sufficiently designated the property to enable a proper **description** of it to be given in the complaint. A description of the land assessed as "the unsold portion" of eleven square leagues of land known as Los Mokelamos, is fatally defective. *Id.*

1396. A complaint in an action to recover unpaid taxes is sufficient if it avers "that certain sums are due for certain taxes levied in the year 1858, upon certain real estate assessed in the year 1858," without stating that these taxes were levied under an assessment ending on the first day of March, 1858. *People v. Todd*, 23 Cal. 181.

1397. In this case, suit for delinquent taxes in Colusa county under the act of 1860 (stats. 1860, p. 246), the complaint having set forth various items, as state tax, general county fund, school, building, indigent sick and contingent tax, demurrer was filed and overruled, and answer filed. Plaintiff then moved, without notice to defendant, to strike out answer. Granted, and judgment at once entered for plaintiff for the full amount claimed: *Held*, that, as there appears to be no authority for levying the **contingent and building tax**, the complaint shows no cause of action as to these items, and that the judgment is thus far unauthorized and will be set aside.

People v. Hager, 19 Cal. 462.

1398. The averments in the complaint in this case, as to the levy and assessment, are sufficient, under the act of 1860, to put upon defendant the burden of showing that she is not liable. *People v. Seymour*, 16 Cal. 332.

1399. A complaint under the act of May 17, 1861, which avers that the tax "was levied upon and assessed against personal property," contains no causes of action. The complaint should not only aver that the tax was levied upon and assessed against personal property, but also the kind or **kinds of personal property**.

People v. Holladay, 25 Cal. 300.

1400. In an action brought by the people to recover judgment for delinquent taxes assessed during the three years preceding March 1, 1861, the complaint is fatally defective, if it does not aver that the **tax collector** has failed to collect the taxes in question by reason of his inability to find,

seize, or sell property belonging to the delinquent. *Id.*

1401. If an assessment of a tax made during the three years preceding March 1, 1861, is defective, in not stating the kind and quantity of property assessed, whether real or personal, or if real, in not giving its description, the pleader, in an action brought to recover judgment for such a tax, may, if the same can be ascertained, insert in his complaint the necessary averments as to **kind and quantity** or description. *Id.*

1402. In an action to recover delinquent taxes in the county of San Bernardino, assessed for the year 1860, the complaint should **state** the assessed value of the real estate, the improvements, and the personal property, **each separately**.

People v. Rains, 23 Cal. 131.

1403. When the statute provides that the district attorney, before commencing suit, shall publish **notice to delinquents**, it is not necessary to aver in the complaint that this notice was published, but the failure to publish this notice must be taken advantage of by plea in abatement, or it is waived. *Id.*

1404. The acts in relation to the collection of delinquent taxes, which compel the defendant to verify his answer, do not change the rule in the forty-sixth section of the practice act, "that where the complaint is not verified, a general denial of its allegation in the answer will put in issue all its material allegations."

Rowley v. Howard, 23 Cal. 401.

1405. If a complaint in an action to recover judgment for taxes avers that the tax is for an assessment of defendant's "claim to and possession of" lands, an answer setting up as new matter that the lands are **public lands** of the United States, contains no defense. *People v. Frisbie*, 31 Cal. 146.

1408. A complaint in an **action to recover a tax**, which alleges that a portion of the real estate assessed to the defendants belonged to other persons, does not state a cause of action. *People v. Hyde*, 48 Cal. 431.

Tender.

1409. In suit by a vendee for specific performance of a contract of sale, the averment of tender of payment was in general terms—as that the tender had been repeatedly made, and that the plaintiff has been at all times, and still is ready and willing to pay: *Held*, that the tender should have been stated with greater **particularity** as to time, but that the objection, in this respect, can not be taken for the first time in the supreme court.

Duff v. Fisher, 15 Cal. 375.

1410. In an action on a note and to foreclose a mortgage given to secure it, where

the promisor and mortgagor is made defendant along with one claiming under the mortgagor, by deed subsequent to the mortgage, the purchaser from the mortgagor can not claim the benefit of nor offer testimony to show a tender of the amount due on the mortgage before suit brought, unless he pleads it. Such plea by the mortgagor will not avail the purchaser.

Bryan v. Maume, 28 Cal. 238.

1411. It is a general rule that a defendant who pleads a tender to entitle himself to costs, must not only aver a tender, but that he has **always** been and is **ready to pay** the sum tendered, and the money must be brought into court. *Id.*

1412. In actions for breach of duty by a railroad company in not conveying a passenger, it is not necessary for plaintiff to allege in his complaint a strict legal tender of his fare. *Tarbell v. C. P. R. R. Co.*, 34 Cal. 616.

1413. It is sufficient to allege that plaintiff was ready and willing, and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts. *Id.*

1414. A complaint on a contract in which the defendant agrees to purchase a given quantity of hay, then in a stack, from the plaintiff, and pay a fixed sum therefor, at a fixed time, and the hay to be weighed at the stack, should aver, if the hay has not all been delivered, a readiness or offer on the part of the plaintiff to deliver it.

Barron v. Frink, 30 Cal. 486.

1415. If, by the laws of the United States, there is more than one kind of lawful money, a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States, is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive. *Magraw v. McGlynn*, 26 Cal. 420.

Theater.

1416. A complaint which charges that the defendant "did willfully and unlawfully on the first day of the week, commonly called Sunday, to wit, on the Sabbath day, get up, and in getting up and opening of a theater," contains a sufficient statement of the facts constituting the offense of getting up a theater on the Sabbath day.

People v. Maguire, 26 Cal. 635.

Trespass.

Complaint.

1417. It is not necessary that there should be express words, showing where the declaration in trespass leaves off, and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 125.

1418. Action for damages against defendants, averring that they "with force and arms, broke and entered" upon the premises of plaintiff, and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water: *Held*, that, under our system of pleadings, the words, "with force and arms broke and entered," do not confine the proof to the direct and immediate damage, as in the old action of trespass; that the facts being clearly set out in the complaint, the addition of these words was surplusage.

Darst v. Rush, 14 Cal. 81.

Answer.

1419. Where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage. *Rowe v. Bradley*, 12 Cal. 226.

1420. In an action for damages for an alleged trespass upon the plaintiff's land, if the defendant justifies the alleged trespass under the act in relation to laying out and establishing roads, he must in his answer show a strict compliance with all the provisions of the statute.

Sherman v. Buick, 32 Cal. 241.

1421. In an action for a trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of possession for the defendants to aver, in their answer, that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiffs.

McCormick v. Bailey, 10 Cal. 230.

1422. In trespass *quare clausum fregit*, where the complaint avers matters of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defense.

Pico v. Colimas, 32 Cal. 578.

1423. In trespass *quare clausum fregit*, an answer justifying merely because the defendant has an easement on the land, contains no defense. *Id.*

Undertakings, Bonds.

Complaint.

1424. If a bond has to be executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended.

Morgan v. Thrift, 2 Cal. 562.

1425. A bond should be sued on, setting

out breaches and damages. Assumpsit on the condition would be bad on demurrer.

Baker v. Cornwall, 4 Cal. 15.

1426. No averment of **notice** to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of one party as in the other.

People v. Edwards, 9 Cal. 286.

1427. A complaint in an action upon statutory undertaking, which contains no other **description of the instrument** than an allegation that it corresponds with the provisions of a certain section of the practice act, is defective. The defect, however, being of form rather than of substance, objection to it must be taken by demurrer to the complaint. *Miles v. Gleason*, 21 Cal. 274.

1428. An averment in the complaint in a suit on an **appeal bond**, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The non-payment of the judgment can be shown without issuing an execution. *Tissot v. Darling*, 9 Cal. 278.

1429. In an action on an undertaking on appeal, it is sufficient averment of the **delivery** of the undertaking, if the complaint show that it was **filed in the clerk's office**.

Holmes v. Ohm, 23 Cal. 268.

1430. Where, in an action on an appeal bond, conditioned to pay the judgment appealed from if the same should be affirmed by the appellate court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: *Held*, that the **conditions** of such bond were not broken, and that no action would lie thereon.

Chase v. Ries, 10 Cal. 517.

1431. Where an **appeal** is **withdrawn** or dismissed by consent of both parties, without being called to a final hearing, no action can be maintained on the appeal bond.

Osborn v. Hendrickson, 6 Cal. 175.

1432. In a suit on a statutory undertaking, given to **release property attached**, and reciting the fact of a levy of the writ, the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is sufficient without averment of the previous proceedings. *McMillan v. Dana*, 18 Cal. 339.

1433. Where defendant in attachment applies to the court, under sections 136 and 137 of the practice act, for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that, "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the court makes an order discharging the writ and releasing the property: *Held*, in suit against the sureties

on the undertaking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual **release and redelivery of the property** to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. *Id.*

1434. The **recitals** in statutory undertakings given in such cases have the same effect and are to be construed in the same way as bonds making the same recitals, and are conclusive of the facts stated. *Id.*

1435. Where the sheriff, under a writ of **attachment** in the suit of plaintiff against D. M. Eder and P. M. Eder, as the firm of D. M. Eder & Co., is about to levy upon the property of said firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble and expense he may be put to by reason of the non-seizure of the property, and also "to pay whatever judgment may be rendered against said defendants;" and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be a partner: *Held*, that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the **intention of the parties**. *Heynemann v. Eder*, 17 Cal. 433.

1436. Such bond will be presumed to have been executed with reference to the provisions of the statute; and as the security required by the statute is a security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants, satisfies the condition to "pay whatever judgment may be rendered against said defendants." *Id.*

1437. The **sureties** on a statutory undertaking given to release property attached, reciting the fact of the levy, the release of the property and promises to pay the judgment, etc., can not, when sued on the undertaking, question either the fact of the levy, or whether the property was subject to it.

McMillan v. Dana, 18 Cal. 339.

1438. In an action on a **bond** given to **release property from attachment**, the complaint should state that the property was released upon the execution and delivery of the bond. To charge the obligors, it is necessary to state the consideration of the

undertaking; and a mere reference to the condition of the bond itself, wherein such release is stated as a consideration, is insufficient. *Palmer v. Melvin*, 6 Cal. 651.

1439. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was **released upon the delivery of the undertaking**. *Williamson v. Blattan*, 9 Cal. 500.

1440. A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Id.*

1441. Where a **ball bond** is given to appear and answer an indictment, the complaint must aver that the **indictment was found**, or is pending. *Id.*

Williamson v. Smith, 3 Cal. 271.

1442. In the action against the **sureties on an injunction bond**, the condition of which is that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded: *Held*, that such complaint is fatally defective. *Id.*

Tarpey v. Shillenberger, 10 Cal. 390.

1443. The **sureties** are entitled to stand on the **precise terms of the contract**, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Id.*

1444. An averment in a complaint on a county treasurer's **official bond** that he received money belonging to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions. *Id.*

Mendocino Co. v. Morris, 32 Cal. 145.

1445. In an action on an official bond of a county treasurer, if the complaint avers only a breach by a failure of the treasurer to keep the money in the county safe, and by a withdrawal of the same and **conversion** to his own use, a recovery can not be had for a failure of the treasurer to pay into the treasury his commissions retained on payments made to the state. *Id.*

Sacramento Co. v. Bird, 31 Cal. 66.

1446. If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, and verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the **signature of the principal**. *Mendocino Co. v. Morris*, 32 Cal. 145.

1447. An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the non-feasance or misfeasance of the officer. *Id.*

Van Felt v. Littler, 14 Cal. 194.

1448. In suit upon the **official bond of a county assessor**, who had received a certificate of election, given bond and entered upon his duties, neither the principal nor the sureties can deny the official character of the assessor. They are stopped by the bond. *People v. Jenkins*, 17 Cal. 500.

1449. The district attorney of a county has the authority, of his own volition, with or without instructions from the controller of state, county court, or the board of supervisors of a county, to bring an action upon the official bond of the **tax collector** of a county. *People v. Love*, 25 Cal. 520.

1450. All the money due on a tax collector's bond may be recovered in a single **action in the name of the people of the state**, although part of the money thus due may belong to the county and part to the state. *Id.*

1451. The complaint in an action on a tax collector's bond need not aver that the **taxes** charged on the assessment roll were legally assessed. *Id.*

1452. If a copy of the bond sued on is set out in the complaint, an answer denying its execution which is not verified admits its **due execution**. *Id.*

Sacramento Co. v. Bird, 31 Cal. 66.

1453. If there be a **defect** in an official bond by the failure of the principal to place a **seal** opposite his name, the defect will not defeat a recovery thereon as against the sureties, if the defect is suggested in the complaint. *Id.*

1454. A complaint in an action against a **sheriff** and his sureties for an alleged trespass of the sheriff, which avers that the other defendants than the sheriff are the securities on his official bond, does not state a cause of action against the sheriff on the bond. *Ghirardelli v. Bourland*, 32 Cal. 585.

1455. **Recognizances** in the form prescribed in section 523 of the criminal practice act (gen. laws, art. 2110). The complaint alleged substantially that G. was indicted for gaming and arrested, and that then defendant executed the recognizance which is set out; that G. appeared at the first term of the court thereafter and pleaded not guilty, and case continued to next term, at which time, the case being called for trial, G. did not appear, and the defendants, though "called," did not produce his body; that the court then made an order forfeiting the recognizance, and that defendants did not produce the body of G. before the final

adjournment of the court: *Held*, on demurrer, that the complaint states a cause of action; that the objection that gaming being a misdemeanor, G. could appear by attorney, can not avail, because there is nothing to show that he offered so to appear, even assuming that such matter could be here set up against the judgment of forfeiture in the court of sessions.

People v. Smith, 18 Cal. 498.

1456. A complaint in a recognizance in a criminal case should aver that the same was filed in or became a matter of record in the court where it was returnable.

Mendocino Co. v. Lamar, 30 Cal. 627.

1457. In suit in the district court upon a recognizance of bail given under order of the county judge for the release of a party charged with larceny, the complaint need not aver that the recognizance was certified by the court of sessions to the district court, nor that the principal has not satisfied the judgment of forfeiture. The authorities that such certificate and averment are necessary, refer to proceedings by *scire facias* upon a record of the recognizance to which the accused is a party.

People v. Love, 19 Cal. 676.

1458. In an action upon a bail bond, given by a person held on a criminal charge, the complaint must allege that the person bailed was released from custody upon the execution and delivery of the bond.

Los Angeles Co. v. Babcock, 45 Cal. 252.

1459. In an action on a bond to indemnify the plaintiff against damages he might sustain by levying an attachment on certain property, and where the complaint alleged the recovery of judgment against plaintiff for damages, against which he was indemnified, and the payment of said judgment: *Held*, that said averment of payment was material to plaintiff's right to recover for the amount of such judgment.

Roussin v. Stewart, 33 Cal. 208.

1460. In an action upon an undertaking given on appeal from the judgment of a district court for the possession of real estate, for costs and damages, and for the value of the use and occupation of the premises, it is not necessary to aver in the complaint that the district court had jurisdiction to render the judgment appealed from.

Murdock v. Brooks, 38 Cal. 596.

1461. Nor is it necessary to allege that the undertaking had the effect to stay the execution of the judgment, if it appears therein that proceedings for the execution of the judgment were never taken, and that the appellant has full benefit of a stay pending his appeal.

Id.

1462. If a copy of the undertaking be set out in the body of the complaint it will be taken and considered as a part thereof. Id.

1463. A complaint in such a case is not defective, because it contains no averment that an execution had been issued, and returned unsatisfied, or because no demand for payment is alleged to have been made on the principal.

Id.

1464. Nor is it necessary to allege that the plaintiff in the judgment was entitled to the possession of the premises pending the appeal.

Id.

1465. Where a complaint on a forfeited recognizance sets forth that the name of the accused for whose appearance to answer it was given, and the name by which he was indicted was Antonio Martini, but that it was given in the recognizance as Antonio Martinez, and that the same person was intended: *Held*, that a demurrer on the ground of ambiguity and uncertainty as to the person accused was properly overruled.

People v. Eaton, 41 Cal. 657.

1466. In an action on a recognizance, where it appears that the accused was named Martini in the indictment and Martinez in the recognizance, and there was testimony that the same person who was held to answer by the name of Martinez was indicted by the name of Martini: *Held*, that a motion for a nonsuit on the ground of the variance of names was properly overruled, and that a finding that the person indicted was identical with the person held to answer was justified.

Id.

1467. To enable a party to recover upon an undertaking to answer for damages, all the material facts constituting the cause of action must be stated in the complaint.

Vilhac v. S. & I. R. R. Co., 53 Cal. 209.

1468. If, after a judgment is rendered by default, the defendant, for the purpose of procuring the default to be set aside, gives an undertaking to pay any judgment that may be recovered against him, the complaint in an action on the undertaking must aver that the judgment was set aside.

Jenner v. Stroh, 52 Cal. 504.

1469. A complaint in an action on an undertaking, given to procure the release of property held by a sheriff under an attachment, must aver that the attachment was discharged.

Id.

1470. The fact that such instruments are common law bonds instead of undertakings does not change the rule.

Id.

Answer.

1471. Conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it can not be set up by the obligors, as the bond would be single, and in a suit thereon, the plaintiff would be entitled to the full amount.

Swain v. Graves, 8 Cal. 549.

1472. The law imports a consideration to a sealed instrument from its seal. At common law, a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this state has not altered the presumption of a consideration, which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer.

McCarty v. Beach, 10 Cal. 461.
Wills v. Kempt, 17 Id. 98.

Vendor's Lien.

1473. In a bill in equity to enforce a vendor's lien, it is not necessary to allege the issuance of execution under a judgment at law, previously obtained by the vendor against the purchaser for the amount due, and return of *nulla bona* to sustain the allegation of insolvency.

Walker v. Sedgwick, 8 Cal. 398.

1474. A general averment in the complaint, to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rule that a vendor's lien does not exist in this state where mortgage security is taken.

Hunt v. Waterman, 12 Cal. 301.

1475. If a party pay a sum as part of the purchase money for land, under an agreement that the sum paid shall be retained by the vendor in case he shall convey a good title to the vendee, the latter, in order to maintain an action to recover the amount paid, must aver in his complaint a tender of the unpaid portion of the purchase money, or give some sufficient excuse for the omission to tender it.

Englander v. Rogers, 41 Cal. 420.

1476. In the face of such an agreement, the vendor will not be permitted to aver, if he brings an action to recover possession from the party holding under the contract, that he sold less than the whole title to the land, unless he can also aver that the written contract, by reason of fraud, mistake, or the like, does not show the real contract.

Marshall v. Caldwell, 41 Cal. 611.

Water, Diversion of.

1477. In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water.

McDonald v. B. R. & A. Co., 13 Cal. 220.

1478. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof.

Leigh v. Ind. Ditch Co., 8 Cal. 323.

1479. A complaint alleging that plaintiffs are the owners and in possession of certain

mining claims on a certain stream, and are entitled to the **natural flow** of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof.

Id.

1480. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the **precise quantity** of water required for the use of the mills, and to which plaintiff claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be **res judicata** in a subsequent suit.

McDonald v. B. R. & A. Co., 15 Cal. 145.

1481. The union in one count of a complaint of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek, * * * so as to turn the water of said creek out of its natural channel," etc., and thus divert it from the plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * * hoist for the purpose of clearing out said dams and flumes of slum, stone, and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites **several distinct causes of action** in one count.

Gale v. Tuolumne Co., 14 Cal. 25.

1482. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means is not important enough to require **several counts**.

Id.

Work and Labor Done.

1483. A complaint which avers substantially that the defendant was, at a certain time, indebted to the plaintiff in a certain sum for professional services rendered at the special instance and request of the defendant, is sufficient without stating in terms the value of the services, or that the defendant promised to pay.

Wilkins v. Stidger, 22 Cal. 232.

1484. An allegation in a complaint, that the defendant was, on a day named, indebted to the plaintiff in a certain sum of money for work and labor before that time performed for him at his request, states of a cause of action. Pavisich v. Bean, 43 Cal. 364.

1485. A party employed to perform work at a place distant from that at which he was when employed, can not recover his passage money to such place if the complaint fails to allege any consideration for the promise to pay such passage money.

McFadden v. Crawford, 39 Cal. 662.

Miscellaneous.

1486. In an action by a city to recover from a banking corporation a license alleged to be due for carrying on business, an averment in the complaint, that by virtue of an ordinance the defendant was liable to pay a license tax, is not an averment of the existence of an ordinance requiring the defendant to take out a license.

Sacramento v. Mills, 51 Cal. 504.

1487. In an action to compel a party to make a second deed to the plaintiff, in place of one which has been lost without being recorded, an averment in the complaint, that the plaintiff demanded a deed and offered to pay the expenses, but that the defendant refused, is a sufficient averment of demand.

Conlin v. Ryan, 47 Cal. 71.

1488. Where the complaint avers that "the space formed by the junction of Market and Bush streets had been laid out, graded and planked, and that the space formed as aforesaid is a space formed by the junction of two streets, terminating at the same point, according to the provisions of section 37 of the consolidation act;" and the answer avers that "the space formed by the junction of Market and Bush streets, as mentioned in the complaint, is not formed by the junction of two streets terminating at the same point, within the true intent and meaning of the thirty-seventh section of the consolidation act;" *Held*, that the answer meets the allegation of the complaint as to the manner in which the space is formed, and that if no material issue is made on this point, it is because the material fact, to wit, that the space was formed by the junction of two streets terminating at the same point, is not directly alleged.

Bassett v. Enwright, 19 Cal. 635.

1489. The expressions "according to" and "according to the true intent and meaning of," as here used, mean the same thing. *Id.*

1490. The omission of a United States revenue stamp can not, under any circumstances, be set up as a defense in a state court, to an action upon a contract. The case of Hallock v. Jaudin, 34 Cal. 172, overruled on this point.

Duffy v. Hobson, 40 Cal. 240.

1491. On the point that the omission of a United States internal revenue stamp can not be set up as a defense in a state court to an action or contract.

Thomasson v. Wood, 42 Cal. 416.

1492. In a complaint to set aside an execution sale, made under a judgment, on account of matters extrinsic to the judgment, at which the purchaser was not a party to the judgment, if there is no averment that the purchaser had notice of such extrinsic facts, he will be deemed a purchaser without notice.

Reeve v. Kennedy, 43 Cal. 643.

1493. In an action to set aside, as fraudulent, a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance, is not irrelevant or redundant matter.

Perkins v. Center, 35 Cal. 713.

1494. In an action by a stockholder on the refusal of trustees to institute action, it is necessary to aver a demand and refusal, without which the action will not be sustained.

Cogswell v. Buell, 39 Cal. 320.

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PLEDGE**1. IN GENERAL.****24. SALE OF PROPERTY PLEDGED.****IN GENERAL.**

1. A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence.

St. Losky v. Davidson, 6 Cal. 643.

2. Where a lease is assigned as security for a note, it is a pledge, and not a mortgage. The "pledgee" does not take the legal title by the assignment, or by failure of the "pledgor" to pay the note; but he has the right to collect the rents and apply them on the note, and is responsible for the surplus.

Dewey v. Bowman, 8 Cal. 145.

3. Where particular property was pledged to secure the first advance, the proceeds from

a sale thereof must be applied to the **payment of that advance.**

Marziou v. Piochie, 8 Cal. 522.

4. If a corporation is indebted to A. for money advanced, and, as security for the same, issues to B., as trustee for A., shares of the capital stock of the corporation, to be retransferred to the corporation upon payment of the indebtedness, the transaction constitutes a **pledge of the stock.**

Brewster v. Hartley, 37 Cal. 15.

5. The fact that in such case B. is the trustee of A., and that the stock is issued to B., does not prevent the transaction from being a pledge of the stock as between the creditor and the corporation. Id.

6. The general property of the stock in such case is in the pledgor, the corporation. Id.

7. A party by pledging **negotiable securities**, transferable by delivery, loses all right to the securities when transferred by the pledgee in good faith to a third party. The pledgee, in such a case, should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises.

Coit v. Humbert, 5 Cal. 260.

8. S., a wagon-maker, and W., a blacksmith, entered into an arrangement for the building of **wagons**, by which S. was to do the wood-work and W. the iron-work, and W. was also to furnish the materials for the wood-work, for which he was to have a lien as security on the interest of S. in the wagons: *Held*, that the contract constituted an hypothecation of the interest of S. in the wagons while they were being made, and that when the wagons came into the possession of W. he became a **pledgee in possession** thereof, and was entitled to retain such possession until paid.

Waldie v. Doll, 29 Cal. 555.

9. Where two parties own wagons in common, and one pledges his half to the other for advances, if the pledgee keeps the wagons on his premises and marks them with his name, and exercises control over them, the mere fact that the pledgor is painting them does not show a **surrender of possession** by the bailee. Id.

10. Where the relation of pledgor and pledgee exists, if the debt is paid, it is the duty of the pledgee to account for and pay over all the **income, profits, and advantages** derived from the bailment.

Hunsaker v. Sturgis, 29 Cal. 142.

11. If the pledgor makes the pledgee his **agent to sell** the property pledged, and the pledgee then becomes the agent of the purchaser, he commits a fraud on the pledgor, and is bound to pay him all that he received from the purchaser for acting on his behalf.

Id.

12. One assuming to own **personal property**, and pledging it, is estopped from afterwards asserting that he did not own it when he pledged it; and a subsequent acquisition of title by the pledgor, as between the parties to the contract, inures to the benefit of the pledgee, without any new delivery or ratification of the pledge.

Goldstein v. Hort, 30 Cal. 372.

13. One who receives personal property in pledge from another who does not own, but who subsequently, and while the pledge continues, acquires the title to it, may recover possession of the same from one who becomes possessed of it without right. Id.

14. The pledgor of personal property **warrants the title** of the property pledged. Id.

15. A **delivery of possession** of property pledged must be made to the pledgee in order to consummate the pledgee's right. Id.

16. When the payor of a note assigns to the payee, as **collateral security** for the payment of the note, a **note and mortgage** given by a third person to the payor, the payee holds this note and mortgage as a pledge, and an assignee of the payee who receives the note and mortgage upon the same terms, also holds them as a pledge.

Ponce v. McElvy, 47 Cal. 154.

17. If one who receives from his debtor an **assignment of a note and mortgage** given by a third person to the debtor, as collateral security for his debt, after the death of such third person, obtains from the administrator of his estate and the probate judge an allowance of the note and mortgage as a claim against the estate due to him, its character as a mere security for a debt remains unchanged, and the same rule obtains if the claim is presented by and allowed to an assignee of the first assignee who received the same upon the same terms. Id.

18. In such case, if, after the **allowance of the claim by the administrator**, the assignee to whom the claim held as collateral security is allowed, bids in the mortgaged premises at administrator's sale, and appropriates the claim in payment of the purchase money, he has no higher right to the land than he had to the note and mortgage, and the land becomes the security. Id.

19. If the person who holds **mining stock** in secret trust for another, pledges the same for a debt of his own, and the United States district court, upon the bankruptcy of the pledgor, holds the transaction a fraud on the bankrupt law, and compels the pledgee to account to the assignee of the pledgor for the value of the same, and renders judgment against the pledgee, and the pledgee pays the judgment, he thereby acquires the title of the assignee and pledgor, to the stock.

Thompson v. Toland, 48 Cal. 99.

20. Though such pledge may be a fraud under the bankrupt law, as between pledgor and pledgee, it is nevertheless valid, as between the pledgee and *cestui que trust*. Id.

21. If one who holds mining stocks in secret trust for another, pledges the same for his debt, without notice to the pledgee of the interest of the *cestui que trust*, and the pledgee sells the stock without previous demand and notice, the right of action for the conversion is in the pledgor, and not in the *cestui que trust*. Id.

22. If, in such case, the *cestui que trust* has a cause of action outside of the contract of pledge, he must first pay or tender the money for which the stocks were pledged. Id.

23. Conceding that the pledgor could, in such case, maintain an action against the executors for the recovery of the proceeds of the sale, or such portion of them as had passed to the credit of the estate, the action is for money had and received to the use of the plaintiff and in affirmance of the sale.

Von Schmidt v. Bourn, 50 Cal. 616.

SALE OF PROPERTY PLEDGED.

24. A pledgee has no right to sell until after demand and notice; and if he sells without demand and notice to a party having full knowledge of his title no absolute title passes, and the property remains in the hands of the purchaser as a pledge.

Dewey v. Bowman, 8 Cal. 145.

25. Personal property pledged to secure a debt may be sold by the pledgee, after the debt to secure which it was pledged has become due, if the sale be made at public auction and after reasonable notice of the time and place of sale be given to the pledgee.

Wilson v. Brannan, 27 Cal. 258.

26. A pledgee of chattels has a right at common law, if the pledge is not redeemed within the stipulated time, to sell the property pledged, at auction, by giving public notice of the time and place of sale, and if the sale does not satisfy the debt he may recover the deficiency from the pledgor by an action at law.

Mauge v. Heringhi, 26 Cal. 577.

27. The common law right of the pledgee to sell the pledge upon the default of the pledgor, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by chapter 1 of title 8 of the practice act. Id.

28. Where, without calling on the pledgor to redeem, the pledgee sold the pledge, a chose in action, this was a conversion of the pledge, and the pledgee thereby became liable, in an action for the conversion, for the value of the pledge at the time of the conversion in excess of his demand secured by the pledge, with legal interest thereon from the time of the conversion.

Gay v. Moss, 34 Cal. 125.

29. The pledgee of a chose in action,

pledged as security for the payment of a debt, is not authorized to sell the pledge without calling on the pledgor to redeem, and giving him a reasonable notice of his intention to sell. Id.

30. In such a case it may be well doubted whether the pledgee of a contract for the payment to the pledgor of a much larger sum than the debt due to the pledgee from the pledgor, was not bound to collect the amount due on the contract and reimburse himself out of the proceeds. Id.

31. Where a chose in action is assigned and delivered as collateral security for the payment of a debt due the assignee, the assignment and delivery to the assignee of the chose in action are necessary to give the latter full authority to readily control the security and make it available, but this does not necessarily constitute the transaction a chattel mortgage as distinguished from a pledge. Upon the facts in this case, the transaction was a pledge. Id.

32. A pledge does not vest the title in the pledgee. He has only a special property in or lien on the chattel pledged, and if the pledge is not redeemed by the time limited it retains the character of a pledge still.

Heyland v. Badger, 35 Cal. 404.

33. In a pledge, the title, after condition broken, does not pass to the pledgee, who has only a lien on the property, and in all cases the possession must accompany the pledge.

Wright v. Ross, 36 Cal. 414.

34. In case of a pledge, the title remains in the pledgor after condition broken, with right to redeem at any time before a sale of the property; and if the property is sold by the pledgee in satisfaction of his demand, he can not become the purchaser at his own sale. Id.

35. The distinction between a pledge and chattel mortgage, whilst well defined in theory, is sometimes difficult of application to the facts of the transaction. Id.

36. A note secured by mortgage may become the subject of either a pledge or mortgage, but to make such pledge available to the pledgee there must accompany the pledge a power to assign the note and mortgage in case of a sale of it, and to release the property in case of a satisfaction of it. Id.

37. Whether negotiable paper indorsed over to and held by the creditor as security for the payment of a debt, without any other express agreement between the parties, is a mortgage or a pledge, *quære?*

Donohoe v. Gamble, 38 Cal. 340.

38. The question whether a sale of mining stock made in the board of brokers is not a sale at public auction, such as a pledgee is authorized to make upon default being made by the pledgor, not decided.

Child v. Hugg, 41 Cal. 519.

39. If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make his margin good, and without sufficient notice of time and place, still, if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale. *Id.*

40. Plaintiff and Templeton were severally creditors of Thompson. Templeton, as security for his debt, held in pledge Thompson's goods, of greater value than the sum of both plaintiffs and Templeton's debts. By an arrangement between them, plaintiff guaranteed to Templeton the payment of his debt, and received from an assignment and the possession of said goods, in pledge to secure the payment of the debts of both plaintiff and Templeton. Thompson, who was not a party to this arrangement between plaintiff and Templeton, afterwards expressed himself gratified at its consummation. Thereafter, defendant, as sheriff of the city and county of San Francisco, levied upon and took said goods from plaintiff's possession under a lawful writ of attachment against the property of Thompson, issued out in the suit of Martin v. Thompson, whereupon plaintiff brought this action against defendant for said seizure, and to recover the full value of said goods: *Held*, first, that Templeton lost his lien on the goods, as pledgee, by surrendering them to plaintiff, and taking said guaranty for his debt; second, that by said arrangement between Templeton and plaintiff, and the subsequent assent thereto by Thompson, plaintiff acquired, as pledgee, a valid lien on said goods to secure the payment of both said debts; and, third, that plaintiff is entitled to recover in this action, and his right of recovery is not limited to his interest only as a pledgee of the goods, but extends to the whole value of the goods.

Treadwell v. Davis, 34 Cal. 601.

41. In an action by the pledgee against a stranger for the conversion of pledged property, the rule is that plaintiff is entitled to recover its full value; but if against the owner, or one acting in privity with him, then only for plaintiff's special interest therein as pledgee. *Id.*

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POSSESSORY ACT.

1. REQUISITES AND QUALIFICATIONS.
6. RIGHTS OF CLAIMANTS.

REQUISITES AND QUALIFICATIONS.

1. The possessory act of 1852 is intended for the benefit of **actual settlers**.

Gird v. Ray, 17 Cal. 352.

2. A person entering upon and possessing public lands, under the possessory act of April 20, 1852, holds the lands **subject** to the right of any person to enter upon it, and work the **mines** of precious metals thereon. This right of the miner to enter upon lands thus held is subject to such regulations and restrictions as the legislature may see fit to impose; and the act of April 25, 1855, compelling the miner to give bonds to the owner of crops growing on such lands before he can use the mineral lands on which crops are growing, is but a regulation of a right given by the act of April 20, 1852, and is not liable to any constitutional objection.

Rupley v. Welch, 23 Cal. 452.

3. A party claiming land under the possessory act of 1852, must show **compliance with the provisions** of the act. He must be a citizen of the United States, must file the affidavit required by section 2, and make his improvements within the ninety days, etc. Merely residing on a part of the land, tracing lines, putting up stakes, for boundaries, etc., is not sufficient.

Wright v. Whitesides, 15 Cal. 46.

4. If there is a defect in the **affidavit** taken to claim land under the possessory act of the legislature, passed in 1852, the defect can not be cured by an affidavit subsequently taken under the same act to correct the same. Such subsequent affidavit, if it amounts to anything, must be regarded as an original proceeding.

Hawthurst v. Lander, 28 Cal. 331.

5. The survey of land, and making an affidavit and recording the same, in accordance with the possessory act of 1852, does not invest the claimant with the right to recover the possession of the land from one who was before them in the actual possession of it.

Id.

RIGHTS UNDER POSSESSORY ACT.

6. No one can obtain the benefit and protection of the possessory act of this state, and of the acts amendatory thereto, but they who **actually reside** upon the land.

Wolfskill v. Malajowich, 39 Cal. 276.

7. The term "**occupy**," as employed in the possessory act, is equivalent to the term "**reside upon**."

Id.

8. **Constructive possession** of what is known to be public land can not be estab-

lished, except by a compliance with the provisions of the possessory act.

Id.

9. The right to be protected in his constructive possession is a personal right accorded to the claimant, who complies with the act, and, if assignable at all, is clearly only assignable to one who shall actually reside upon the land.

Id.

10. The possessory statute (stats. 1852, p. 158) confers no right, such as will maintain **ejectment**, upon a settler, until all the acts required by it shall have been performed; and it does not affect the question that he has been prevented by force or otherwise from making his intended improvements.

Crowell v. Lanfranco, 42 Cal. 654.

11. Where in an action by H. against W. to recover possession of a quarter section of land, being part of the public domain, H. made claim under the possessory act of this state, and his statutory notice whereby the claim was made, in addition to certain specified metes and bounds, described the lands as the south-east quarter of section 8, township 21 north, of range 1 east, etc., while in fact, the demanded premises were in township 22, instead of said township 21: *Held*, that so much of said description as attempted to identify the land by reference to the government survey, must be disregarded, because of the **error** in the number of the township.

Hicks v. Whitesides, 35 Cal. 152.

12. Where a person, with intention to take up a tract of public land under the possessory act (stats. 1852, p. 158), filed his affidavit of location, and within ninety days thereafter hauled lumber upon the ground for a house; and such lumber was removed during the night; and on his attempting to replace it next day, he was driven off with threats of violence by a band of armed men: *Held*, that he had acquired no rights under the possessory act which would enable him to maintain **ejectment** against those who drove him off.

Crowell v. Lanfranco, 42 Cal. 653.

13. Where the **vendor** of a tract of land taken up under the possessory act (stats. 1852, p. 158) remained in **possession**, with vendee's consent, of the only portion ever actually occupied by him, and vendee never entered under his deed: *Held*, that whether such possession by the vendor might be considered as an entry under his deed by the vendee or not, the deed would certainly not extend the vendee's possession by construction to any other portion of the tract never in the actual possession of the vendor.

Hughes v. Hazard, 42 Cal. 149.

15. Where plaintiff resided upon a tract of land adjoining the land in dispute, and then located his claim under said act upon this disputed tract, by complying with its provisions so far as to mark out its boundaries, file his affidavit, inclose and plant

trees on about one acre of it, and occasionally work other portions thereof, but still residing on the other tract, and never actually living on this: *Held*, that he can not recover in ejectment against a party subsequently surveying, taking possession of, and inclosing the land preparatory to claiming it under the act of 1852; that whatever may have been plaintiff's rights during the period allowed for putting improvements on the premises, they were lost at the expiration of that period by his non-residence; *held, further*, that if plaintiff had perfected his claim by actual residence on the land, he might have absented himself for sixty days without forfeiting his rights; but that the fifth section of the act of 1852 does not apply where the party has never resided upon the land. *Gird v. Ray*, 17 Cal. 352.

16. A party relying on the possessory act of the state must show **compliance with its provisions**, and can then maintain an action for the possession of lands occupied for cultivation or grazing without showing an actual inclosure or actual possession of the whole claim.

Coryell v. Cain, 16 Cal. 567.

17. In an action to recover possession of a tract of land claimed by plaintiff under the possessory act of this state, evidence tending to show that at the time plaintiff filed his declaration he knew that the land in controversy, or any portion of it, was claimed by defendant, is relevant.

Hicks v. Whiteside, 23 Cal. 404.

18. The two hundred dollars of improvements pertaining to the realty, required by the fourth section of the possessory act, must be made on the land claimed before an action can be commenced to recover possession of the same. *Id.*

19. To enable a party to recover lands under the possessory act of this state, he must have complied with the provisions of the act.

Sweetland v. Froe, 6 Cal. 144.

20. A party who has erected improvements on land, and has sold them to another, can not afterward, by making a survey and filing affidavit with the county recorder, acquire any right to the possession of land in the possession of another. And if he conveys subsequently to the same person who purchased the improvements, the latter acquires no rights to any portion of the land attempted to be pre-empted, except that covered by his actual inclosure. *Id.*

EJECTMENT, 170. | TRESPASS, 28.

POSTHUMOUS CHILD.

DESCENTS AND DISTRIBUTIONS, 3

POWER OF ATTORNEY.

1. TO SELL AND CONVEY REAL ESTATE.
35. OF MARRIED WOMAN.
44. IRREVOCABLE POWER.
52. CONSTRUCTION OF.
72. POWER CONTAINED IN MORTGAGE.

TO SELL AND CONVEY REAL ESTATE.

1. A power of attorney to "attend to all business affairs appertaining to real or personal estate," is too indefinite to sustain a transfer of real estate, more particularly that acquired long subsequent to its execution.

Lord v. Sherman, 2 Cal. 498.

2. The power to purchase "any property," in connection with a given object, includes the power to purchase property, both real and personal, necessary to the object. The omission of the word "real" does not limit the power so as to exclude the purchase of real property from its exercise.

De Witt v. San Francisco, 2 Cal. 239.

3. The power to sell does not include the power to make a deed of trust, with power to the trustees to sell the trust estate as they may deem advisable.

Smith v. Morse, 2 Cal. 524.

4. If the notice required is not given in the execution of a power, the proceeding is a nullity.

Ellis v. Eastman, 38 Cal. 195.

5. A power of attorney confirming all sales, leases, and contracts of every description, confers the power to sell land.

Sullivan v. Davis, 4 Cal. 291.

6. A power to sell real estate must be expressly stated.

Billings v. Morrow, 7 Cal. 171.

7. A power to "sell and convey" property is special, and must be strictly pursued.

Dupont v. Wertheman, 10 Cal. 354.

8. A power of attorney, not affecting real estate, is not required to be recorded, and the fact of such instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of its execution.

Stevens v. Irwin, 12 Cal. 306.

9. Where a power of attorney, not under seal, authorizes the agent to sell a saw-mill, dwelling, etc., by the execution of all needful instruments, sealed or otherwise, and the agent sells the right of the principal, by a paper not under seal, representing himself as the attorney of the principal, and the vendee takes possession and retains it for several years, he has an equitable estate in the premises, with the right to its full enjoyment, and this right, united to possession, enables him to maintain an action for interruption to his possession or injury to the property.

McDonald v. Bear River Co., 13 Cal. 220.

10. Where a purchaser, under a conveyance executed by an attorney having a power

not under seal, pays the purchase money, and enters into possession, a court of equity will protect him, and parties claiming under him, against subsequent purchasers with notice from the grantor of the power.

Dutton v. Warschauer, 21 Cal. 609.

11. A power to sell and convey land not under seal, and therefore insufficient to authorize the execution of a conveyance of the fee, is nevertheless sufficient authority for the execution of a **contract of sale**; and a deed made by the donee reciting the sale, and purporting, in pursuance of the power, to convey the fee, is a sufficient "note or memorandum" of such contract, and though inoperative as a conveyance, is good as an agreement to convey. Id.

12. A power of attorney to sell land must contain some **description** of the property to be sold, unless it be shown *alimule* that the land in controversy is the only land owned by the principal at the time.

Stafford v. Lick, 13 Cal. 240.

13. Where a power of attorney, relative to real estate, authorizes the agent "to grant, bargain, and sell the same, or any part or proportion thereof, for such sum or price, and on such terms as to him might seem meet," the agent has no power to make a conveyance in **consideration** of love and affection in the principal for the grantee in the conveyance, and such conveyance is on its face a nullity. The power of attorney authorizes a sale for a moneyed consideration only. Mott v. Smith, 10 Cal. 533.

14. The authority of an attorney to execute for his principal a conveyance of real estate must be in **writing**, and a deed purporting to have been executed by an attorney is inadmissible in evidence without proof being first made of the attorney's written authority.

Videau v. Griffin, 21 Cal. 389.

15. When a deed has been executed by an attorney without any previous written authority, no subsequent **parol acknowledgment** of his authority by the principal will make the conveyance valid. Id.

16. The only exception to the rule that an authority to execute a deed must be conferred by writing is when the execution by the attorney is in the **presence of the principal**, and to bring a case within this exception it is not sufficient that the attorney was directed to sign the name of the principal and affix his seal, but the execution must have been in his immediate presence and under his immediate direction. Id.

17. The **death of the principal** operates as a **revocation** of a power of attorney to convey land, and if, after the death of the principal, the attorney in fact makes a deed under the power, the deed is void, even if the attorney is ignorant of the death.

Ferris v. Irving, 28 Cal. 645.

18. One who has given to another a power of attorney to sell his real estate, may sell the same, notwithstanding the execution of the power, provided he does so before the attorney acts under the power.

Blood v. Shannon, 29 Cal. 393.

19. S. gave B. a power of attorney to sell his real estate for a sum certain in gold coin, provided he did so within fifteen days, and agreed to give ten per cent. for making the sale. Two days thereafter, B. made the sale, and received a bank check for the price. S. refused to ratify the sale, because he had **previously sold** the property: *Held*, that S. not having objected to the sale by B. because he did not receive the money, was liable for the ten per cent.; *held, further*, that S. should have objected to the mode of payment before it was too late to obviate it. Id.

20. A power of attorney which authorizes the attorney to sell the lands of the constituent, and to do whatever is necessary to carry the power into execution, does not authorize the attorney to make **partition** of lands in which the constituent has an interest as tenant in common.

Borel v. Rollins, 30 Cal. 408.

21. F. gave D., as they supposed, a valid power to sell land, but it was worthless. F. then departed from the state and afterwards wrote to D., saying: "I want you to sell some of my lots, or advance the means to meet this administration act, before the year expires, which I send you by mail. You can sell such lots as you see fit, retaining enough to pay Judge G. for the first purchase money. It might be best to cut them up so as to sell in small lots. But you judge of this:" *Held*, that this letter authorized D. to sell at his discretion; *held, further*, that a deed made under it by D., if not good as a deed, was good as a **contract** by F. to convey.

Neil v. Shirley, 33 Cal. 202.

22. F. empowered D. to sell land and take up a note held by G. against F. D. sold the land to G. at the face of the note, which was its full market value, and took the note in payment: *Held*, that a power to sell imports a **sale for cash**; but *held, further*, that the above was a sale for cash within the rule, and not an accord and satisfaction. Id.

23. Where Brown and wife authorized Taylor to sell their land on credit, without specifying the time of such credit, and Taylor sold on a credit of seven years: *Held*, that Taylor could only sell upon a **reasonable credit**, and that the question of the reasonableness of the credit was to be determined only after testimony heard.

Brown v. Central L. Co., 42 Cal. 257.

24. V., the owner of an unconfirmed Mexican grant, executed to B. a power of attorney, which, after reciting the appointment, read as follows: "I give him full, complete, and perfect power, as my said attorney

in fact, to do any and everything to secure my title to said rancho, and to prosecute the pretension of the same in all of the courts of the United States; and by this I ratify, confirm, and approve all the doings of my said attorney in fact concerning said rancho." *Held*, that the power did not confer on the agent any authority to sell the land, or any part of it, or enter into any contract which would bind the principal to convey the same or any part thereof. *Blum v. Robertson*, 24 Cal. 127.

25. Where an officer in making a sale of property, acts under a naked statutory power with a view to divest, upon certain contingencies, the title of the citizen, the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed. No presumption is in such case to be indulged that the officer has performed his duty, or complied with the law.

Keane v. Connovan, 21 Cal. 291.

26. The rule by which a presumption of compliance with legal formalities in a sale by officers or trustees, is sometimes raised by lapse of time with possession in the purchaser, only authorizes the presumption as to intermediate steps in the proceeding. That which is the foundation of the authority to sell, as well as the execution of the deed by which the sale is consummated, is not within the rule, and must in all cases be proved. *Id.*

27. Thus, if from lapse of time since the execution of a tax deed and possession by the purchaser under it, presumptions could be indulged in support of any of the preliminary acts essential to the exercise of the power of sale, they could only be in favor of the acts between the assessment and the execution of the deed, and not of the assessment itself, which was the foundation of all subsequent proceedings. *Id.*

28. By the act of 1850, concerning conveyances, powers of attorney which do not authorize the agent to make an absolute conveyance of real estate, but which authorize him to make a lease of the principal's land for a term exceeding one year, or to make any other instrument affecting the real estate of the principal, except executory contracts for the sale thereof, are entitled to record.

Jones v. Marks, 47 Cal. 242.

29. A power authorizing the attorney in fact to sell all the real estate of the principal, lying in the city and county of San Francisco, is good, without a particular description of the property owned by the principal.

Roper v. McFadden, 48 Cal. 346.

30. The fact that a power of attorney is not acknowledged or recorded does not affect its validity. *Id.*

31. If a party relies on a grant of land

under a power of attorney, the authority of the attorney must be shown.

Hager v. Spect, 52 Cal. 579.

32. Under the statutes of this state, in force in the year 1867, a power of attorney for the sale and conveyance of land, which was not under seal, did not authorize the attorney to convey the legal title, but was sufficient to enable him to enter into a valid contract of sale.

Heinlin v. Martin, 53 Cal. 321.

33. In such a case, if the attorney enter into contract of sale, and in the name of his principal execute to the purchaser a deed absolute in form, though inoperative to pass the legal title, it will be treated in a court of equity as a valid contract of sale, entitling the purchaser to a conveyance of the legal title; and if the purchaser by a conveyance absolute in form convey his interest in the premises to a third person, the conveyance will be deemed in a court of equity an assignment of the contract of sale. *Id.*

34. If a power of attorney for the sale and conveyance of land in this state, executed in the republic of Mexico, be written by the notary in his official book kept for that purpose according to the usage prevailing in that country, and if the instrument so written in the official book be duly signed, acknowledged, and certified as required by the laws of this state, and if the notary thereupon deliver to the attorney a certified copy of the original, these facts will constitute sufficient evidence of delivery. *Id.*

OF MARRIED WOMAN.

35. A married woman can not invest another with power to sell any interest she may possess in real estate, in the absence of a statute to that effect, and there is no such statute in this state.

Mott v. Smith, 16 Cal. 533.

36. To the efficacy of a conveyance of her real estate by a married woman, it is essential that she join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him, or compulsion, or undue influence from him, and that she does not wish to retract its execution. This private examination—this determination of the will as to the retraction of the execution—are not matters which can be delegated to another. *Id.*

37. In a power of attorney made by the wife for the sale of her separate estate, it is not necessary that the husband's name be mentioned in the body of the instrument as a constituent, but it is sufficient if he sign, seal and acknowledge it. It is not necessary that such power should in terms authorize the attorney to sign the husband's name to the deed. *Dentzel v. Waldie*, 30 Cal. 138.

38. Prior to the passage of the act of April 3, 1863, a married woman was incompetent to execute a power of attorney. The act of April 3, 1863, had a retroactive effect, and validated powers of attorney before then executed by married women, in which the husband joined, and also validated all conveyances of the **wife's property** theretofore made under such powers.

Dow v. Gould & Curry M. Co., 31 Cal. 629.

39. The act of April 3, 1863, did not validate powers of attorney theretofore made by married women, but to which the husband did not affix his **signature in writing**. Id.

40. A sale of a married woman's **separate property**, made by her attorney in fact in her name, under a power in the execution of which the husband did not join by affixing his signature in writing, is **void**, and if made before the passage of the act of April 3, 1863, was not validated by that act. Id.

41. A power of attorney of a married woman is void unless the husband join in the execution of the same by affixing his signature to the instrument in writing. Id.

42. A married woman may make a valid **executory contract**, by her attorney in fact, affecting her separate estate, acquired by her in California before its cession to the United States, and her husband may be such attorney in fact.

Racouillat v. Sansevain, 32 Cal. 376.

43. A **joint power** of attorney from the husband and wife is effectual to authorize the attorney in fact to execute a lease of the separate estate of the wife.

Douglas v. Fulda, 50 Cal. 77.

IRREVOCABLE POWER.

44. Where a principal expressly gives a power to collect debts for the purpose of providing the means to return advances made by the agent, there would seem to be no doubt of the irrevocable character of the power.

Marziou v. Pioche, 8 Cal. 522.

45. The power being irrevocable, the agent has an indisputable right to institute an **action to recover the debts** due to his principal, even against the objection of his principal. Id.

46. But where the debts due exceed the advances due the agent, the principal has a right, if his debtor do not object, to limit the agent's right of recovery to the amount due him for advances, the power being irrevocable only to the extent of the agent's interest. Id.

47. But if the debtor object, the principal has no right to subject him to the costs and expenses of more suits than the parties originally contemplated. Id.

48. Where a power of attorney is coupled

with an interest, upon proper allegations, sustained by unequivocal proof, a court of equity will restrain its revocation, and enable the attorney to execute the trust.

Posten v. Rasette, 5 Cal. 467.

49. The interest which an attorney in fact must have, in order to render his power of attorney irrevocable, must be an **interest in the property** on which the power is to be exercised, and not an interest in the money derived from a sale of the property.

Barr v. Schroeder, 32 Cal. 610.

50. A power of attorney may be irrevocable though it is not a power coupled with an interest, as where it is given as **security for the payment of money**, or is made irrevocable. Id.

51. A power of attorney which makes the attorney a **universal agent** for the transaction of all ordinary business will not be held irrevocable, unless its terms are so plain as to need no construction. Id.

CONSTRUCTION OF.

52. An agent authorized by power of attorney to wind up and adjust the affairs of a mercantile house in the city of New York, which had been conducted in the name of his principal, derives no authority from such power of attorney to bind his principal by a **promissory note** given on the purchase of real estate in the city of San Francisco.

Fisher v. Salmon, 1 Cal. 413.

53. The **destruction** of a power of attorney does not destroy the power. Upon the loss of the paper, there is no reason why its existence should not be shown and the power continued, so as to carry out the object of both the principal and agent.

Posten v. Rasette, 5 Cal. 467.

54. Where B. authorizes A. to do all acts in his name concerning their mining operations, followed by the authority to sign B.'s name to any company articles, does not authorize A. to sign B.'s name to a **promissory note**, even where the money was used in carrying on their joint mining operations.

Washburn v. Alden, 5 Cal. 463.

55. General words in powers of attorney are limited and controlled by **particular terms** and designations. Id.

56. In powers, covenants, releases, or other contracts, where a **several interest** is alone expressed or referred to, no general terms will allow the meaning to be extended to a joint interest.

Johnson v. Wright, 6 Cal. 373.

57. A power of attorney authorizing the attorney "to settle and adjust all partnership debts, accounts, and demands, and all other accounts and demands now subsisting, or which may hereafter subsist between me and any person or persons whatever," and to ex-

ecute releases for such purposes, does not confer a power to release a **covenant of guaranty** made to the principal and others jointly, for the payment of rent and purchase money of property sold by them as tenants in common. *Id.*

58. In such case the debt guaranteed is not a partnership debt, nor does it fall within the provisions of the power referring to demands subsisting "between me and any other person or persons," which is confined to demands in which the principal had a several and sole interest. *Id.*

59. Where authority to perform **specific acts** is given by a power of attorney, and general words are also employed, such words are limited to the particular acts authorized. *Billings v. Morrow*, 7 Cal. 171.

60. A power of attorney giving to the attorney in fact full authority to represent the person of the principal in all that concerns his interest in the state of California, and to annul any other power previously granted, and letters afterwards written by the principal to the attorney, speaking generally of the propriety of the sale of land in California belonging to the principal, and of the price and terms, and telling the attorney he can give a provisional writing of sale, and to make a sale and it will be approved, do not confer authority upon the attorney to bind the principal by a **contract of sale**. *Treat v. De Celia*, 41 Cal. 202.

61. A power of attorney which authorizes the attorney in fact to sell "the one half" of a lot of land, without saying which half, or whether the agent is to sell one half in severalty, or an undivided one half, empowers the agent to sell one half of the lot in severalty, exercising his own **discretion** as to which half. *Alemanly v. Daly*, 36 Cal. 90.

62. One in possession of public land sufficiently describes the same in the power of attorney by calling it his **claim of land**. *Henley v. Hotaling*, 41 Cal. 22.

62a. *Billings v. Morrow*, 7 Cal. 171, as to construction of a power of attorney, commented on, and the rule there laid down not to be extended.

De Rutte v. Muldrow, 16 Cal. 505.

63. Where a **building** is in process of construction by three tenants in common, according to a plan agreed on, a power of attorney from one to an agent, authorizing him "to represent the principal's interest in the property, to cast his vote in relation thereto in all matters relating to the administration or improvement of the property, and to do and perform every act or thing relating to and concerning such interest, except the sale or hypothecation thereof," authorizes the agent to consent to **alterations in the plan**. *Hastings v. Halleck*, 13 Cal. 203.

64. A power of attorney to sell "my saw-

mill, dwelling, etc., said mill and other improvements, being situated," etc., embraces the **water privilege** of the mill.

McDonald v. B. R. Co., 13 Cal. 220.

65. A power of attorney authorizing the agent to "superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal whatsoever, giving my said attorney full power to use my name, to release others or bind myself, as he may deem proper and expedient, hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," gives the agent power to execute a **lease of real estate**, containing a clause that the lessee "shall have the privilege of purchasing any part of said land during the continuation of this lease, at its value, in preference to any other persons."

De Rutte v. Muldrow, 16 Cal. 505.

66. If in an instrument conferring a power there be an inconsistency between the **recital** stating the consideration moving the donor to the execution and the subsequent terms defining the power, the recital will not operate as a limitation upon the power.

Beatty v. Clark, 20 Cal. 11.

67. Equity will not aid the **non-execution** of a power; but when a party undertakes to execute a power, and by mistake does it imperfectly, equity will, in favor of creditors and others peculiarly within its protective favor, aid the **defective execution**. *Id.*

68. Thus, where there is a defect in the execution of a power to make a mortgage, the condition of the mortgage not following the terms of the power, and the design to execute a mortgage in pursuance of the power is apparent, and the object sought by its execution is substantially accomplished, equity will afford relief and enforce the mortgage. This it will do either by directing a correction in the condition of the mortgage, and then enforcing the mortgage in its corrected form, or by construing the defectively executed instrument in connection with the power to which it refers, thus qualifying and restricting the condition, and giving effect to the mortgage conformably to the intention of the donors of the power, and of the mortgagor. *Id.*

69. When one is appointed, by written instrument, the attorney in fact of another, his power to bind the principal must be ascertained alone from the **language of the instrument**, by which he is clothed with authority to act for and in the name of the principal. *Blum v. Robertson*, 24 Cal. 127.

70. A power of attorney in which the principal authorizes the agent to make **contracts**, to settle **outstanding debts**, and

generally to do all things that concern his interest in any way, real and personal, to use the principal's name to release others, to bind the principal as he may deem proper and expedient, and making the agent his **general attorney** and agent, and ratifying and confirming whatever the attorney may do by virtue of the power, authorizes the attorney to execute a **lease** of the principal's real estate for a term exceeding one year, and to execute any instrument affecting the real estate of the principal, unless, it may be, a conveyance of it.

Jones v. Marks, 47 Cal. 242.

71. If a power of attorney authorizes the attorney in fact to sell and convey lots in a town "for purposes of actual improvement for mercantile and other purposes," the agent is **authorized to sell**, and the words "for purposes," etc., do not limit his power.

Spect v. Gregg, 51 Cal. 198.

POWER OF ATTORNEY IN MORTGAGE.

72. Where, at a sale under a power contained in a mortgage, the mortgagee becomes the purchaser indirectly, by having the mortgaged premises bid in for himself, such sale is not therefore void, but only voidable on the application in equity of the mortgagor. The legal title passes by the sale.

Blockley v. Fowler, 21 Cal. 326.

73. In an action of ejectment where the defendant claimed title through a purchase made at a sale under a power contained in a mortgage, the court gave the following instruction: "If the jury believe, from the evidence, that M. B. McKinney, the mortgagee mentioned in the mortgage, made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser, but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, then the sale was void." The jury found for plaintiffs, who had judgment: *Hehl*, on appeal, that the instruction was erroneous in pronouncing the sale void on the supposed state of facts, and that, for this error, the judgment must be reversed. *Id.*

74. From lapse of time and acquiescence in the possession of the purchaser, the regularity of a sale under a power may be inferred, and a presumption indulged that due notice thereof, as required by the power, was given. *Simson v. Eckstein*, 22 Cal. 580.

75. Where a mortgage contains also a power of sale, and names the mortgagee as the attorney in fact to make the sale, the sale is not invalidated from the fact that the

attorney employs the services of an auctioneer to make the sale for him.

Fogarty v. Sawyer, 23 Cal. 570.

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PRACTICE ACT.

1. In construing this act, it is proper to remember that the two leading ends contemplated by the system are simplicity and economy; and it would seem, therefore, to be a just conclusion, that the court should exercise a **liberal construction**, and that the main intent and spirit of the act should be fairly carried out.

Adams v. Hackett, 7 Cal. 201.

2. We adopt the New York construction of the code where the sections are alike.

Id. 203.

3. Our practice, while it enlarges the field of remedy, does not take away **pre-existing remedies** by implication.

Lorraine v. Long, 6 Cal. 452.

4. Our system of pleading is formed upon the model of the **civil law**, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the courts to assist, as far as possible, in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system.

Jones v. Steamship Cortes, 17 Cal. 497.

5. The practice act of April 29, 1851, is **prospective** in its operation, and to give it a retrospect beyond the time of its passage would be in violation of all settled rules of construction.

Thorne v. San Francisco, 4 Cal. 154.

6. The practice act applies to **equitable as well as to legal actions**, so far as its provisions are consistent with the rights and remedies administered in courts of equity.

Duff v. Fisher, 15 Cal. 375.

Goodwin v. Hammond, 13 Id. 168.

Riddle v. Baker, 13 Id. 302.

7. The practice act, as to **evidence** at least, governs all cases, legal or equitable, by the same rules.

Goodwin v. Hammond, 13 Cal. 168.

8. The phrase, "**proceeding according to the course of the common law**," has been used merely from force of habit, or mainly for ornamental purposes; it leaves no

definite impression on the understanding; it is simply equivalent to a knowing look or shake of the head. When first employed, its use was harmless; but its continued use, where the modes of the common law have been superseded, is mischievous.

Hahn v. Kelly, 34 Cal. 391.

9. The practice act is entirely remedial. It does not affect the rights of the parties as to the subject-matter of the controversy, but prescribes the mode in which redress may be had when these rights have been invaded.

Hastings v. Cunningham, 39 Cal. 137.

10. When, in pending actions, proceedings have been taken prior to the taking effect of the code, the sufficiency of such proceedings must be determined by the laws in force at the time, and by no other rule.

Caulfield v. Doe, 45 Cal. 221.

11. Such proceedings will, on appeal, be decided in accordance with the former practice act. Hancock v. Thom, 46 Cal. 643.

PRAVER.

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PRE-EMPTION.

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ANCE.

PREScription.

1. To acquire a prescriptive right to over-flow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for a period of five years; there must have been an actual occupation by the flow of water, to the knowledge of the owner, and such as to occasion damage and give him right of action; and there must have been such a use of premises and such damage as will raise a presumption that the owner would not have submitted to it unless the other party had acquired a right so to use it.

Grigsby v. Clear Lake W. Co., 40 Cal. 396.

2. Prescription or adverse use can not mature into a title as against the United States. Mathews v. Ferrea, 45 Cal. 51.

3. If the owners of a ditch constructed for

conveying water use the same peaceably, openly, and exclusively, under a claim of right, with the knowledge of the right of the owners of the land, for a continuous period of five years, they acquire, by prescription, the right to an easement over the land for the same. Campbell v. West, 44 Cal. 646.

4. An owner of land can not acquire a prescriptive right to flood with water land higher than his belonging to the United States, and the purchaser of such higher land from the United States may commence an action for the injury at any time within the statutory period after he buys from the United States, notwithstanding the fact that it may have been flooded while the United States owned it.

Ogburn v. Connor, 46 Cal. 347.

5. No right by prescription can be acquired to the use of water as against the government of the United States.

Wilkins v. McCue, 46 Cal. 656.

6. If a grant of land by Mexico or Spain was imperfect, no prescriptive right to the use of water flowing from it can be acquired without an adverse user for five years from the time of a final survey, or the issuing of a patent to the grantee. Id.

7. Plaintiff claiming that one S., his predecessor, had title to the land sued for by prescription as against the government of Mexico, through actual occupancy for more than ten years without being disturbed by that government: *Held*, that even if prescription run against the government, it will not avail plaintiff, because the verdict is against such a holding and claiming as to give him title by prescription.

Hall v. Dowling, 18 Cal. 619.

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PRESENTMENT.

CRIMINAL LAW. | PLEADING, 906.

PRESUMPTIONS.

1. IN GENERAL.

25. OF MATTERS IN THE COURT BELOW.

IN GENERAL.

1. Presumptions are only indulged to supply the absence of facts. There can be no presumption against ascertained and estab-

lished facts. The presumption, therefore, of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held.

Nieto v. Carpenter, 21 Cal. 455.

2. It is scarcely to be presumed that one man will execute to another a deed without the **assent** of that other.

Bensley v. Atwill, 12 Cal. 231.

3. No presumption of a grant will arise as against the **United States**, but the legislative grants, or the letters patent, or something that is made by law their equivalent, must be produced.

Doran v. C. P. R. R. Co., 24 Cal. 245.

4. **Injury** is presumed from evidence erroneously admitted, and the adverse party must show clearly that no injury accrued, or the judgment can not stand.

Grimes v. Fall, 15 Cal. 63.

5. The fact that two or more persons join in the **execution** of a mortgage of lands does not raise a presumption that the estate mortgaged is joint property.

Bowen v. May, 12 Cal. 348.

6. Where the validity of a **sale** made in a foreign state is drawn in question in the courts of this state, the **law of the place of contract** will be presumed, until the contrary is shown, to be the same as that of our own state in reference to the same subject-matter. This presumption extends to statutory as well as to the common law.

Hickman v. Alpaugh, 21 Cal. 225.

7. In the absence of proof on the subject, the presumption is that the **laws of another state** are the same as those of this state.

Hill v. Grigsby, 32 Cal. 55.

8. In the absence of proof as to the laws of Texas, the courts of this state, in interpreting a will made in that state, will presume its laws to be in accordance with the laws of California.

Norris v. Harris, 15 Cal. 226.

9. The fact that the bill by the usual conveyance reached its destination within a month from its date was sufficient to raise a presumption that defendant had received **notice of payment** in double that time.

Weaver v. Page, 6 Cal. 681.

10. To establish title under a deed executed in pursuance of a power authorizing a sale upon **notice**, as a general rule the giving of the required notice must be proved, and will not be presumed from the execution of the deed. *Simson v. Eckstein*, 22 Cal. 580.

11. The **official acts** of officers in the course of their ordinary and accustomed duties, and within the general scope of their powers, will be presumed to have been done by lawful authority.

Hart v. Burnett, 15 Cal. 530.

12. An officer will not be presumed to

have exceeded his authority, especially the officer of a foreign government.

Den v. Den, 6 Cal. 81.

13. Where the **return of a sheriff** states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else.

Curtis v. Herrick, 14 Cal. 117.

14. The law presumes that every officer will **faithfully perform** his duties, until the contrary is shown.

Egery v. Buchanan, 5 Cal. 53.

15. The presumption under our statute is that all the land in the state is **public land** until the legal title is shown to have passed from the government to private parties. This presumption is reconcilable with the presumption of title arising from possession.

Burdge v. Smith, 14 Cal. 380.

16. The right of one who enters upon the public lands of the United States without the consent of the government to take possession of and hold more than one hundred and sixty acres, discussed.

Dyson v. Bradshaw, 23 Cal. 528.

18. The appellant must affirmatively show error, and if he presents a **bill of exceptions** taken to the admission of certain evidence, and under a certain state of facts the evidence would be admissible, the presumption will be, that the facts existed, unless he show the contrary by bringing up all the **evidence** in the record.

Ferrer v. Home Mutual, 47 Cal. 416.

19. The mere fact that a party held **possession of pueblo land** within the limits of the city of San Francisco for a period of several years, prior to 1861, and then died, raises no presumption, in an action brought by his intestate to recover the land, that this possession was connected with the title of the city.

McManus v. O'Sullivan, 48 Cal. 7.

20. All intendments, consistent with the record in the appellate court, must be taken in support of the **judgment**.

Doyle v. Franklin, 48 Cal. 537.

21. If the line of the Pacific railroad was definitely fixed before a **pre-emptor**, living on an odd section granted to said road, which had been surveyed, had filed his **declaratory statement**, then, although he afterwards files such statement and receives a patent, the railroad company has the better title.

Weaver v. Fairchild, 50 Cal. 360.

22. The presumptions are that the **act of an officer**, with the general scope of his powers and duties, was correctly performed.

Id.

23. As against a mere trespasser, one in possession of **public land** will be presumed to be the owner.

Brandt v. Wheaton, 52 Cal. 430.

24. While all voters are presumed to

know the law and the time when the full terms of office expire, they are not presumed to know the fact that an officer has resigned or died.

Tillson v. Ford, 53 Cal. 701.

AS TO MATTERS IN THE COURT BELOW.

25. The rule is that the presumptions of law are in favor of the **jurisdiction** and of the regularity of the proceedings of courts of superior or general jurisdiction, which, in this state, comprise all courts of record; and this rule obtains equally, whether their proceedings be by the course of common law or statute law, or be in the acquisition of jurisdiction of the person of defendant, by making either actual or constructive service of the summons on him; but that no such presumptions are indulged in favor of the jurisdiction or regularity of the proceedings of courts and tribunals of inferior or limited jurisdiction, which, in this state, comprise all courts not of record, and all special boards and tribunals which are created by law and clothed with judicial functions of a limited and special character; and all persons who claim any right or benefit under their judgment must show their jurisdiction affirmatively.

Hahn v. Kelly, 34 Cal. 391.

26. The rule by which **inspection of the record** is governed is that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. In such case, it will be presumed that what ought to have been done was not only done, but rightly done; but where the record states what was done, it will not be presumed that something different was done. A want of jurisdiction affirmatively appears on the face of the record, when whatever was done is stated, and which having been done, was not sufficient in law to give the court jurisdiction. *Id.*

27. The existence of a **petition for the probate of a will** which is not on file may, after the lapse of several years, be inferred, from mention thereof in the minutes of the probate court and reference thereto in books kept by the clerk, and papers on file, and oral testimony tending to prove, but not positively asserting the fact. Where it was shown that a petition since lost or destroyed, was filed in the proper court, the object of which was to procure the probate of a will; that the testator was dead when the petition was presented, and resided at the time of his death in the county where the alleged probate was had; that the petition was drawn by lawyers whose business it was to prepare such papers; that the court assumed jurisdiction, took proof of the execution of the will, issued letters testamentary, and ordered and approved a sale of real estate by the executor: *Held*, that it should be presumed, after the lapse of eight years, that the petition con-

tained a statement of the **necessary jurisdictional facts**. In *re Warfield*, 22 Cal. 51.

28. The appellate court will presume in **favor of the judgment** below, unless the record clearly show error.

Thompson v. Monrow, 2 Cal. 99.
Kilburn v. Ritchie, 2 Id. 145.

29. The supreme court will not presume error, or that facts exist which would show error. If the court below commits error in its finding or judgment, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant.

Herriter v. Porter, 23 Cal. 385.

30. All intendments must be in favor of sustaining the judgment of courts of original jurisdiction; and to disturb such judgments it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. *Nelson v. Lemmon*, 10 Cal. 49.

31. Upon an appeal from a judgment of the county confirming the **report of commissioners** apportioning expenses for widening a street among lot owners and railroad corporations, unless the record shows a different state of facts, the presumption under the provisions of said act is that such expenses were apportioned according to the benefits received by each.

Appeal of N. B. & M. R. Co., 32 Cal. 449.

32. All presumptions under the express provisions of the act are in favor of the correctness of the action of such commissioners. It devolves on one objecting to the confirmation of their report to show error. *Id.*

33. If the court makes a **finding** of facts, but does not include a finding upon one of the issues raised, and the judgment rendered is based upon that issue, the presumption will be that the court found upon that issue in such a way as to sustain the judgment.

Sears v. Dixon, 33 Cal. 326.

34. Where it appears on the face of the judgment record itself, that there was no trial before a jury and no evidence given to the court, it will not be presumed on appeal that any evidence was adduced in the case, but the court will presume that the cause was heard on the pleadings alone.

Belt v. Davis, 1 Cal. 134.

35. Every intendment is in favor of a judgment of a court of record, and, until the contrary be made clearly to appear, the appellate court is bound to suppose that it was based on proper evidence.

Grewell v. Henderson, 7 Cal. 290.

36. Where the record returned to this court contains nothing but the pleadings and the judgment of the court below, without embodying the testimony given at the trial, this court will presume that the evidence was **sufficient to sustain the judgment**; and this, although it appear in the judgment itself, entered up by the judge of the court

below, that the judgment was based upon grounds wholly untenable.

Folsom v. Root, 1 Cal. 374.

37. The presumption of law is that the evidence warranted the verdict. If the jury in their verdict necessarily pass on a material question of fact, the appellate court will not reverse the judgment on the ground that there was no evidence to warrant the verdict, unless a motion is made for a new trial, and a statement made which shows that no evidence was introduced to prove the fact. The presumption of the law is that there was evidence to sustain every material fact found by the jury. Doll v. Anderson, 27 Cal. 248.

38. This court will presume in favor of sustaining the judgment of the district court, that proof was made of the disallowance of the claim by the administrator, which supplied the want of the averment to that effect.

Hentsch v. Porter, 10 Cal. 555.

39. Where the record shows that a demurrer was interposed to the complaint and was sustained by the court, and afterwards, during the same term, a judgment was rendered in favor of the plaintiff, this court will not presume that the order sustaining the demurrer was set aside by the court before judgment was rendered.

Seaver v. Cay, 9 Cal. 564.

40. In such a case the record shows that judgment was improperly rendered. Id.

41. When there are both issues of law and fact joined in the same cause, and the cause is tried on the issues of fact and a judgment rendered, the presumption will be indulged, on appeal, that the issue of law had first been disposed of.

Brooks v. Douglass, 32 Cal. 208.

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PRINCIPAL AND AGENT.

1. IN GENERAL.

15. WHAT CONSTITUTES AN AGENCY.

17. EVIDENCE OF AGENCY.

19. WHAT ACTS BIND THE PRINCIPAL.

40. INSTRUMENTS EXECUTED BY AGENT.

46. LIABILITY OF AGENT.

57. AUTHORITY OF AGENT.

72. RATIFICATION.

IN GENERAL.

1. Attorneys in fact act under special power created by deed; the term agent includes all classes of agents, and an agent is not necessarily an attorney in fact, though an attorney in fact is an agent.

Porter v. Hermann, 8 Cal. 819.

2. The words "attorney in fact" are not synonymous with the term "agent." Id.

3. General words in an agency must be construed in reference to matters specially mentioned. Taylor v. Robinson, 14 Cal. 396.

4. The party dealing with an attorney in fact is bound to know at his peril what the power of the agent is, and to understand its legal effect.

Blum v. Robertson, 24 Cal. 127.

5. Notice to an agent of facts arising from, or connected with the subject-matter of the agency, is constructive notice to the principal, where the notice comes to the agent while he is acting for the principal and in the course of the very transaction.

Bierce v. Red Bluff H. Co., 31 Cal. 160.

6. If one acts as agent of another, and uses his money in making a purchase of land at sheriff's sale, but buys in his own name, the interest he acquires by the purchase vests in equity in his principal.

Green v. Clark, 31 Cal. 591.

7. A principal may sue in his own name on a contract in writing, made and signed by his agent without disclosing his principal; but in order to maintain the action, the principal must show the agency, and the power of the agent to bind him at the time. But in such a case, the defendant may make the same defenses against the newly dis-

covered principal as he could against the agent with whom he dealt as principal.

Ruiz v. Norton, 4 Cal. 355.

8. A tenant in common of lands, employed as agent by special agreement between himself and co-tenant to take charge of the land, make sales thereof at certain prices, receiving a commission of five per cent. on sales, may sue his co-tenant for the services rendered, in respect to the land, outside of selling it.

Thompson v. Salmon, 18 Cal. 632.

9. The fact, in such case, that the agent renders from time to time an account of his sales, deducting his disbursements for taxes, costs of suit, his commissions, etc., without including any charge for his other services, as superintending a large number of suits, hunting up witnesses, ascertaining the portion of land on which each squatter was settled, etc., does not preclude him from afterwards making a monthly charge for these latter services, whatever may be the effect of his omission to include such charge in his accounts as against the reasonableness of the charge. Id.

10. If the owner of land employs another person to sell for him his land, at an agreed rate of commission, and the broker finds a purchaser, who is willing to take the land at the price fixed, the owner can not, by a refusal to sell to him, or by a sale to another, avoid the contract, and escape the payment of the commission.

Phelan v. Gardner, 43 Cal. 306.

11. In an action to foreclose a mortgage where K. defended as a subsequent purchaser of the mortgaged property, the lower court having found as a fact that K. was the agent of plaintiff, and acted as such in procuring the note and mortgage, and receiving interest upon the note, but without stating more particularly the duties devolving upon him as agent, the appellate court refused to infer from this that his duties as agent were of a character which prevented him from contracting in relation to the property on which the debt was secured.

McCarty v. White, 21 Cal. 495.

12. The relations between an attorney in fact, who undertakes to care for and protect the land of his principal, and negotiate sales of the same, and the principal, are of a fiduciary nature, and the agent must not put himself, during his agency, in a position which is adverse to that of the principal.

Rubidoex v. Parks, 48 Cal. 215.

13. Agents, from the nature of their employment, are subject to the rule which governs the relation of trustee and cestui que trust, and an act of the agent with respect to the subject-matter of the agency, injurious to the principal, may be avoided by the principal, as between themselves. Id.

14. The agent and principal are not abso-

lutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; but, in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly, and honestly. Id.

WHAT CONSTITUTES AN AGENCY.

15. A. was indebted upon a note and mortgage to B., in the sum of forty thousand dollars. B. assigned the note and mortgage to C., and received from him his notes in lieu thereof. Afterwards A. mortgaged to C., together with other property, the property previously mortgaged to B., subject to first mortgage, for which C. was to advance to A., from time to time, sums of money not to exceed twelve thousand dollars, to enable A. to pay his debts. By this mortgage C. was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the twelve thousand dollars and interest, and in case the rents should not be sufficient for that purpose, and A. should not pay within two months after request, then C. was to sell, and out of proceeds to pay the amount and interest so advanced. C., at various times, advanced to A. nearly twelve thousand dollars, and collected rents to the amount of twenty-eight thousand dollars. Subsequently C. died, and then his executor collected the rents: Held, in an action by A. against C.'s administrator, that C. acted in the purchase of the note and mortgage of B. as an agent of A., and that A. was entitled to the trust fund. Gunter v. Jones, 9 Cal. 643.

16. To constitute a valid agency, where property is its subject, it is not essential that the principal should hold the legal or equitable title, or more than a naked claim of title. It may be created for the acquisition of title, either legal or equitable, or for the protection of an asserted title.

Hardenbergh v. Bacon, 33 Cal. 356.

16a. An agency, having property for its subject, may be created by parol, and may be proved in the same manner. Id.

EVIDENCE OF AGENCY.

17. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not.

Minturn v. Burr, 16 Cal. 107.

18. The consent of the owner to a disposition of his property may be inferred

from acts, as well as given in direct terms. It may be inferred when he gives such evidence of the authority of disposal as usually accompanies such authority, according to the custom of trade and the general understanding of business men.

Wright v. Solomon, 19 Cal. 64.

WHAT ACTS BIND THE PRINCIPAL.

19. The right of selection is the basis of the responsibility of a master or principal, for the acts of his agent. No one can be held responsible, as principal, who has not the right to choose the agent from whose act the injury flows. Boswell v. Laird, 8 Cal. 469.

20. A party who gives a general power of attorney to another to transact all business, etc., authorizing the attorney "to make, execute, and deliver promissory notes," etc., will be held liable for all such notes, etc., executed in his name by his attorney, when they have reached the hands of an innocent holder, although they may have been made for the private purposes of the attorney. Hellman v. Potter, 6 Cal. 13.

21. The principal is not bound to notice recorded conveyances executed in his name by his attorney, not authorized by the power. Billings v. Morrow, 7 Cal. 171.

22. Notice by the principal of the contents of a written agreement with his agent, which terminates the agency, is sufficient notice of the termination of the agency.

Van Dusen v. Star M. Co., 36 Cal. 571.

23. If the principal has for a long time recognized the act of his agent in buying goods for him, and paid for them, he is liable for goods ordered by the agent for them from the same parties, after the agency ceases, if they have no notice that the agency has ceased. This liability of the principal is the same to the assignee of the demand, even if the assignee had notice before the goods were sold that the agency had ceased. Id.

24. If V. sells goods to S., ordered by W., the agent of S., and S. recognizes the agency and pays for the same for several years, and V. is then notified by S. that the agency of W. has ceased, he can not hold S. for goods afterwards furnished on W.'s order, and on the declaration of W. that S. was to pay for them. When the agency of W. ceased, it required the consent of S. to render him liable afterwards. Id.

25. It is within the scope of the general authority of a railroad conductor to remove persons from the cars who get on wrongfully; but if, in so doing, he does not exercise care and caution, but acts maliciously, and injury results, the company is liable. Kline v. U. P. R. Co., 37 Cal. 400.

26. A railroad conductor is not acting outside of his authority in admitting on its cars all persons properly seeking admission as

passengers, or in excluding all who do not come as passengers, or are not fit to be admitted, and the company is liable for his wrongful performance of either. Id.

27. If a railroad company, whose road forms a junction with another road, intrusts a person employed and paid by such other road with the business of attending to its trains at such junction, the fact that he was employed by the other company does not release it for damages caused by his negligence. Taylor v. W. P. R. Co., 45 Cal. 323.

28. If a railroad company is sued for damages alleged to have been caused by the incompetency of its agent, the question should be left to the jury whether the company used all reasonable precautions to ascertain the agent's competency before employing him, but were, nevertheless, deceived by the fraudulent practices of the agent. Id.

29. If the act of the agent is within the general scope of his authority, or is specially approved by the principal, the principal is liable for all damages sustained thereby. Id.

30. Where the agent, on behalf of his principal, performs an unauthorized act, yet if the principal has put the agent in a position to mislead innocent parties, he is responsible to them.

Davidson v. Dallas, 8 Cal. 227.

31. A subsequent general power from the principal to the agent, to sue for all sums due the principal, and to execute all instruments necessary to carry the power into full effect, will, as to innocent third parties, bind the principal for obligations incurred in the collection of a loan, which was unauthorized as between the principal and agent. Id.

32. Admissions of an agent, to bind the principal, must constitute part of the *res gestæ*, that is, they must be made with reference to the subject-matter, and at the time of the act done.

Garfield v. K. Ferry W. Co., 14 Cal. 35.

33. James Harter and S. N. Stranahan were sued as joint makers with the Ocean mining company of a note, set forth in the complaint, in the following form: "Three months after date the Ocean mining company promise to pay to W. G. Bright, or order, one thousand dollars, for value received, with interest at the rate of two per cent. per month. (Signed.) James Harter, trustee, S. N. Stranahan." Judgment by default was rendered against the company and H. and S.: *Held*, that this judgment was erroneous; that the instrument itself showed the intention of H. and S. to bind the company and not themselves, and that they were not personally liable.

Shaver v. Ocean M. Co., 21 Cal. 45.

34. The statement or representation of an agent, made at the time of a transaction

which is within the scope of his authority, is evidence against the principal himself.

Neely v. Naglee, 23 Cal. 152.

35. The agent can not, in the exercise of the power delegated, bind the principal by any act **beyond the power**, or beside it, though it is competent for him to perform such subordinate acts as are usually incident to or necessary to effectuate the object expressed. Blum v. Robertson, 24 Cal. 127.

36. Where one is intrusted by another with goods with **power to sell** the same as the agent or clerk of the owner, a mere intention on his part to appropriate the proceeds to his own use does not amount to a conversion of the goods; but while his agency continues, his sales, in pursuance of his authority, are valid and bind the owner.

Herron v. Hughes, 25 Cal. 555.

37. If the agent of a telegraph company at one of its stations, with power to delegate his authority, employs another person to transmit and receive messages, and such other person sends a **false message** purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money, and the sender then personates the fictitious person and obtains the money, without any neglect on the part of the bank, the telegraph company is responsible to the bank for the same.

Bank of Cal. v. W. U. Tel. Co., 52 Cal. 280.

38. Assumed, for the purposes of the decision, that an agent of a telegraph company has no authority to appoint a **subagent** to perform his duties in sending and receiving dispatches. Id.

39. Although a principal is not bound by a contract made in his name by a subagent, appointed by his agent without authority, yet he is responsible for the negligence and torts of such subagent, if the agent who appointed him was at the time acting in the business of his principal, and the subagent was transacting such business. Id.

INSTRUMENTS EXECUTED BY AGENT.

40. The word "agent," appended to the signature of the agent, is not mere *descriptio personæ*, but is the **designation of the capacity** in which he acted.

Sayre v. Nichols, 7 Cal. 535.

41. Where a **bill of exchange** was headed with the name of a banking office, and when paid, was to be charged to that office, and was signed by a person as agent: *Hehl*, that the agent was not personally responsible thereon. Id.

42. If, on the face of an **instrument not under seal**, executed by an agent, with competent authority, signing his own name simply, it appears that the agent executed it

in behalf of the principal, the principal, and not the agent, is bound.

Haskell v. Cornish, 13 Cal. 45.

43. If the name of the principal, and the intention to bind him, appear in an instrument not under seal, the agent having authority, the principal alone will be bound, though the instrument be signed in the agent's name only.

McDonald v. Bear R. Co., 13 Cal. 220.

44. If, in the body of a **note**, it appear that the note is the note of the principal, or made by the signer for and as agent of the principal, it is the note of the latter, even though the words "agent for," or the like, are not added to the signature.

Haskell v. Cornish, 13 Cal. 45.

45. An agent signing his own name to a promissory note made on behalf of his principal, is **not personally liable** as a maker if the instrument itself discloses the intention to bind his principal and not himself.

Shaver v. Ocean M. Co., 21 Cal. 45.

LIABILITY OF AGENT.

46. An agent for the collection of a note is confined to the taking of money in payment, and has **no power**, unless special authority is given, **to take goods** in payment.

Nudgett v. Day, 12 Cal. 139.

47. The **maker** of the note, having knowledge of the agency, is bound to inquire into the extent of the powers of such agent. Id.

48. Plaintiff, on the twenty-ninth of October, 1855, delivered to Rhodes & Whitney, who were running an express from Weaver-ville, Shasta, and other points in the mines, and connecting with the express of Wines & Co., at Sacramento, who ran to San Francisco, "a sealed package of gold dust," consigned to the United States mint, San Francisco, for coinage, for account of plaintiff. Rhodes & Whitney transmitted the package to Wines & Co., at Sacramento, who took it to San Francisco and deposited it (Nov. 1, 1855), at the mint, the receipt given them at the mint naming the depositors thus: "Pat. Tuite, G. H. Wines & Co." The mint certificate of assay, of same date, is headed thus: "No. 10,451. Memorandum of gold bullion deposited at the branch mint of the United States at San Francisco, the first day of November, 1855, by Pat. Tuite." Rhodes & Whitney received this certificate from Wines & Co., and delivered it to plaintiff, taking up their receipt to him. November 6, 1855, Wines & Co. received the coin from the mint, per their clerk, who usually made the deposits and drew the coin, the receipt to the mint being signed: "G. H. Wines & Co., per Pat. Tuite." Wines & Co. received packages from Rhodes & Whitney, and disposed of them according to instructions. No special instructions in this case appear on the way-bill book of Rhodes & Whitney. At

the time of deposit in the mint, and during the whole transaction, defendant Wakelee was agent of Wines & Co., at San Francisco, the members of the firm being non-residents. March, 1857, defendant, as agent of Wines & Co., delivered to Rhodes, of the firm of Rhodes & Whitney, which firm was dissolved in December, 1855, Rhodes alone from that time carrying on the express, a bag of coin containing one thousand three hundred and sixty dollars and twenty-five cents, marked "Rhodes & Whitney, Weaverville, for acc't of Patrick Tuite." Rhodes then went east and died: *Held*, that neither Wines & Co. nor Rhodes & Whitney had any authority to receive the money from the mint, their engagement terminating upon the gold being deposited at the mint; and that, as defendant knew of the terms of this engagement, and hence that in withdrawing the money he was acting beyond the scope of his employment as agent, he is personally liable to plaintiff for money had and received.

Tuite v. Wakelee, 19 Cal. 692.

49. The fact that an agent appears by his own testimony to be a **secret partner** with the principal will make no difference.

Tomlinson v. Spencer, 5 Cal. 291.

50. R. having a possessory interest in certain premises which had been sold under a foreclosure decree, employed M. to manage the property, and receive all its proceeds and pay them over in certain fixed proportions to R. and S.: *Held*, that M. was a mere agent of R., and not a "**tenant in possession**," and, therefore, not liable to the purchaser at the sale for the rents and profits.

Shores v. Scott River Co., 21 Cal. 135.

51. Where one reposes **special confidence** in another in negotiating a sale of property, and the other seeks this confidence, and then betrays it to the damage of the one by whom he was trusted, he becomes liable for the loss sustained thereby.

Hunsaker v. Sturgis, 29 Cal. 142.

52. Where a person voluntarily becomes an **unpaid agent** of another to negotiate a sale of stock of a corporation, and then receives a certain sum from a purchaser as a reward for acting in his behalf, and procuring a sale for less than the purchaser was willing to pay, the agent becomes liable to the owner for the loss he sustained by this breach of confidence.

Id.

53. If an agent, in executing a contract, use terms which charge himself, he may be sued upon the instrument itself as the contracting party; but it is otherwise if the contract contains terms which bind the principal only.

Hall v. Crandall, 29 Cal. 567.

54. An agent who is informed of a defect in the **title of his principal** to land, is not permitted to acquire a title, but will be held as **trustee** for his principal. The agent is forbidden, not merely to perform in his own

name and for his benefit such acts as he is authorized to perform in the name of his principal, but he can not act upon the subject of the trust for his own benefit. Where the agency is to take care of the interests of the principal in certain property, and the agent, in violation of his trust and duty, purchases for his own use an outstanding or adverse title to the same, the principal may proceed against him upon the ground that such purchase was fraudulent as against the principal, and avoid it; or he may, at his option, treat the agent as his trustee, and claim the benefit of the purchase.

Hardenbergh v. Bacon, 33 Cal. 356.

55. Where B. was the agent of H., to take care of the interests of H. in certain mining ground in Nevada, and B. and W., being partners in their dealings in mining lands and stocks, purchased—or W. alone, having notice of said agency and of the rights of H. therein, and with the consent of B., purchased—for their joint benefit, said mining ground; thereby B. and W. became **tenants in common** of said ground, each holding an undivided half thereof; and the moiety that passed to B. became subject, instantly, to the trust in favor of H.

Id.

56. In making said purchase, W. was neither actually nor constructively the agent of H., and W.'s half of the property purchased can not be controlled for the benefit of H. except through said notice to him of the said rights of H. therein, and then only to the extent of said rights.

Id.

AUTHORITY OF AGENT.

57. An agent, to effect an insurance, who retains the policy, has the authority to collect it, in case of loss, and the presumption is that he did retain it, especially as he proceeded to collect the money.

De Ro v. Cordes, 4 Cal. 117.

58. The **authority to sign his name** in this particular instance is a limitation upon what might otherwise be considered a general power.

Washburn v. Alden, 5 Cal. 463.

59. An agent can not **delegate discretionary powers**, but he may delegate mere mechanical powers or duties.

Sayre v. Nichols, 7 Cal. 535.

60. Where the principal of a line of stages, by letter to one acting as his agent in such business, wrote: "You will do better by getting new drivers, and agents, and horses," and such agent **employed a subagent**, and subsequently the principal was informed of such employment and made no objection: in an action for the wages of the subagent: *Held*, that the facts were sufficient to authorize the jury to find the **fact of authority** in the agent to employ the plaintiff.

McConnell v. McCormick, 12 Cal. 142.

61. Authority to an agent, in general terms, to collect, or secure a claim of the

principal, is not an authority to purchase for the principal the property of the debtor to secure the claim. Such purchase is not the natural or usual means of securing the debt.

Taylor v. Robinson, 14 Cal. 396.

62. Defendant bought ale of B. & Co., who professed to act on their own account. The ale belonged to plaintiff, and was delivered to defendant upon an order for it obtained by B. & Co. from plaintiff. Defendant paid B. & Co. for the ale, and had no knowledge of plaintiff's interest until after the ale was received and paid for: *Held*, that plaintiff can not sue the defendant for the purchase money; that the fact that the order of delivery came from plaintiff was not sufficient to give defendant notice of plaintiff's right, and that the transaction comes under the doctrines applicable to agents of an **undisclosed principal** contracting in their own names, who, when empowered to sell, may receive payment.

Lumley v. Corbett, 18 Cal. 494.

63. *Held, further*, that even if B. & Co. had acted expressly as agents, the payment to them would have discharged the debt, because the circumstances would have been sufficient to show their authority to receive it; that it is only in the absence of circumstances justifying it that such authority could not be inferred. *Id.*

64. In suit against an agent for fraudulently appropriating money of plaintiff, defendant can not, on trial, object, that the person making the demand on him before suit did not exhibit his authority so to do, unless defendant questioned his authority at the time of demand. *Id.*

Baxter v. McKinlay, 16 Cal. 76.

65. An agency to sell land is revocable at any time before sale, unless coupled with an interest, or given for a valuable consideration. *Brown v. Pforr*, 38 Cal. 550.

66. The secretary of a mining company has not authority, by virtue of his office, to make assignment of the promissory notes of the company. *Blood v. Marcuse*, 38 Cal. 590.

67. Such assignment is not a corporate act, unless it is shown that the secretary was not only authorized to make the transfer, but to make it in his official capacity. *Id.*

68. A verbal authority to an agent to sell real estate is not sufficient to authorize the agent to execute a contract of sale in the name of his principal, or to sign the name of the latter to such contract.

Duffy v. Hobbs, 40 Cal. 240.

69. A power to sign the name of the principal to a contract of sale may be given verbally; but the words used for that purpose must be so distinct and clear in their meaning and import as to manifest with the requisite degree of certainty the intention of the principal. *Id.*

70. The plaintiff sued to recover for services as agent of defendants, under an alleged agreement with defendants' agent, but there was no proof that the agent had authority to make the agreement: *Held*, that the plaintiff should have sued for **work and labor** done, and not upon the agreement.

Johnson v. Pacific Mail Co., 5 Cal. 407.

71. H. purchased goods of P. and M., which were consigned to P., an agent. H. failing to pay for the goods upon delivery, P. brought an action to recover the purchase money: *Held*, that P. had no right of action in his own name. *Semble*, if the purchase had been made directly from P., although the goods belonged to another, the rule would be different.

Phillips v. Henshaw, 5 Cal. 509.

RATIFICATION.

72. A general ratification of all the acts of an attorney does not include acts not within the scope of the power. The principal who ratifies must know the character of the acts to be ratified; otherwise, the ratification is void.

Billings v. Morrow, 7 Cal. 171.

73. Acts of an agent without authority, subsequently ratified by the principal, bind the principal back to the inception of the transaction.

Taylor v. Robinson, 14 Cal. 396.

74. But such ratification can not defeat rights of third persons acquired between the act of the agent and the ratification by the principal, as attachments levied on property of a debtor after sale by or to an agent. *Id.*

75. A ratification of the unauthorized acts of an agent can only operate after full knowledge of those acts.

Davidson v. Dallas, 8 Cal. 227.

76. Ratification by a principal, of the acts of his agent, depends upon the knowledge of those acts on the part of the principal; and where the knowledge is partial, so will be the ratification.

Marziou v. Pioche, 8 Cal. 522.

77. No presumption of ratification of an alleged sale under a power can be indulged, unless knowledge of the alleged sale, with its attendant circumstances, is brought home to the grantee of the power.

Dupont v. Wertheman, 10 Cal. 351.

78. The term "ratified," when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent.

Ellison v. Jackson W. Co., 12 Cal. 542.

79. A ratification can only be made when

the principal possesses at the time the **power to do the act ratified**. He must be able at the time to make the contract to which, by its ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he can not acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself.

McCracken v. San Francisco, 16 Cal. 591.

80. A ratification is **equivalent to a previous authority**. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *Id.*

81. A private proprietor having full power over his own property, may ratify an **unauthorized sale** of the same made by a person assuming to be his agent, without reference to its mode, whether made publicly or privately. He may, in some instances, be estopped from denying the act of the assumed agent after **appropriating its benefits** with knowledge of the facts.

Grogan v. San Francisco, 18 Cal. 590.

82. So the **state** may ratify the acts of her agents upon a subject within the constitutional control of the **legislature**, when they exceed their powers. She may do this by legislation directly affirming the acts, or by legislation proceeding upon their assumed validity, and for the reason that there is no limitation as to the mode in which the state may give her assent, except that it shall be by an act or resolution of her legislature. *Id.*

83. Not so with a **municipal body** under restrictions such as are contained in the charter of 1851 of the city of San Francisco. Her authorities could give their **assent to a sale** of the city property only in one way, to wit, by an ordinance authorizing a sale at public auction, after due advertisement of the time, place and terms. *Id.*

84. A ratification of a contract made by an agent professing to act therein for the principal, but not having authority for such purpose, must, in order to bind the principal, be made by him with a **knowledge of the terms of the contract** and the material facts affecting it.

Blen v. B. R. & A. Co., 20 Cal. 602.

85. A ratification amounts in itself to **presumptive evidence** of everything necessary to sustain it. It supposes a knowledge of the thing ratified, and in the case of a contract the inference from the ratification is that its terms were known; and to rebut this inference, evidence of mistake or misapprehension is required. *Id.*

86. If an **attorney in fact**, whose power

does not authorize him to make **partition** of the lands of his principal, makes such partition, the principal may afterwards give effect and confirmation to the partition by the execution of deeds of conveyance, which necessarily recognize the partition as of legal validity. *Borel v. Rollins*, 39 Cal. 408.

87. If the court finds as a fact that one person executed a **written instrument** for another as his attorney in fact, without any power to do so, but that the constituent afterwards expressly ratified the act, the presumption will be that the ratification was in some legal and sufficient mode.

Recoullat v. Sansevain, 32. Cal 376.

88. A principal is liable for the actual **damage** caused by the act of his agent done in the usual course of his employment, but is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal.

Mendelsohn v. Anaheim L. Co., 40 Cal. 637.

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PRIVITY.

1. Where the vendor assigns the bond given by the vendee to secure the purchase money, no privity exists between the vendor and the assignee of the vendee, unless it be by express stipulation.

Truebody v. Jacobson, 2 Cal. 269.

2. The plaintiff consigned goods to M'L., who sold them and received the proceeds. M'L. was the partner of a firm (and one of the defendants), which, being in want of funds, proposed to add another partner, B. (also a defendant), to loan the money of

plaintiff, in his hands, for the purposes of the firm, to be repaid when funds of the firm could be had; which was consented to, and the money advanced under this arrangement. The firm was sued for the money so loaned: *Held*, that there was no privity between the plaintiff and defendants on which to establish the relation of debtor and creditor; that M'L., as agent of plaintiff, had no authority to loan the money to the defendants, and it can only be regarded as an advance by one partner to the partnership concern, for which they are liable to him, and that M'L. alone is liable to plaintiff.

Evans v. Bidleman, 3 Cal. 435.

3. There is no privity of contract or estate between the purchaser upon the decree of sale on foreclosure and the tenant of the mortgagor. The purchaser may treat the tenant as an occupant without right, and maintain ejectment for the premises, except where the purchaser is precluded, by his acts or declarations, from thus treating him.

McDermott v. Burke, 16 Cal. 580.

4. The purchaser can not, for the want of privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, expressed or implied, is made between them with reference to the occupation. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered, unless the acts or declarations of the purchaser, anterior to the purchase, qualify the subsequent relation of the parties, or the rights springing from it. *Id.*

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435. ACCOUNTS OF EXECUTORS AND ADMINISTRATORS AND PAYMENT OF DEBTS.

458. *Settlement of.*
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501. APPEALS.
521. PUBLIC ADMINISTRATOR.

JURISDICTION OF PROBATE COURTS.

1. The facts of the death of the intestate, and of his residence within the county, are foundation facts, upon which all the subsequent proceedings of the court must rest. Unless these facts exist, the court can not make a single binding order in reference either to the subject-matter or the person.

Haynes v. Meeks, 10 Cal. 110.

2. But when these facts do exist, every subsequent movement of the court is the exercise of jurisdiction over the subject-mat-

ter, and over all persons who have been brought properly before it. *Id.*

3. Probate courts have no jurisdiction to administer upon the estates of deceased persons who died prior to the adoption of the constitution.

Downer v. Smith, 24 Cal. 114.

4. The residence of a party at the time of his death, and not the situation of the estate, is the test of probate jurisdiction.

Estate of Harlan, 24 Cal. 182.

5. The probate court of the county of which the decedent was a resident at the time of his death alone has jurisdiction to issue letters of administration upon his estate. *Id.*

6. Letters of administration upon an estate, granted by the probate court of one county, can not be collaterally attacked by showing that the last place of residence of the deceased was not in that county, and, therefore, that the court had no jurisdiction.

Irwin v. Scriber, 18 Cal. 499.

7. S. dies out of the state, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order to transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: *Held*, that on these facts, the probate court of Santa Clara county could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that mandamus will not issue to compel the latter court to take jurisdiction.

Estate of Scott, 15 Cal. 220.

8. The general right to sue an administrator being taken away by the state, the declaration must bring the case within the exception, so as to give the court jurisdiction.

Ellissen v. Halleck, 6 Cal. 386.

9. Where suit was brought to recover rents and profits of a ditch, and plaintiff's title to the property came through a public administrator's sale: *Held*, that it is not essential to the title that letters of administration were issued to the administrator, if he were duly authorized to administer by the judgment of the probate court having jurisdiction. The grant of administration was sufficient, and this could be shown in the case of a public administrator by production

of the order or a copy; the mere failure to issue letters does not affect the jurisdiction.

Abel v. Love, 17 Cal. 233.

10. The probate court has no jurisdiction to receive or act upon an account presented by an executor of an executor against the estate of the testator of the deceased executor. *Bush v. Lindsey*, 44 Cal. 121, affirmed.

Wetzler v. Fitch, 52 Cal. 638.

11. The interest of the wife in the common property, while the community exists, is a mere expectancy, and after her death her interest constitutes neither legal nor an equitable estate; and there is nothing for a probate court to act upon.

Pacard v. Arellanes, 17 Cal. 525.

12. If the probate court, in a matter where it has jurisdiction, makes an order upon insufficient evidence, or contrary to the evidence, the order can not on that ground be attacked in a collateral proceeding.

Boyd v. Blankman, 29 Cal. 19.

14. Since the adoption of the constitutional amendments of 1862, district courts have no jurisdiction to try issues framed in probate courts, and sections 20 and 204 of the probate act have become inoperative.

Estate of Tomlinson, 35 Cal. 509.

Will of Bowen, 34 *Id.* 862.

15. Where the contestants to the probate of the will of T. raised as an issue in the probate court, among others, that T. was not of a sound and disposing mind at the time the will was made, which being certified to the district court, in conformity with sections 20 and 204 of the probate act, for trial, was returned to the probate court, coupled with the evidence taken at the trial in the district court, but it appeared that the jury did not find upon the issue either way, whereupon the probate court, upon said evidence, assumed to determine the issue against contestants, and admitted the will to probate: *Held*, first, that the district court had no jurisdiction to try said issue; second, that the probate court had no authority to determine the same upon evidence which had been taken at a trial in the district court; and, third, that said issue was material and it was error to admit the will to probate without a lawful determination of the same.

Estate of Tomlinson, 35 Cal. 509.

16. The jurisdiction of the probate courts over the estates of deceased persons does not divest the district courts of their general jurisdiction as courts of chancery, over actions for a settlement of the affairs of a partnership. *Griggs v. Clark*, 23 Cal. 427.

17. The probate court does not lose its jurisdiction over a subject of which it has taken cognizance by adopting the proceeding of an issue whereby to determine the issue advisedly; the finding of a jury in the district court is merely in aid of its jurisdiction, by

settling the facts, and thus furnishing the material upon which it is to act, and after such findings the functions of the district court cease. *Pond v. Pond*, 10 Cal. 495.

18. There is no relation of inferiority in the constitution or powers of the probate court as respects the district court. They are unlike; but, within their respective spheres, equal. They are both constitutional courts. No appeal lies from one to the other. *Id.*

19. Issues of fact are sent from the probate court to the district court, not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. But it was never intended to transfer any portion of the jurisdiction of probate courts to the district courts. Nor was it designed, by the act of 1855, directing these issues, to make the judgments of the district courts binding upon the courts of probate. *Id.*

20. Rule 50, established by this court, requiring the probate judge, when an issue of fact is joined, to certify it for trial to the district court, is intended to be limited to cases proper for such action.

Keller v. De Franklin, 5 Cal. 432.

21. The discretion of the probate court in this matter is subject to review by the supreme court, and, in case of gross abuse, would be corrected. *Id.*

22. The probate court has jurisdiction to try and determine issues of fact arising in proceedings before it. *Id.*

23. The issues of fact joined in the probate court, and which are sent to the district court for trial, are of that class upon which the probate judge is unwilling to pass his judgment, or where, from great conflict of evidence, a reasonable doubt must exist in his mind as to which side has the right. *Id.*

24. Under our statute (acts 1858, p. 95) the same presumptions as to jurisdiction attach to the proceedings of probate courts within the jurisdiction conferred on them by law, as in the case of district courts.

Irwin v. Scriber, 18 Cal. 499.

25. An administrator having resigned on settlement, the judge of the probate court found him indebted to the estate in the sum of sixteen thousand dollars, and ordered him to pay it into court, and upon his refusal, the heirs brought suit on his administration bond: Held, that there was no law making the probate judge a fiscal agent, and the decree for the payment of money into court was *coram non iudice*.

Willson v. Hernandez, 5 Cal. 437.

26. The Mexican system of administration upon the estates of deceased persons

was superseded by the adoption of the common law in this state, April 13, 1850.

People v. Sinter, 28 Cal. 502.

27. The estates of deceased persons in this state who died prior to the passage of the probate act of 1850, and subsequent to the adoption of the common law, can be administered on in accordance with the provisions of the probate acts in force. *Id.*

28. The meaning of this provision (subdivision 1 of section 2) is that administration must be granted in the county of which deceased was a resident at the time of his death; and the words "or immediately previous to" must be considered as mere surplusage.

Beckett v. Selover, 7 Cal. 215.

Abel v. Love, 17 Id. 233.

29. A failure to make the order admitting a will to probate on the day specified in the notice, or to fix, by adjournment of the proceeding, a subsequent day for the order, is a mere irregularity, and does not affect the jurisdiction. *Will of Warfield*, 22 Cal. 51.

30. One attacking a judgment or order of a probate court made within the scope of its jurisdiction must affirmatively show error.

Lucas v. Todd, 23 Cal. 182.

31. If, after the death of the intestate, that portion of the county in which he resided at the time of his death is erected into a new county, or attached to another county, the probate court of the old county still retains its jurisdiction over the administration.

Estate of Harlan, 24 Cal. 182.

32. The forty-sixth section of the act of 1863, concerning courts of justice and judicial officers, applies only to the probate courts to be organized under the constitutional amendments of 1862.

Pryor v. Downey, 50 Cal. 389.

33. Whenever issues of fact are tried by the probate court, findings of fact are proper.

Estate of Crosby, 55 Cal. 574.

PROBATE OF WILLS.

34. The laws of California, before the adoption of the constitution, did not require wills to be probated. Our statutes do not apply to wills that took effect before they were passed. They must rest for their validity upon the laws under which they were made. Under them the heirs became entitled to immediate possession.

Grimes' Estate v. Norris, 6 Cal. 621.

Panand v. Jones, 1 Id. 488.

Castro v. Castro, 6 Id. 158.

Tevis v. Pitcher, 10 Id. 465.

35. Wills under the Spanish and Mexican law, and questions arising upon the probate of the will of a Mexican citizen of California, executed September, 1846, considered and discussed.

Penand v. Jones, 1 Cal. 488.

36. It seems that there never was a pro-

bate court in California prior to the organization of the state, and that probate of a will was unknown. *Castro v. Castro*, 6 Cal. 158.

37. The will of a testator, dying before the organization of the state government, did not require to be probated under the then existing laws.

Grimes' Estate v. Norris, 6 Cal. 621.

38. An alcalde appointed in a will as executor, but not named therein as heir or legatee, nor deriving any profit or advantage under it, and being allowed by law no compensation for his services, is competent to authenticate the will in his judicial capacity.

Panaud v. Jones, 1 Cal. 488.

39. The omission by the probate court of San Francisco in its proceedings in probating wills previous to 1855, to attach to the will, and file with it for record, the certificate mentioned in section 24 of the act concerning estates of deceased persons, is not a fatal defect, invalidating the probates of that period.

Will of Warfield, 22 Cal. 51.

40. A will takes effect on proof of its execution, in the absence of a statute requiring it to be probated.

Castro v. Castro, 6 Cal. 158.

41. A will only becomes executed upon the death of the testator, and therefore this construction does not affect wills made before the passage of the statute, where the testator did not die till after its passage.

Grimes' Estate v. Norris, 6 Cal. 621.

42. After twenty years' acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law, which had never any force in California.

Castro v. Castro, 6 Cal. 158.

43. The record of a probate court, admitting a will to probate, is admissible as evidence to show the death of the testator, if it contains all the necessary recitals to show that the court acquired jurisdiction. If, however, it is made to appear that there are minor heirs living in the county who were not served with citations to appear, the court does not acquire jurisdiction and the record does not prove the death.

Randolph v. Bayue, 44 Cal. 366.

44. Where the testator and the witnesses to a will are dead, proof of the signatures of the witnesses and of the testator will be sufficient evidence of its due execution.

Tevis v. Pitcher, 10 Cal. 465.

45. The record of a probate court, consisting of a last will and testament, testimony of the subscribing witnesses, petition of the executor, and order admitting will to probate, are admissible in evidence for the purpose of proving the will, even if no letters have issued.

Larco v. Casanueva, 30 Cal. 560.

46. Citation to heirs, to show cause

against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself.

Abila v. Padilla, 14 Cal. 103.

47. On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding lands devised therein in trust for a devisee, and without having any interest himself therein.

Peralta v. Castro, 6 Cal. 354.

48. It is not necessary to the validity of a probate that a formal judgment or decree that the will is admitted to probate or is proved should be entered; a direct statement that the will is proved, although entered in the minutes as a part of and preliminary to an order directing letters to issue, is sufficient.

Will of Warfield, 22 Cal. 51.

49. The probate of a will, until revoked, is conclusive of its validity in all collateral proceedings; and its rejection by the probate court is also conclusive of its invalidity.

Castro v. Richardson, 18 Cal. 478.

50. A decree of the probate court, admitting a will to probate, not reversed by the appellate court, is final and conclusive, and is not liable to be vacated or questioned by any other court, either incidentally or by a direct proceeding for the purpose of impeaching it.

51. In the United States the courts have uniformly held that the principles established in England apply and govern the cases arising under the probate laws of this country, and that whenever in any state, the power to probate a will is given to a probate or surrogate court, the decree of such court can not be set aside or vacated by the court of chancery on the ground that it was obtained by fraud, or on any other ground.

Id.

52. A proceeding, by petition to the probate court, to obtain an order that a former probate of a will therein be adjudged void, on the ground of want of jurisdiction, and that the will be admitted anew to probate, is not a direct proceeding to set aside the former probate, but a collateral proceeding, in which such former probate can only be attacked for want of jurisdiction, and not for irregularity.

Will of Warfield, 22 Cal. 51.

53. In a proceeding commenced by the state in a district court, for the purpose of setting aside a decree of the probate court, establishing the validity of a will, it is not important to decide whether the period of one year fixed as the time within which persons interested may appear and contest the probate, is a limitation which runs against the state; as the only effect of holding that it does not would be to authorize the state to institute such proceeding in the

probate court, but not to confer any new jurisdiction upon the district court.

State v. McGlynn, 20 Cal. 233.

54. The danger which might be apprehended from holding as conclusive, upon so important a matter as the probate of a will, the decree of a single court, and not that of highest jurisdiction, is guarded against by the right of appeal to the supreme court, and by the statutory provision allowing the decision to be opened, and the validity of the will to be again contested, in the same court by any one interested, within one year from the admission to probate. *Id.*

55. Whether the exception in regard to probate decrees be founded in good reason or otherwise, it has become too firmly established to be disregarded; and at the present day it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees. *Id.*

56. The probating of a will is not a proceeding to decide a contest between parties, but a proceeding *in rem*, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment; and therefore the decree of probate is conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts. *Id.*

57. A judgment admitting a will to probate, made upon a petition stating all the necessary facts, and after the publication of due and legal notice of the application for probate, is **conclusive of the validity of the will** when called in question in any collateral proceeding or action.

Rogers v. King, 22 Cal. 71.

58. Where the probate court acquired jurisdiction to probate a will by the presentation to it of a proper petition for that purpose, and the publication of notice of time of proving the will, and afterwards in such proceeding admits the will to probate, its determination is final, except upon a direct proceeding by appeal or otherwise to reverse it, and can not be questioned collaterally.

Will of Warfield, 22 Cal. 51.

59. Notice of an application to admit to probate an alleged will under section 13, or a copy of such will, with an authenticated probate thereof, under section 23 of the probate law, is not "a summons, notice, or advertisement," required to be published in the "state paper" under the act of March 23, 1870. *Estate of Miller*, 39 Cal. 550.

60. It is immaterial whether the stamp required on probate of wills is affixed to the will upon its being admitted to probate, or to the certificate of proof thereof attached,

or to the letters testamentary with the will annexed. *Satterlee v. Bliss*, 36 Cal. 489.

61. When the papers in the matter of an estate are offered in evidence in a collateral action, the court in which they are offered can not review the action of the probate court upon the question whether the stamp affixed upon the probate of the will was such as the value of the estate required. The presumption is that the probate court passed upon the question of the value of the estate, and its decision is final. *Id.*

62. No petition is required as the foundation of a proceeding to probate a will; a petition is only necessary under the statute where the executor named therein accepts the trust, and then not for jurisdictional purposes. *Estate of Howard*, 22 Cal. 395.

63. The jurisdiction in a proceeding to probate a will depends upon certain facts which the court, on reviewing the will, must inquire into and determine; and the mere possession of the will vests the court with all the authority necessary for that purpose. *Id.*

64. The taking of a legacy by the wife, under the will of the husband, will not prevent her from contesting the validity of the will, so far as it disposes of the one half interest in the common property to others.

Beard v. Knox, 5 Cal. 252.

65. She is entitled to her own share of the common property, and to the legacy out of the share of her husband. *Id.*

66. The records of the place in which the testator lived and where his will was made having been scattered or destroyed by a public enemy, it must be presumed, under the maxim *omnia præsumentur rite et solemniter esse acta*, that the will was duly registered in the proper book of records.

Panaud v. Jones, 1 Cal. 488.

67. If the statute fixes the number of days that a notice of the time of application to the probate court for probating a will and issuing letters testamentary shall be published, the order directing the publication of such notice need not direct how often the notice shall be published, if it requires the publication to be made according to the statute. *McCrea v. Haraszthy*, 51 Cal. 146.

68. If one only of two or more executors named in a will petitions for its admission to probate, and no citation is served on the others named as executors, and it does not appear that such others are residents of the county where the petition is filed and therefore are required to be cited, it will not be assumed, for the purpose of invalidating the proceedings admitting the will to probate, that such others were residents of the county where the petition was filed. *Id.*

69. The statute of May 1, 1851, requiring the orders and decrees of the probate court to be entered at length in the minute-book,

and to be signed by the judge, is **directory merely**, as it is entirely silent as to the consequences to follow from a failure of the judge to sign. *Id.*

70. Parties represented upon the contest of a will by an attorney appointed by the court, are not parties to the contest so as to be barred by the adjudication; but may (under section 1327, code civil procedure), within a year after the probate, contest the probate or validity of the will; and at the hearing, the court (under section 1829, code civil procedure) must proceed to try the issues of fact joined, in the same manner as in the original contest of the will.

Estate of Cunningham, 54 Cal. 556.

71. If an instrument is offered for probate as a will, which is testamentary in its character, questions concerning the construction to be placed upon it can not be raised for the purpose of preventing it from being admitted to probate. Such questions can not be considered until after it is probated.

Estate of Cobb, 49 Cal. 599.

72. All questions relating to the sufficiency of the pleadings should be passed upon when presented, and before proceeding further with the trial. Accordingly, where the court below, upon the application of the contestants of a will, made at the close of the testimony, to amend his petition, reserved its ruling, but stated that, in case the will was set aside, it would allow the amendment, and otherwise not: *Held*, that this was an irregularity; but *held, also*, as evidence had been admitted as to all the facts alleged in the amended petition, that the contestant was not injured, and that the ruling was not ground for reversal.

Estate of Brooks, 54 Cal. 471.

73. Upon the trial of the contest of a will, a witness testified to some remarks made a few days before the execution of the will, by the proponent (who was also the principal beneficiary), as to the condition of the testator; and the court said: "That is not evidence. Declarations of the proponent before the date of the will * * * are not evidence in this case;" to which the contestant excepted, but neither side moved to strike out the evidence: *Held*, first, that this did not amount to a ruling to exclude the testimony; and, second, that the evidence was objectionable as **hearsay. *Id.***

74. Upon an issue as to the mental condition of a testator, the opinions of persons acquainted with his business and social habits: *Held*, to be admissible in evidence. *Id.*

75. The probate court can not hear the petition for the probate of a will without proof of service of notice upon the heirs, as required by the code of civil procedure.

Estate of Cobb, 49 Cal. 599.

See secs. 76-83.

LETTERS TESTAMENTARY AND OF ADMINISTRATION.

76. It is the object of the law, that administration should not be granted until the death of the party, and only one administration within the state; it therefore makes his residence at the time of his death the test by which to determine where the grant should be made. Accordingly, these two facts must be alleged in the petition; and they must be true in fact. If not true in fact, the proceedings are void; and the decision of the probate court upon these jurisdictional facts is not conclusive upon any one not actually before the court.

Beckett v. Selover, 7 Cal. 215.

Haynes v. Meeks, 10 Id. 110.

77. And, unless the court has jurisdiction, the proceedings, however regular, can not be sustained, collaterally, as in a case where administration is granted by a probate court of the wrong county. *Id.*

78. The probate court can not refuse to hear testimony to show that the deceased was not, at the time of his death, a resident of the county where the estate was being administered. *Beckett v. Selover, 7 Cal. 215.*

79. A petition for letters of administration to the probate court of a county, describing the deceased as late a resident of that county, would seem to conform to the words of the statute. *Id.*

80. On the hearing of such petition, it is error in the probate judge to refuse to hear testimony that the deceased did not die in the county in which the estate is being administered, and also to refuse to allow the heirs to question the justice of the claims allowed. *Id.*

81. A petition for letters of administration on an estate, stating that the deceased was "late a resident" of the county, etc., instead of stating that his residence was there "at or immediately preceding his death," in the language of the statute, is sufficient to give jurisdiction.

Abel v. Love, 17 Cal. 233.

82. Where a petition for letters of administration is addressed "To the Hon. the judge of the probate court of the county of Santa Clara," and goes on: "The petition of M. S. of Monterey, etc., shows that Dr. John T., late a resident of the county aforesaid, died in said county," etc.: *Held*, that the word "aforesaid" refers to the county named, to wit, "Santa Clara," and not "Monterey," and hence, that the petition sufficiently shows that Dr. T. was a resident of Santa Clara county at the time of his death. *Townsend v. Gordon, 19 Cal. 188.*

83. The amount and value of an estate are not jurisdictional facts in an application for letters of administration.

Lucas v. Todd, 28 Cal. 182.

84. A petition for letters of administration is sufficient, if it states facts showing that the petitioner is one of the persons entitled to administer. *Id.*

85. The allegations in a petition for administration are not sufficient to give the court jurisdiction, unless proper notice be given to bring the parties before the court. But if proper notice was in fact given, and the proof was merely defective, it would seem competent for the court to receive another affidavit of the clerk, and file the same *nunc pro tunc*. *Beckett v. Selover*, 7 Cal. 215.

EXECUTORS AND ADMINISTRATORS.

Who May Act.

86. The proviso of the fifty-second section of the act to regulate the settlement of the estates of deceased persons, as amended by the act of April 23, 1855, extends to all the classes of persons designated in the section, and is not limited to persons embraced within the tenth class; and a surviving partner, though a brother, where the partnership existed at the time of the death of the intestate, can not be administrator of the estate. *Cornell v. Gallaher*, 16 Cal. 367.

87. The word "competent," as used in the sixty-ninth section of the probate act, and applied to a surviving husband, or wife, child, father, mother, or brother, means not addicted to drunkenness, not imprudent, or wanting in integrity or understanding.

Estate of Pacheco, 23 Cal. 476.

88. Upon dissolution of the community by the death of the wife, the husband has the exclusive right, in his capacity of survivor, to administer the common property, and to take possession and dispose of it for the purpose of settling the community. The wife's interest is not subject to administration under the laws for the settlement of the estates of deceased persons. *Id.*

89. That section of the statute which provides that "any other of the next of kin who would be entitled to share in the distribution of the estate" (subdivision 7 of section 52 as it read before the amendment of 1861) shall be entitled to administer, must be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there were no nearer kindred.

Anderson v. Potter, 5 Cal. 63.

90. The brother of deceased being entitled to letters of administration on the estate, gave D., a stranger, a writing requesting the court to appoint him administrator. D. applied for letters, annexing to his petition said writing. At the hearing, the brother asked leave to withdraw the writing, opposed the appointment of D., and prayed letters to himself: *Held*, that the brother waived his right, and that having encouraged D. to go to the expense and trouble of applying

for letters of administration, he is estopped from withdrawing his assent and waiver, or renunciation. *Estate of Kirtlan*, 16 Cal. 161.

91. The mere fact that one is not of kin to the deceased does not incapacitate him to hold the office of administrator. A stranger is legally competent, though the other parties named in the fifty-second section of the act concerning the estates of deceased persons are entitled to priority. *Id.*

92. The recognition, by the probate court, of a person as administrator, when he has not qualified and received letters, does not make him an administrator *de facto*.

Pryor v. Downey, 50 Cal. 388.

93. Under our system there is probably no such thing as an executor *de son tort*; at all events, no man can be an executor *de son tort* in regard to land. *Id.*

94. If an administrator of an estate is appointed and qualifies, and afterwards, without his removal (a will having been found), another person is appointed administrator with the will annexed, and qualifies, the latter appointment supersedes the former administration, and the acts of the administrator with the will annexed are valid.

McCauley v. Harvey, 49 Cal. 497.

95. If one of two executors is absent from the state, the other can administer; and in such case, where one only has acted, and the decree of distribution refers to him alone, the absent executor is not a necessary party to an action against the other by a distributee to recover his share of the estate.

Wheeler v. Bolton, 54 Cal. 302.

96. An illegitimate child is not entitled to administer on the estate of his father as against a brother of the father.

Estate of Pico, 52 Cal. 84.

97. Where a widow, who was both devisee and executrix, married, and she and her husband then deeded the land devised: *Held*, that though the marriage may have operated as a revocation of the letters testamentary, yet there was an unclosed administration, and the grantee was not entitled to possession.

Chapman v. Hollister, 42 Cal. 462.

98. If the court orders letters to issue to one person, the issuance of letters to another is unauthorized and void.

Estate of Frey, 52 Cal. 658.

99. Where a distributee is legally incapable of receiving the appointment to administer an estate, a recommendation by him of another party for that purpose is addressed to the mere discretion of the court, and is of no legal consequence whatever.

Estate of Morgan, 53 Cal. 243.

100. The surviving husband or wife of a deceased person, though incompetent to serve on account of non-residence, nevertheless

less is **entitled to nominate a suitable person for administrator.**

Estate of Cotter, 54 Cal. 215.

101. The right of persons entitled to administer on an estate to have, upon their written request, letters of administration granted to persons not entitled to administer, only exists where there is a vacancy in the administration. Estate of Carr, 25 Cal. 585.

102. Where notice in the manner prescribed by law has been given of an application for letters of administration, and upon the hearing no opposition is made, and letters are issued to the applicant, who is not within the degrees of consanguinity mentioned in the sixty-seventh section of the act to regulate the settlement of the estates of deceased persons, the only parties who can obtain a **revocation of the letters** of an absolute, unqualified right, are, the wife, child, father, mother, or brother, of the intestate, and they are only authorized to have the letters revoked by presenting a petition praying the revocation, and that letters may be issued to him or her. Id.

103. Where the husband dies without leaving issue, and leaves his wife pregnant, and she is afterwards delivered of a child, and then applies for letters of administration upon the estate of the child, and the father of the deceased contests the issuance of letters on the ground that the child was not born alive, and the issue is tried, and the probate court finds that the child was born alive and grants the letters, **the judgment of the probate court is evidence** upon the question as to whether the child was still-born, in a **subsequent application** of the father of the deceased to contest the account of the administrator, and is conclusive upon that question.

Garwood v. Garwood, 29 Cal. 514.

Appointment of.

104. The order for the appointment, as provided in section 62 of the probate act, the qualification of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of an administrator of an estate. **The appointment is in fieri** until the appointee has qualified and received his letters. Estate of Hamilton, 34 Cal. 464.

105. To vest the incoming administrator with **title to the estate**, there must be a grant of administration to him; the mere handing over the papers by the old administrator to the new is not sufficient.

Rogers v. Hoberlein, 11 Cal. 120.

105a. While one administrator of an estate is in office, there is no power in the probate judge or court to appoint a new one.

Estate of Hamilton, 34 Cal. 464.

Hayes v. Meeks, 20 Id. 288.

106. The sixty-sixth section of the act concerning the estates of deceased persons does not restrict the power of appointment given in the fifty-second section. The object of this section, the sixty-sixth, authorizing the appointment of some **competent person**, at the request of the person entitled, to be joined with such person, was to allow those entitled to letters the aid of others more competent. Estate of Kirtlan, 16 Cal. 161.

107. A decedent who left an instrument in writing entitled to probate as his last will and testament did **not die intestate** within the meaning of section 1365 of the code of procedure. In such case the granting of letters of administration, with the will annexed, is not limited to the order prescribed in said section. Estate of Barton, 52 Cal. 538.

BONDS.

108. The supreme court will not, in an action brought by an administrator, review the action of the probate court in ascertaining the value of the estate and **fixing the amount** of the administrator's bond.

Lucas v. Todd, 28 Cal. 182.

109. Section 1401 of the **code of civil procedure**, which provides that in certain cases the powers of an executor may be suspended upon an application for an order requiring him to give bonds, does not conflict with section 1396 of the same code, which gives the general power to require a bond in proper cases. Estate of White, 53 Cal. 19.

Powers of.

110. D., a resident of Texas, and possessed of property situated in that state, makes a **will**, giving all his estate, real and personal, to his wife and children, in equal interest, one with the other, and investing his wife with the sole and entire control of the whole estate during her life, for the benefit of herself and children, free from the control and guidance of the courts of law in that or any other state where she may happen to reside at the time of his death, with full and complete **power** in her own name, and as guardian of his children, **to sell and convey**, or exchange, any portion or all of his estate, and to give title to the same, and to purchase with the proceeds such other property as she might deem best for her own interest, and that of his children, "without the intervention or interposition of any court whatever," and appointing her executrix of his will and guardian of his children: *Held*, that, under the will, the wife has power to sell the entire property of the estate; and that, describing herself in a bill of sale as "executrix," etc., does not limit the estate sold to her interest as such executrix, the designation being intended merely to identify herself as the individual mentioned in the

will. The designation does not operate as a limitation upon her power.

Norris v. Harris, 15 Cal. 226.

111. By our statute there are only two classes of administrators, **special and general**; and no such officer as an "administrator *de bonis non*" is known to our law. When the authority of a general administrator is terminated, and a new one appointed, the latter takes the place of the first, succeeds to the office, clothed with the same powers, and subject to the same restrictions, and when he invokes the action of the court, must institute the same proceedings, and, so far as he is able, must make a similar showing.

Haynes v. Meeks, 20 Cal. 288.

112. If the testator appoints an executor of his will, and the executor dies, and an **administrator with the will annexed** is appointed, the administrator with the will annexed, under the statutes of California, possesses all the power conferred on the executor named in the will, and can sell the land devised if the executor could have sold it.

Kidwell v. Brummagin, 32 Cal. 436.

113. **Administrators** in law are deemed **but as one person**, and the act of any one of two or more co-administrators in a matter within the sphere of his authority as administrator is the act of all.

Willis v. Farley, 24 Cal. 490.

114. During the administration, and until distribution, partial or final, the **executor or administrator is entitled** to have the **possession of the property** left by the deceased, and may recover the possession from an heir or devisee.

Page v. Tucker, 54 Cal. 121.

115. The **authority of an administrator as to unfinished business** in his official custody continues after the expiration of his term of office, and the sureties on his bond remain liable. Estate of Aveline, 53 Cal. 259.

116. If, in a devise to executors in trust for heirs, the testator expresses a desire that his homestead shall not be sold unless necessary, and that the same shall be used by his wife and children as a home, the **executors have authority to sell the homestead** if it becomes necessary.

Etcheborne v. Auzeais, 45 Cal. 122.

117. The **right of enjoyment of possession to public lands** may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another.

Grover v. Hawley, 5 Cal. 485.

118. The administrator of a deceased husband **can not maintain any claim against the surviving wife** in relation to property claimed by her as her separate property, which the deceased husband could not have successfully asserted in his life-time.

Peck v. Brummagin, 31 Cal. 440.

119. At common law, the real estate of the intestate vested in the heir and the personal estate in the administrator. But under our system the true theory would seem to be, that both the real and personal estate of the intestate **vests in the heir, subject to the lien of the administrator** for the payment of debts and the expenses of administration, and with the right in the administrator of present possession.

Beckett v. Selover, 7 Cal. 215.

Harwood v. Marye, 8 Id. 580.

120. A **surviving partner** has, under the statute of May, 1850, regulating the settlement of the estates of deceased persons (section 198), the **exclusive right of possession**, and the absolute power of disposition of the assets of the partnership.

Allen v. Hill, 16 Cal. 113.

Duties of.

121. He is to take care of, **manage and preserve the estate** committed to him; but this does not mean that he is, at discretion, to pay off all incumbrances resting on the property, upon the notion that property may increase in value, and thereby a speculation may be made for the estate.

Estate of Knight, 12 Cal. 200.

122. The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; he can not advance money to remove incumbrances, unless his intestate was bound to pay the money.

Id.

123. An administrator can not pay out the money of the estate to **remove an incumbrance** from the property of the estate, which debt the estate is in no way responsible for.

Id.

124. If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an incumbrance, it is not impossible that a court of chancery might order the expenditure of the money needed to remove such incumbrance.

Id.

125. If an administrator undertakes to go beyond the **strict line of his duty** as the law defines it, he acts upon his own responsibility, and while he can receive no profit from a successful issue of his investment, he must bear the loss of a failure.

Id.

126. An administrator must prosecute the settlement of an estate with all reasonable **diligence**.

Walls v. Walker, 37 Cal. 424.

127. It is no part of the duty or authority of the administrator to manage the estate for the benefit of the estate or of the heirs; so far as they are concerned, it is his duty, simply, to **preserve the estate** until distribution.

Brenham v. Story, 39 Cal. 179.

128. When an administrator has funds in

his hands over the expenses of the funeral and last sickness of the intestate, and the allowance to his family, he should obtain an order at his next annual settlement to apply the same to the payment of debts.

Walls v. Walker, 37 Cal. 424.

129. An executor holds the money received by him from the proceeds of the estate, in **fiduciary capacity** for the use of those interested in the estate, and it is his duty to retain the money thus received until it can be distributed in the manner provided by law. Magraw v. McGlynn, 28 Cal. 420.

130. The surviving member of a partnership owning real property, is something more than a mere tenant in common with the representative of the estate of the deceased partner. He is a trustee for the purpose of winding up the affairs of the firm, and is accountable for the value of the use and occupation of the landed estate of the partnership. Smith v. Walker, 38 Cal. 385.

131. The surviving partner is bound to account and pay over to the administrator of the deceased partner all the profits of the realty, as well as that of the personalty, that rightfully belong to the estate, notwithstanding he may have purchased the interest of the heirs in the estate, or of the community interest of the surviving wife of the deceased partner; and it is for the probate court to distribute the estate to the parties entitled. Id.

Liabilities of.

132. The refusal of the administrator to pay the money into court was no breach of the conditions of the bond.

Willson v. Hernandez, 5 Cal. 437.

133. An administrator is not relieved from a compliance, to the extent of his ability, with the statute, as to the **statement of the personal property** in his petition, by the fact that there has been a previous administrator of the estate. He must show not merely the personal property which has come into his possession since his appointment, but must also show, to the extent of his ability, that which came into the hands of his predecessor.

Haynes v. Meeks, 20 Cal. 288.

134. An heir, who in a subordinate capacity managed the property of an intestate without administration, under the direction and control of another, while the Mexican law was in force, is not liable in a character analogous to that of an **executor de son tort** at common law.

Valencia v. Bernal, 26 Cal. 328.

135. If the executor has come into the possession of the trust fund or its substitute, so that the same can be identified, he can be held to account, and **charged as a trustee** upon the same terms as his testator held the trust, and the relationship of trustee and

cestui que trust will be added to that of executor. Lathrop v. Dampton, 31 Cal. 17.

136. In case administration be by more than one executor, each one is equally entitled to the **possession of the estate**; and where, without the agency of one executor, the property of the estate passes into the possession of another, and becomes lost to the estate, he is not chargeable who had not the possession of the portion thus lost.

Abila v. Burnett, 33 Cal. 658.

137. Where an administrator uses the funds of the estate in his private business, or retains them in his hands for an unreasonable length of time, to the prejudice of the heirs and creditors, he will be **charged interest on the same** in his settlement.

Walls v. Walker, 37 Cal. 424.

138. If the heirs or creditors seek to charge the administrator with interest on funds in his hands, they must show affirmatively that he kept the funds an unreasonable length of time, or used the same in his private business, or derived profit therefrom. Id.

139. Where an executor is directed by the will to loan out moneys belonging to the estate, and he converts the same and invests it in his own business, he may, at the election of the legatee or other party interested, be held to account either for the interest which he might, with ordinary diligence, have obtained upon a loan of the fund, or for the **profit realized** from such investment.

Estate of Holbert, 39 Cal. 597.

140. Where an administrator did not keep the funds of the estate separate from his own money, but used them for his own purpose: *Held*, that he was properly chargeable with interest. Estate of Gasq, 42 Cal. 289.

141. An administrator who **withdraws money** belonging to the estate from a solvent bank, where it had been drawing, and would have continued to draw, interest, when he had sufficient money to pay the debts of the estate and expenses of administration without drawing it, does not thereby become chargeable with interest on the sum thus withdrawn, provided he does not mingle it with his own, or use it for his own profit, or deposit it in a bank in his own name, or neglect to settle his account for a long time.

Estate of McQueen, 44 Cal. 584.

142. Where an executor incurs **expenses in litigating a will** under which he administers, he is not personally chargeable therefor, even if through the mistake of his counsel in a matter of unsettled practice at the time, they were lost, when they might probably have been collected from the contestant, but they will be allowed to him as expenses of administration.

Abila v. Burnett, 33 Cal. 658.

Actions by.

143. An administrator by our statute being entitled to **possession of the real estate** of the deceased may maintain **ejectment**.
Curtis v. Herrick, 14 Cal. 117.

144. A complaint in **replevin** by an executor should show the death of the testator, his leaving a will, the appointment therein of the plaintiff as executor, the probate of the will, the issuance of letters testamentary thereon to the plaintiffs, and their qualification and entry upon the discharge of their duties as executors.

Halleck v. Mixer, 16 Cal. 575.

145. The executors had the right to institute the action under the general authority conferred upon them by the statute. No special authorization from the probate court is requisite in such cases.
Id.

146. In an action upon **joint and several contracts** or obligations, an administrator can not be joined with the survivor, because the one is joined *de bonis testatoris* and the other *de bonis propriis*.

May v. Hanson, 6 Cal. 642.

147. In this state all property of the deceased, real and personal, remains in the possession of the administrator until administration of the estate is had or a decree of distribution is made by the probate court. The administrator, until then, is the **proper party** plaintiff in a suit to quiet title to the estate.
Curtis v. Sutter, 15 Cal. 259.

148. A decree reciting that "this action having been continued in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for the plaintiff, it is now ordered," etc., clearly shows the **suggestion of the death** of the original plaintiff, and a continuance of the cause or a revival of it in the name of the executor; at all events any irregularity in this respect can not be attacked collaterally.

Gregory v. Haynes, 13 Cal. 591.

149. In suit by an administrator against defendant, for **conversion** of the property of the estate, under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof, as to the right, or title, or possession, of plaintiff, and the taking or interference by defendant, being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion.

Beckman v. McKay, 14 Cal. 250.

150. The administrator may maintain an action for the wrongful **conversion** of the personal estate of the deceased, intermediate the death and issuance of letters.

Jahus v. Nolting, 29 Cal. 507.

151. Such action may be maintained against one who has **embezzled or alien-**

ated the personal estate of the deceased, without the aid of section 116 of the probate act; and said section does not give a new right of action, but merely increases the damages.
Id.

152. If the complaint in such action alleges that the defendant embezzled, alienated, and converted to his own use the personal estate of the deceased, and prays for double damages, the plaintiff is entitled to recover double damages, if the proofs sustain the allegation; but if the proofs of such conversion fail to show that it took place intermediate the death and the grant of letters, the plaintiff's recovery should be as in an ordinary action in trover.
Id.

153. Section 116 of the probate act does not afford the exclusive remedy for embezzlement and alienating the personal estate of the deceased, intermediate the death and grant of letters.
Id.

154. Section 116 of the probate act is not a penal but a remedial statute.
Id.

155. When a **partnership** was formed in Missouri, and comprehended as well transactions in that state as in this, a full settlement should involve and include as well transactions there as here. The administrator of the deceased partner, therefore, is not entitled to a decree, irrespective of the firm debts there, and the survivors would seem to be entitled to retain in their own hands money or assets sufficient to pay this indebtedness, whether due in Missouri or on contracts made there or here.

Griggs v. Clark, 23 Cal. 427.

156. Where a **special administrator** commences an action for the recovery of real property, thereby preventing the statute of limitations from running against the claim of the deceased, and the successor in interest of the deceased becomes by order of court substituted as plaintiff in the action instead of the special administrator, the right conserved by the bringing of the action by the special administrator will inure to the said successor in interest.

Garrison v. Byington, Oct. T., 1867.

(Not reported.)

157. Where the complaint avers title as administrator, a **default** admits it.

Curtis v. Herrick, 14 Cal. 117.

158. Possession of land at the death of a party gives **prima facie** title to his heirs, or representatives.

Gregory v. McPherson, 13 Cal. 562.

159. In suit by an administrator against defendant, for **conversion** of the property of the estate, under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof, as to the right, or title, or possession of plaintiff, and the taking or interference by defendant, being conflicting, it is error to instruct the

jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion.

Beckman v. McKay, 14 Cal. 250.

160. The plaintiff was appointed administrator of the estate of P. seventeen years after P.'s death, and shortly thereafter brought action against B. and others to recover possession of a lot in San Francisco, and alleged in his complaint that P. died seised and possessed of said lot; that in February, 1867, after appropriate proceedings therefor, plaintiff had been appointed administrator of the estate of P.; that by virtue of said appointment the plaintiff, on the first day of March, 1867, became, and from thenceforth was and still is, entitled to the possession of said lot; that whilst plaintiff was so seised and entitled to the possession, the defendants, B. and others, on the second day of March, 1867, wrongfully entered and expelled plaintiff therefrom, and have ever since wrongfully withheld the possession. The defendants demurred to the complaint on the ground, amongst others, that it did not state facts sufficient to constitute a cause of action, or to show that plaintiff is entitled to maintain the action. The demurrer was sustained and judgment passed for defendants: *Held*, first, that, considering the facts of the entry of defendants, without title, so late as March, 1867, and after plaintiff became administrator, as disclosed in the complaint, the **cause of action** declared on was not **stale**; second, that there is no statute which limits the time within which letters of administration on the estate of deceased persons may be granted; third, that in such a case no **presumption** of law arises that there had been a **prior administration** and that the estate had been closed; and, fourth, that the demurrer was improperly sustained.

Healy v. Buchanan, 34 Cal. 567.

See sec. 233.

Actions against.

161. A judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim.

Chase v. Swain, 9 Cal. 130.

162. A judgment by default may as well be taken against an administrator as any other party. *Id.*

163. A judgment against an executor for a demand against the testator should direct that the same be paid in **due course of administration**.

Racouillat v. Sansevain, 32 Cal. 376.

164. Where, after the rejection by the executor of a claim against the estate on which he is administering, the claimant sues the executor for its recovery, he is only entitled to a judgment which first ascertains the

amount due, and adjudges the same to be a valid claim against the estate, and then provides that the same be paid by the defendant in due course of administration, upon which no execution can be awarded.

Rice v. Inskeep, 34 Cal. 224.

165. Under our system, a judgment against an administrator is little, if any, better than an **allowance by him, and approval by the probate judge**.

Wells v. Robinson, 13 Cal. 133.

166. When the estate of infants is in the hands of executors, and an order is made by the probate court for the executors to pay to the mother (who is also the guardian of the infants), in her own right, and also as guardian, a sum of money, the order is an **appropriation of a sum of money** for the immediate use of the heirs, and the guardian may assign the same without leave of the probate court, and the assignee may maintain an action against the executors to recover the money. Schmidt v. Wieland, 35 Cal. 343.

167. Disobedience of a decree of distribution by an executor or administrator is a **contempt** of court, and the decree may be enforced by proceedings under the provisions of the code of civil procedure relative to contempt. Ex parte Cohn, 55 Cal. 193.

168. A cause of action for the wrongful taking and conversion of personal property survives against the personal representatives of the wrong-doer after his decease.

Coleman v. Woodworth, 28 Cal. 567.

169. The plaintiff having declared on **promissory notes**, was only required to prove their due execution, and their rejection by the administrator of McMickel, in order to establish *prima facie* his right to a verdict. Bagley v. Eaton, 10 Cal. 126.

170. The bond containing a description of the notes, which was admitted as competent evidence, pertinent to the issue, and the evidence of the due **presentation of the claim**, and its rejection by defendants, were sufficient, and the nonsuit was improperly granted. *Id.*

171. In this state all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a **necessary party** to all suits affecting it.

Harwood v. Marye, 8 Cal. 580.

172. The administrator being, under our system, entitled to the possession of the real property, must be made a party to all suits affecting it. *Id.*

173. The complaint, after setting out the note and mortgage sued on, alleges that Smith, one of the mortgagors, is dead; that one William Smith, a resident of Virginia, is his heir. It not appearing by the complaint whether there was any administrator of the estate of Smith, and no presentation of the

claim for allowance being alleged: *Held*, that the action could not be maintained, and that the fact of there being no administrator will not excuse want of presentation. *Id.*

174. The administrator being entitled to the possession of the real property, must be made a party to all suits affecting it. And in an action to foreclose a mortgage, the complaint setting out the note and mortgage sued on, and alleging that Smith, one of the mortgagors, was dead, the administrator of Smith not being made a party, and it not appearing that any administrator had been appointed: *Held*, that the complaint was defective for want of proper parties. *Id.*

175. If a party dies during the pendency of an action, and his executors are substituted, a personal judgment can not be rendered against them; but the judgment must be made payable in the due course of administration. *Atherton v. Fowler*, 46 Cal. 323.

176. In 1849 Lataillade died intestate, at Santa Barbara, California. His father-in-law, Jose de la Guerra, without legal authority, took possession of his assets, and undertook to settle his affairs. Between 1849 and 1850 said Jose received five thousand six hundred and forty-nine dollars and fifty cents in money and gold dust, belonging to the estate; and, between L.'s death and 1853, said Jose paid persons claiming to be creditors of the estate, sixteen thousand four hundred and two dollars. Letters of administration upon the estate of Lataillade were issued in 1857, and, in 1858, plaintiffs, as executors of the last will of said Jose de la Guerra, presented to such administrator their claim for ten thousand seven hundred and fifty-two dollars and fifty cents, balance of payments by said Jose to L.'s creditors over the assets received. Claim rejected, and this suit brought against the administrator for the amount: *Held*, that Jose de la Guerra, so far as the common law governs the case, was an *executor de son tort*, and hence the plaintiff can not recover; that their testator acquired no rights by his payment of debts over and above the value of assets received, and could not thus make himself a creditor of the estate.

De la Guerra v. Packard, 17 Cal. 182.
See sec. 230.

LIMITATIONS.

177. The theory of the statute of limitations supposes that the claimant may sue or prosecute his action, and that it is by his own default suit is not brought by him. But upon or after the death of the judgment debtor, the plaintiff's right of action ceased. The statute substituted the presentation of the claim for suit, allowing the administrator to acknowledge it and place it on the list of recognized debts of the estate; but the right to sue does not come from the existence

of the claim and the non-payment, but comes from the refusal of the executor to acknowledge it as a just claim against the estate. This right, therefore, does not accrue until the presentation of the claim, and the party is not bound to present it until after publication of the notice required by the statute; and we think it would be unjust to hold that the claim was barred by the statute when the claimant was in no legal default.

Quivey v. Hall, 19 Cal. 97.

178. The statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued.

Smith v. Hall, 19 Cal. 85.

179. A claim is not barred in one year after the issuance of letters by virtue of section 24 of the act of limitation, if it was not due at the time of his death. *Id.*

180. Where D. had a running account with L. from 1838 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857; and D., within one year after the granting of letters of administration, commenced his suit on said account against the estate: *Held*, that the suit was commenced in time.

Danglada v. De la Guerra, 10 Cal. 386.

181. The fact that a long period intervened between the death and the administration taken on the estate can make no difference. *Id.*

See *Tynan v. Walker*, 35 Cal. 634.

See secs. 254, 255, 262, 263.

Proceedings in.

182. In actions upon joint and several contracts or obligations, an administrator can not be joined with the survivor, because the one is sued *de bonis testatoris*, and the other *de bonis propriis*.

Humphrey v. Yale, 5 Cal. 173.

May v. Hanson, 6 *Id.* 642.

183. Where a bill for the foreclosure of a mortgage made by the deceased is filed against the executor, and no averment of presentation and rejection of the account is made in the bill, it is demurrable.

Ellissen v. Halleck, 6 Cal. 386.

184. The general right to sue an administrator being taken away by the statute, the declaration must bring the case within the exception so as to give the court jurisdiction. *Id.*

185. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued.

Hentsch v. Porter, 10 Cal. 555.

186. Where an administrator is sued in equity by the people to compel him to pay over to the county treasurer money collected by the intestate, as tax collector: *Held*, that

he occupied the position of one who takes possession, without authority, of property belonging to another, and that he may be treated as a trustee "*de son tort*."

People v. Houghtaling, 7 Cal. 348.

187. Though the defendant in such an action be described in the caption of the complaint as administrator, yet the facts show that it is not sought to charge him as administrator, and no relief is sought against the estate: *Held*, that the objection that he is sued in his **representative capacity** is untenable. Id.

188. Actions against an estate can not be sustained until the appointment of an administrator, and the complaint must show a **presentation** to him for payment.

Harwood v. Marye, 8 Cal. 580.

189. Where, in an action against an administrator, the complaint is founded upon an instrument alleged to have been executed by the intestate, it is not necessary under the statute that the administrator should deny the **signature of the intestate** on oath. It must be proved.

Heath v. Lent, 1 Cal. 410.

190. In case of a **mortgage debt** due by the estate of a deceased person, which has been allowed by the executor and the probate judge, there is no necessity for a foreclosure against the estate, and the policy of the law being against burdening an estate with unnecessary costs, such a bill will not lie.

Falkner v. Folsom's Executors, 6 Cal. 412.

191. In an action against an administrator, the court should, if asked, **charge the jury as to the statute time** within which the action could be brought when the claim is rejected. Benedict v. Hoggins, 2 Cal. 385.

192. It is error in the court to refuse to instruct the jury in accordance with the provisions of the one hundred and thirty-fifth section of the act to regulate the settlements of the estates of deceased persons, when requested so to do, and the evidence shows that it is proper and relevant. Id.

Resignation of.

193. Upon the resignation of an administrator the court must appoint another to receive the estate, unless it is in a condition for distribution. The probate judge is not a fiscal agent, and can not **order the money to be paid into court**.

Willson v. Hernandez, 5 Cal. 443.

194. An administrator can not resign by **permission of the probate court** without first settling up his accounts and delivering over the estate to his successor appointed by the court. The permission given in one case by the one hundredth section of the statute is a negative upon the right in others.

Haynes v. Meeks, 10 Cal. 110.

195. Though the probate court has no

right to accept the resignation of an administrator until he has settled his administration accounts, such an **acceptance** of his resignation is only a **voidable error**, and not void. Id.

196. The acceptance by the probate court of the resignation of an administrator is sufficiently established by the **appointment of his successor**. Id.

197. Where an administrator filed in the probate court his resignation, and on the same day the court made an order reciting that the administrator had filed his resignation, and requiring him to turn over to the public administrator all the effects of the estate, and that he settle with the public administrator by the first day of the next term, and when such settlement should be fully made, the administrator and his sureties be released, and where no final settlement was made: *Held*, that such act was an **acceptance on the part of the court** of such resignation. Id.

198. The fair inference to be drawn from section 100 of the "act to regulate the settlement of the estates of deceased persons," is, that the permission given an executor or administrator to resign in the case specified is a negative on such right in all others. Id.

199. The court had no right to accept the resignation of the administrator until he had settled his account with the estate. Id.

200. If the administrator or executor of an estate resigns his trust, and an order is made by the probate court accepting the resignation, and the resignation and order of acceptance are in proper form, when the proceeding is collaterally questioned in another court, the **presumption** is that the order accepting the resignation was properly made, and that the executor or administrator had settled his accounts and delivered up all the estate to some person appointed by the court.

Lucas v. Todd, 28 Cal. 182.

201. A resignation is not a matter absolutely in the power of an administrator to be made at any time he may choose. The statute only confers upon him a **conditional right** to resign, and the statutory conditions must be complied with, or dispensed with by the court, before a resignation tendered will take effect. Haynes v. Meeks, 20 Cal. 288.

202. The probate court has no power to accept the resignation of an administrator until he has first **settled his accounts** with the estate. Id.

Haynes v. Meeks, 10 Cal. 110.

Removal—Revocation of Letters.

203. Where the law does not declare the vacancy as a consequence flowing from a particular event, a **revocation of the letters of the first administrator**, he being still living, is essential to the appointment of another person to succeed him. The only

competent proof of a revocation of letters in such case is an order of the court directing it. *Haynes v. Meeks*, 20 Cal. 288.

204. When letters of administration have been granted to any other person than the surviving husband or wife, the child, father, mother, or brother of the intestate, and either of the persons occupying that relation to the deceased, present a petition to the probate court to have the letters of administration revoked, and to be appointed in place of the incumbent, it is the duty of the probate court to make the **revocation**, and appoint the petitioner, if he or she be competent to perform the duties of the trust.

Estate of Pacheco, 23 Cal. 476.

205. An existing administrator is not removed, simply by force of the appointment of another person as administrator. The office must first become **vacant** before a second appointment can be made.

Haynes v. Meeks, 20 Cal. 288.

See S. C., 10 Cal. 110.

206. If an executor is removed on complaint of an heir, for **mismanagement**, it is not an abuse of the discretion of the court, with respect to **costs**, to direct the costs to be paid out of the funds of the estate.

Estate of Mullins, 47 Cal. 450.

207. The power of the probate judge to remove in his **discretion** an administrator for any of the causes named in the statute will not be interfered with by the appellate court, unless it should be clearly shown that there has been a gross abuse of discretion.

Estate of Deck v. Gherke, 6 Cal. 606.

Compensation.

208. Section 222 of the act to regulate the settlement of the estates of deceased persons allows compensation to the executors according to the rates established, upon the **whole value of the estate**, both real and personal; but this rule only applies where the administration is complete, and the estate is finally settled.

Ord v. Little, 3 Cal. 287.

209. Where the administrator **resigns**, or is removed, leaving the administration complete, there is **no fixed rule** of compensation. The probate court should apportion it, in reference to the compensation fixed by law for the whole, according to sound judgment. *Id.*

210. In such a case it is the duty of the probate court to examine into the nature and value of the services rendered, and comparing as well as possible that which has been done with what yet remains to be done in the course of administration, to apportion the compensation which has been fixed by the law for the whole, according to sound judgment. *Id.*

211. An administrator being compelled

by law to hold, protect, and guard funds coming into his hands, which he has reason to believe to be assets of the estate, until the right to the funds can be determined, is entitled to his **commissions** thereon.

Wells v. Robinson, 13 Cal. 133.

212. The district court has no jurisdiction over the **allowance or apportionment** of the commissions of executors and administrators. *Hope v. Jones*, 24 Cal. 89.

213. A co-executor who takes no care or charge upon himself touching the estate or any part thereof, collects no debts, makes no disbursements, and thus renders no service whatever, is not entitled to any share in the commissions. *Id.*

214. The partnership relation does not exist between co-executors, and they have no joint interest in the commissions allowed by law for their services in administering upon the estate. *Id.*

215. The share of the commissions to which co-executors are respectively entitled is not ascertained by any established rule of law, but upon the principle of equity. *Id.*

216. Each co-executor may keep a **separate account**, and present the same for final settlement, and each is chargeable with the full amount of assets that have come into his hands, and is entitled to be credited with all disbursements legally made by him on behalf of the estate; and the probate court should fix the compensation of each in proportion to the service rendered. *Id.*

217. When no compensation has been provided by the will, executors are entitled to **commissions** on all the estate which comes into their hands, and for which they are held responsible.

Estate of Isaacs, 30 Cal. 105.

218. In the settlement of an administrator's **annual account** he should be charged with the amount of his own note to the deceased, if there is one, and the interest thereon stipulated to be paid.

Estate of Minor, 40 Cal. 565.

219. An administrator's **commissions** should not be allowed to him in the settlement of his annual account, but such commissions are to be ascertained and allowed him when he has rendered his final account, and the estate is ready for distribution. *Id.*

220. An administrator can not set off his commissions on the settlement of his annual account against a sum due by him to the intestate, and with which he is charged. *Id.*

221. If the intestate in his life-time had contracted for the services of another for one year, at stipulated wages per month, and died soon after, and the employee continues to perform the services for the year with the assent of the administrator, and his services are necessary for the protection of the estate, the administrator should be allowed the

wages paid him in the settlement of his account. *Id.*

222. As affording a basis for the allowance of an administrator's commissions, the value of the estate which has been taken into possession, and having been in possession has been accounted for, is alone to be regarded. *Estate of Simmons, 43 Cal. 543.*

223. The probate court should not allow an administrator fees or commissions for property which does not come into his hands, but which is in the possession of other parties, who claim title to it adversely to the estate, even though it is appraised and included in the inventory. *Id.*

224. If expenses are incurred in attempting to administer, the administrator should be allowed them, so far as they are necessary. *Id.*

225. The appellant was appointed administrator of the deceased, but the order was afterward reversed on appeal: *Held*, that he was not entitled, upon accounting, to an allowance for attorney fees and costs expended by him in the contest.

Estate of Barton, 55 Cal. 87.

226. Upon a contest for the administration, the estate certainly should not bear the expense of the losing party; and the question stated but not decided, whether it should bear the expense of the winning party. *Id.*

227. There is but one aggregate sum to be allowed as commissions for administration; and in case of a change of administrations, the court has no basis upon which to make an apportionment between the administrators, until the close of the estate. The outgoing administrator is therefore entitled upon the settlement of his account only, to commissions for the portion of the estate fully administered by him, and for his proportion of the balance of the commission must wait until the final settlement of the estate. *Id.*

228. A person acting as executor under void letters testamentary is not entitled to commissions, fees, or charges.

Estate of Frey, 52 Cal. 658.

INVENTORY AND COLLECTION OF EFFECTS.

229. Where a full inventory of all the effects of the deceased is embodied in a will, it seems to be unnecessary for the executors to make out a new inventory; at all events, their neglect or omission to do so will not invalidate the will.

Panaud v. Jones, 1 Cal. 488.

230. In this state, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it.

Harwood v. Marye, 8 Cal. 580.

231. Under the statute, the right to the possession of the real property of an intestate remains exclusively with the administrator, until settlement or distribution.

Meeks v. Hahn, 20 Cal. 620.

232. Money received by an administrator in payment for goods sold by his intestate as factor upon a *del credere* commission, forms no part of the assets of the estate, and may be recovered by the consignor in an action for money had and received.

Stanwood v. Sage, 22 Cal. 516.

233. A debt due to the intestate is a personality, and does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions to collect the same, and it is error to join the heir as plaintiff with the administrator in an action to enforce its collection.

Grattan v. Wiggins, 23 Cal. 16.

234. Administrator's possession can not be questioned. When an administrator has qualified, and received letters, he is entitled to the assets of the estate wherever they may be; and if he has obtained possession of a note, no matter from whom, the defendant can not, in an action brought on it, object that it is not properly in his custody.

Lucas v. Todd, 28 Cal. 182.

235. The wife's interest in community property is subject to the payment of the debts of the estate, and is an asset for that purpose in the hands of the administrator.

Harp v. Calahan, 46 Cal. 222.

CLAIMS AGAINST THE ESTATE.

What Constitute Claims.

236. In "the act to regulate the settlement of the estate of deceased persons," the words claimant and claim are used as synonymous with the words creditor and legal demand. It was not the scope and purpose of this action to establish claims against the estate, to be paid out in due course of administration. *Gray v. Palmer, 9 Cal. 616.*

237. The term "claims," as used in the act, does not embrace mortgage liens, but has reference only to such debts or demands against the decedent as might have been enforced against him in his life-time by personal actions for the recovery of money, and upon which only a money judgment could have been rendered. *Fallon v. Butler, 21 Cal. 24.*

238. The word "claim," as used in the act concerning the estates of deceased persons, when it speaks of claims against an estate, is broad enough to include a mortgage.

Ellis v. Polhemus, 27 Cal. 350.

239. A note secured by mortgage is a claim against the estate, but the mortgage given to secure the note is not such claim. *Id.*

240. The word "claim," as used in the one hundred and thirty-first section of the

act concerning the estates of deceased persons, includes mortgages as well as claims at large against the estate. *Id.*

241. Such a demand (see facts) is not a claim, in the sense of the statute, against the estate of the deceased. Suit was properly brought in the district court, and the administrator was a proper party for the purpose of liquidating the amount of the indebtedness. *Carr v. Caldwell*, 10 Cal. 350.

242. Such words are used synonymously, and in the probate act have reference to such **debts or demands** against the decedent as might have been enforced against him in his life-time, by personal action, for the recovery of money, and upon which only a money judgment could have been rendered. Such definition does not include a family allowance. *Estate of McCausland*, 52 Cal. 568.

Affidavit to Accompany.

243. By section 141 of the act to regulate the estates of deceased persons, judgments are exempted from the provision of section 131, requiring an affidavit to be attached to the claims showing that it is due, and that there have been no payments, and are no offsets. *Cullerton v. Mead*, 22 Cal. 95.

244. It seems that the affidavit to a claim against an estate must be made by the claimant in person, and not by his attorney in fact. *Macoleta v. Packard*, 14 Cal. 178.

245. No presentation of a claim to an executor is effectual, without an affidavit of its justice. *Pico v. De la Guerra*, 18 Cal. 422.

Presentation of.

246. The rule (the presentation of claims duly verified) only applies to such claims as are **debts** against the estate, and **not to expenses** incurred or disbursements made by the administrator, the policy of the law being merely to prevent estates from being squandered in useless litigation.

Deck v. Gherke, 6 Cal. 666.

247. Also, that the estate be not wasted in unnecessary litigation.

Ellissen v. Halleck, 6 Cal. 386.

Falkner v. Folsom's Executors, 6 Id. 412.

Deck v. Gherke, 6 Id. 666.

248. It seems that the presentation to the administrator is the **commencement of a suit** upon it, and stops the running of the statute. *Beckett v. Selover*, 7 Cal. 215.

249. A claim against a deceased person due to his executor or administrator, must be presented, duly authenticated, with affidavits, to the probate judge for allowance, **within ten months**, or it will be barred.

Estate of Taylor, 16 Cal. 434.

250. Under the one hundred and thirtieth section of the act of 1851, relative to the estates of deceased persons, claims against an

estate which are due must be presented to the executor or administrator as therein prescribed, and within the time allowed, or they will not constitute a charge against the estate. *Pico v. De la Guerra*, 18 Cal. 422.

252. The period within which the presentation must be made, is the same in both cases. *Estate of Taylor*, 10 Cal. 482.

253. Claims against an estate may be presented to the executor or administrator thereof before his **publication of notice to creditors** to present their claims.

Ricketson v. Richardson, 19 Cal. 330.

254. The statute fixing a **limitation of ten months** for the presentation of claims against an estate does not commence running until a claim becomes absolute.

Gleason v. White, 34 Cal. 258.

255. A creditor of the estate of a deceased person, who is absent from the state during the whole period of publication of the notice to creditors, and has **no actual knowledge of the publication**, may present his claim to the administrator at any time before the decree of distribution is entered. No other proof of absence will be required than his own affidavit. Nor will the time for filing his claim be limited by the fact of his return to the state before the expiration of the ten months, within which, by the terms of the notice, claims were required to be presented.

Cullerton v. Mead, 22 Cal. 95.

256. A **claimant of specific property** not bound to present a claim.

Gunter v. Janes, 9 Cal. 643.

257. The claim of a **surviving partner** for advances to the partnership should not be presented to the administrator of the deceased partner for allowance, until the partnership affairs are wound up; and it may be thus presented at any time within ten months after the partnership affairs are settled; and, if rejected, suit may be brought on it at any time within three months after its rejection.

Gleason v. White, 34 Cal. 258.

258. A suit for the **foreclosure** of a mortgage is peculiarly an equity proceeding; and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and probate court, and allowed, it is otherwise.

Belloc v. Rogers, 9 Cal. 123.

259. I. F., defendant's testator, in consideration of **professional services** rendered by plaintiff as attorney, in obtaining a settlement of a certain claim, by which the former had obtained two promissory notes for five thousand dollars each, agreed to hold the said notes, and to collect them, and to pay to the plaintiff one half of the amount received. I. F. assigned one of the notes for value, and

died, and after his death, the note was paid to the assignee. In an action against I. F.'s executrix, to compel her to assign and deliver the other note to the plaintiff: *Held*, that upon the payment of the assigned note, the plaintiff might have claimed against the estate of I. F. one half of the amount, and that his claim in such case should have been presented to the executrix within the time prescribed by law; but that he could also elect to regard the **two notes as constituting an entire fund**, and to take the unpaid note as his share thereof, and that in such case it was unnecessary to present his claim.

Sharpstein v. Friedlander, 54 Cal. 58.

260. The failure of a creditor of an estate to present his claim to the executor for allowance, within the time fixed by the statute after publication of notice to creditors, does **not extinguish the debt** within the sense in which payment would extinguish it, but merely takes away the remedy of the creditor. Whitmore v. S. F. S. U., 50 Cal. 145.

261. The claim which the creditor of an estate may have against the executor, by reason of his acts or omissions as executor, is one which becomes fixed in the life-time of the executor, and is **not contingent** on the fact that the estate may prove insolvent on an account taken after the death of the executor, and, in the event of his death, such claim must be presented for allowance to the administrator of his estate within the time fixed in the notice to creditors.

Estate of Halleck, 49 Cal. 111.

262. Taxes assessed against the property of an estate, pending administration, and while the property is in the possession and under the control of an administrator, are not claims against the estate, which must be presented to the administrator for allowance, under the provisions of sections 130 and 131 of the probate act. The administrator must pay such taxes, as expenses in the care and management of the estate.

People v. Olvera, 43 Cal. 492.

263. No action can be maintained to charge the estate of a deceased person upon a **money demand**, unless the claim has been previously presented to the administrator for his allowance. Eustace v. Jahns, 38 Cal. 3.

264. If the wife, to secure the debt of the husband, mortgages her separate property, and the husband dies, and the holder fails to present the claim to the administrator for allowance, and the mortgage is afterwards enforced; whether the widow has a contingent claim, which she may afterwards enforce against the estate, spoken of, but not decided. Sichel v. Carrillo, 42 Cal. 497.

265. The payee and legal owner and not the equitable owner of a note and mortgage, so long as it remains in his possession unassigned, is the person to present the same for allowance to the administrator of the

estate of the payor, and if he does not so present it within the time required by statute, it is barred, even if the equitable owner resided out of the state, and did not know of the death of the payor.

Marsh v. Dooley, 52 Cal. 232.

266. Mortgages and liens of record form no exception to the rule prescribed by section 136 of the act to regulate the estates of deceased persons, and the claims secured by them must have been presented to the executor or administrator, and rejected by him, before an action can be maintained on them.

Ellissen v. Halleck, 6 Cal. 386.

267. An executor or administrator, holding a debt against the estate of the deceased, can not pay himself and claim a credit, when he has never presented his claim for allowance to the probate judge. The statute requires claims against the estate to be presented in accordance with its directions, whether the claims be held by executors and administrators, or by other creditors of the deceased, and if not so presented within ten months from publication of notice for presentation, they are barred.

Estate of Taylor, 16 Cal. 434.

268. The only difference between the claims of an executor or administrator, and those of other creditors, as to their presentation after publication of notice, is, that the latter must be presented to both the executor or administrator, and the probate judge, and the former only to the judge.

Id., 10 Cal. 482.

269. An objection that a claim against the estate of the intestate has not been presented to the administrator for allowance or rejection, if not made in the court below, **can not be raised in the supreme court.**

Coleman v. Woodworth, 28 Cal. 567.

270. An objection, that a claim was never presented to the administrator, can not be made after a decree allowing it.

Estate of Cook, 14 Cal. 129.

271. The non-presentation of the claim to the administrator is, in its nature and effect, nothing more than a **matter of abatement**. It defeats only the plaintiff's present right to recover, and such an objection to the complaint must be made for the first time in the court below.

Hentsch v. Porter, 10 Cal. 555.

272. The non-presentation of a claim against the estate of a deceased person, to the administrator, will not deprive the district court of jurisdiction over such claim.

Id.

273. The sections of the probate act requiring judgments against administrators, and claims against the estate which have been allowed, to be filed in the probate court, are merely directory.

Estate of Schroeder, 46 Cal. 304.

274. A claim verified, and filed with the county clerk, but not presented to the executor, is no charge upon the estate.

Pico v. De la Guerra, 18 Cal. 422.

275. A mortgage given by the deceased upon property which, after his death, becomes general assets of the estate, must be presented for allowance to the executor or administrator and probate judge, within the time fixed for the presentation of claims against the estate, and if not so presented, can not be enforced in equity, even if no claim is made against the estate for a deficiency.

Pitte v. Shipley, 46 Cal. 154.

276. A mortgage debt which is a lien on property, the title to which is in the estate or in which the estate has a residuary interest, which constitutes a fund for the payment of debts, and is or may be subject to distribution, must be presented to the executor or administrator and probate judge for allowance within the time required by the probate act, or it can not be enforced in equity, even if no claim is made against the estate for a deficiency.

Harp v. Calahan, 46 Cal. 26.

277. The cases heretofore decided by the supreme court, in relation to the presentation of a mortgage claim for allowance by the administrator or executor (except Pitte v. Shipley, 46 Cal. 154), refer to mortgages which were a lien on property which did not belong to the assets of the estate.

Id.

278. An administrator can not waive the necessity of presenting a claim for allowance.

Id.

279. The statute does not provide for the approval of a contingent claim; and where such claim is presented to the executor and the probate judge, and is by them allowed, such allowance does not give validity to the claim as a judgment against the estate.

Pico v. De la Guerra, 18 Cal. 422.

280. Contingent claims and claims not due do not come within the first clause of section 130 above named; they may be presented to the executor, etc., within ten months after becoming due or absolute. But, after becoming due or absolute, they must be presented according to the statute.

Id.

281. Under the two hundred and forty-fourth section of the statute, a contingent claim may be presented to the probate judge, without the affidavit required by section 131; and the effect might be to cause the money to which the party may be prospectively entitled to be paid into court. But this does not relieve the party from the necessity of presenting such claim to the executor after it becomes absolute, with the proper affidavit, before he can be compelled to act on it.

Id.

282. We see in the one hundred and

thirtieth section no authority for the presentation of a contingent claim or a claim not due. The plain effect of the section is to ignore all claims which are due, unless such claims be presented as therein prescribed; and the last clause of the section is simply a proviso exempting claims not due, and contingent claims, from the operation of the first clause, and making a new provision for them, namely, that they may be presented within ten months after becoming absolute liabilities, or reaching maturity. But this does not do away with the necessity of presenting them to the executor after this character attaches to them. If the claim shows on its face that it is a mere contingent claim, or not due; that is, if it shows that it is no present liability against the estate, it is not perceived how the mere act of the executor in approving it, whether that action be in conjunction with the *ex parte* act of the probate judge or not, could give it validity as a judgment. But it is enough to say that the act makes no provision for the approval of a claim of this sort, such as the indorsement on the letter in question would imply, if any implication could arise from it, and the ambiguous language indorsed does not bear such construction, and could not legally have such effect as is imputed.

Id.

283. When the family residence, the common property of the husband and wife, is mortgaged, and the husband afterward dies and the premises are then set apart by the probate court for the use of the widow and family, it is not necessary to present the mortgage claim to the administrator for allowance, before suit to enforce it, provided no claim is made against the assets of the estate for a deficiency.

Schadt v. Heppe, 45 Cal. 433.

284. E. P. R., administrator of an estate, presented to the probate judge for allowance, a claim against the estate, based, in part, upon a promissory note executed to him by the deceased, and, in part, upon a judgment against the deceased in favor of one E. R., of which E. P. R. was the equitable owner, but of which no assignment had been made to him, and the claim was allowed by the judge. Upon a subsequent application for the sale of real estate, it was objected to the claim, that the judgment had never been assigned to E. P. R., and that the claim was not accompanied by a certified or other copy of the judgment: *Held*, that the claim was properly presented in the name of E. P. R., and that under the law as it stood, at the time it was presented, it was not necessary that it should be accompanied by a copy of the judgment.

Estate of Crosby, 55 Cal. 574.

Allowance of.

285. Where there are two or more ad-

ministrators, the allowance of a claim against the estate by one is the act of all, and binding upon all. *Willis v. Farley*, 24 Cal. 490.

286. A verbal allowance of a claim against an estate by an executor or administrator, gives the claimant no cause of action. *Pitte v. Shipley*, 46 Cal. 154.

287. A **legatee** who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. *Williams v. Price*, 11 Cal. 212.

288. A general averment of **diligence** will not do. The bill should state how and why the facts could not have been discovered at the time. *Id.*

289. In such a case, it is not sufficient to allege **ignorance at the time of allowance**, but the plaintiff must go further, and show that he could not, with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Id.*

290. By our probate law, **claims** against an estate, which have been **allowed** by an administrator and the probate judge, have the force and **effect of judgments**; and it is error in the probate court to reject, on the final settlement of the administrator's accounts, sums paid by him on claims so allowed. *Deck's Estate v. Gherke*, 6 Cal. 666.

291. But this rule applies only to such claims as are debts against the estate, and not to **expenses** incurred or disbursements made by the administrator, the policy of the law being merely to prevent estates from being squandered in useless litigation. *Id.*

292. The allowance of a claim against an estate by the executor and probate judge is a judgment in no other sense than a judicial determination of the **estate's indebtedness** in a specified sum to a particular person. Before such claim passes into a final judgment, there must be a decree of the probate court directing it to be paid.

Magraw v. McGlynn, 26 Cal. 420.

293. The allowance of a claim against an estate by an executor or administrator and the probate judge has the force and **effect of a judgment**, to be paid in due course of administration; but it is doubtful whether this judgment would bind another creditor of the estate who is not a party to it.

Estate of Hidden, 23 Cal. 362.

294. The allowance of a claim, due and not contingent, by the executor, and its approval by the probate judge, according to the statute, fixes the obligation upon the estate as a judgment.

Pico v. De la Guerra, 18 Cal. 422.

295. To allow a claim, the only evidence

of which is a check drawn in favor of plaintiff by defendant, is gross error.

Headley v. Reed, 2 Cal. 322.

296. There is no doubt that the allowance and approval of the claim is a *quasi* judgment, binding as between the parties. But the **heirs** of the deceased have a right to go behind the allowance and approval, and to require proof of the original indebtedness after petition and notice for the sale of real estate to pay debts. And, on the hearing of such petition, it is error in the probate judge to refuse to hear testimony that the deceased did not die in the county where the estate is being administered, and also to refuse to allow the heirs to question the justice of the claims allowed.

Beckett v. Selover, 7 Cal. 215.

297. A decree of the probate court ordering a claim to be paid, rendered on petition of the administrator, and without objection by him, is final and conclusive, and can not be assailed collaterally, nor directly, on the ground that it was rendered on insufficient evidence.

Estate of Cook, 14 Cal. 129.

298. A mortgage debt due by the estate of a deceased person stands in the same position as any other debt, and its allowance by the executor and probate judge gives to the claim all the virtues and properties which a judgment against executors can have under our system.

Falkner v. Folsom's Executors, 6 Cal. 412.

299. There being no necessity for a **foreclosure suit against an estate**, where the claim has been allowed, and the policy of the law being against burdening an estate with unnecessary costs, such a bill will not lie. *Id.* See secs. 435, 436.

Rejection of.

300. Where, on the presentation of a demand against an estate to the executor thereof, as provided in section 132 of the probate act, the executor neglected to indorse thereon his allowance or rejection thereof, but held the same for more than ten days: *Held*, that the claim only becomes a rejected claim on the expiration of ten days.

Rice v. Inskeep, 34 Cal. 325.

301. The provision of section 130 of the act to regulate the estates of deceased persons, that it must appear to the "satisfaction of the administrator and the probate judge" that the claimant had no notice, gives to those officers no power or right to arbitrarily say they are not satisfied, and to therefore reject a claim. An affidavit of the claimant, showing to the satisfaction of a reasonable, fair, and impartial mind that he had no notice, is all that is required.

Cullerton v. Mead, 22 Cal. 96.

302. Where an administrator rejects a

legal claim against the estate, and the claimant afterwards sues and recovers judgment therefor, he is entitled to interest from the time of presenting his claim to the administrator. *Pico v. Stearns*, 18 Cal. 376.

303. Where the account presented to an administrator for allowance contains an item for interest, and the face of the paper does not show that interest results necessarily from the facts stated as constituting the claim, interest is not recoverable.

Aguirre v. Packard, 14 Cal. 171.

Contesting Claims.

304. When the account of a claimant is contested, and he applies for leave to amend, by filing a **more full and particular account**, the amendment should be allowed.

Estate of Hidden, 23 Cal. 362.

305. Where **issue** has been joined as to the truth of the claim, the creditor may have it tried before the probate judge, or certified to the district court for trial before a jury.

Beckett v. Selover, 7 Cal. 215.

306. The one hundred and forty-first section of the act relating to the estates of deceased persons applies only to **money judgments**, or to such portions of other judgments as require for their satisfaction execution against the general property of the deceased. *Cowell v. Buckelew*, 14 Cal. 641.

307. For all purposes connected with the administration of the common property, the **debts of the community** are to be regarded, not as the mere private, individual debts of the husband, but as debts of both husband and wife.

Packard v. Arellanes, 17 Cal. 525.

308. No special remedy is provided by our statute for the enforcement of the claims of **creditors of the community** dissolved by the death of the wife, or the protection of persons interested in its property; but the general powers of courts are adequate to give relief.

Id.

309. A **legatee** who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence.

Williams v. Price, 11 Cal. 212.

310. It is error in the court to refuse to instruct the jury in accordance with the provisions of the one hundred and thirty-fifth section of the act to regulate the settlement of the estates of deceased persons, when requested so to do, and the evidence shows that it is proper and relevant.

Benedict v. Hoggan, 2 Cal. 385.

311. Where an **attorney at law** had presented a claim against an estate for fees for **professional services** rendered the decedent in his life-time, and the claim has

been approved and allowed by the administrator and the probate judge: *Held*, that it could not be subsequently attacked by the administrator on the ground that the services were rendered under an agreement for **contingent fees** only, or that the services were not worth the amount charged and allowed.

Estate of McKinley, 49 Cal. 152.

SALE OF PROPERTY.

In General.

311a. Sales by executors and administrators under our probate system, are **judicial**; and the contract need not be in writing prescribed by the parties. The statute of frauds does not apply to such a case, the sale being made by the court.

Halleck v. Guy, 9 Cal. 181.

312. The only effect of an administrator's deed is to convey to the purchaser the **title of the deceased**. Such a deed can contain no warranty of the title. The bidder is bound to examine the title for himself; and the rule of **caveat emptor** applies to these sales.

Id.

313. A **substitution of one bidder** for another at executor's sale, who fails to comply with the terms of sale, can not affect the validity of the sale. The order directing the sale, and the order confirming it, give validity to the purchase.

Id.

314. A purchaser at executor's sale, under an order of the probate court, can not refuse to pay the **purchase money** on the ground that the notice of sale stated a good title, and that the title was not good. The sale was stated in the notice as a probate sale; the bidder knew its character, the effect of the deed, and is bound to examine the title for himself. In these sales, **caveat emptor** is the rule.

Id.

315. Where the terms of sale were one half of the purchase money cash, and the remainder in ninety days, with interest from date of sale at the rate of one per cent. per month, and the purchaser elected to pay the whole amount down: *Held*, that the purchaser is entitled to a **reduction for the interest** on one half of the purchase money. *Id.*

316. Where the **resignation of an administrator** has been improperly accepted, and the acceptance is voidable for error, but not void; the successor of the administrator so resigning having sold land under the order of the probate court: *Held*, that the purchaser could maintain **ejectment** against a grantee of the heir; as, whether the sale be void or voidable, the purchaser who has paid the debts of the estate, should have a lien upon the estate for his purchase money.

Haynes v. Meeks, 10 Cal. 110.

317. But having exercised the right so to do, the error of the court was merely voida-

ble, and can not be taken advantage of collaterally. Id.

318. But *semble* that a direct proceeding to set aside the sale would be preferable. It may be a matter of grave doubt whether a sale of real estate without sufficient notice, would be void or merely voidable. The sale being a proceeding *in rem*, there may not be any sufficient reason for holding it void by reason of a defective notice. Id.

319. An act of the legislature authorizing an administrator to sell real property belonging to the estate of his decedent, except in satisfaction of the lien of creditors, for the support of the family, or to pay the expenses of administration, is unconstitutional.

Brenham v. Story, 39 Cal. 179.

320. If the probate court makes an order applying the proceeds of the sale of a special bequest, made by the testator, to the payment of a debt, the executors can not object that there are other special bequests besides that thus applied.

Estate of Moulton, 48 Cal. 191.

321. If a special bequest is applied to the payment of a debt, and there are other special bequests, the remedy of the one whose special bequest is thus applied, is to seek contribution from the others. Id.

322. If the real estate has been sold, and if an order is made by the probate court applying the proceeds of a special bequest of personal property to the payment of a debt, it will be assumed that the personal estate not specially bequeathed has been thus applied, and that it was necessary thus to apply the proceeds of the special bequest, if the record does not show the contrary. Id.

323. When the probate court makes an order applying the proceeds of a special bequest to the payment of a debt, and the will is not in the record, it will not be assumed that the probate court erred, in adjudging that the intention of the testator could be carried into effect, and yet sell the special bequest. Id.

324. In an application to the probate court to sell real estate to pay the debts of the estate, a judgment recovered against the administrator is *prima facie* evidence of the indebtedness of the estate, as against the devisee of the real estate, or his grantee. Estate of Schroeder, 46 Cal. 304.

325. Courts of probate have the power, and it is their duty, to refuse an order for the sale of real estate, where there has been such delay in making the application as to amount to laches. So *held* (upon the facts stated in the opinion) in a case where ~~seven~~ ^{seven} years had elapsed from the date of the allowance of claims before the application was made. Estate of Crosby, 55 Cal. 574.

326. A proceeding in the probate court for the sale of real estate is perhaps "a spe-

cial proceeding of a civil nature," and, as such, subject to the limitation prescribed by section 363, code of civil procedure; but *held*, unnecessary to decide the question. Id. See sec. 401.

Petition for Sale of Real Estate.

327. A petition to the probate court for the sale of real estate must describe the condition of the land to be sold, and a clause in the statute, that a failure to give such description shall not invalidate the proceedings if the defect is supplied by proof and stated in the decree, does not apply when the petition is attacked by demurrer, or when the objection is taken upon appeal from the order of sale.

Estate of Smith, 51 Cal. 563.

328. The petition for the sale of real estate considered in this case, *held* to be sufficient under section 155, probate act.

Richardson v. Musser, 54 Cal. 196.

329. The power of the probate court to order a sale of the real estate of the deceased results from the fact that the personal estate in the hands of the administrator is insufficient to pay debts, etc.

Stuart v. Allen, 16 Cal. 473.

330. The authority of the probate court to order a sale of real property of an intestate is derived from the statute, and can only be exercised in cases specially designated.

Haynes v. Meeks, 20 Cal. 288.

331. After the guardian *ad litem* in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion.

Stuart v. Allen, 16 Cal. 473.

332. To the exercise of jurisdiction, in ordering a sale of the real estate, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required, is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. Id.

333. So far as the question of jurisdiction is concerned, it is immaterial whether the statements of the petition be true or not; the jurisdiction rests upon the averments of the petition, not upon their proof. Id.

334. The question, argued by Justice Baldwin, in Gregory v. McPherson, 13 Cal. 562, as to the necessity of setting forth, in a petition by an executor to sell real estate, as a jurisdictional fact, the amount of personal estate that has come to his hands, is still open in this court, that case not being authority,

because the justices deciding it did not concur in the grounds of their judgment, as appears in the report. *Id.*

335. In this case the petition and inventory referred to therein are to be regarded as one paper, so far as concerns a statement of the facts which they contain; and when the petition states that the personal property of the estate, which will be shown by the inventory, is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and, therefore, undisposed of. The statement is of a fact existing at the time of the filing of the petition, and that fact is, that the property of the estate is shown by the inventory, and is insufficient to pay the debts, etc., and if it be the property of the estate, it has not been disposed of. *Id.*

336. The prayer of the petition in this case is in the alternative, and, therefore, the petition, as a pleading, was defective, but this defect does not go to the jurisdiction of the court; but, if the true construction of the petition be that it prays for a sale only in the event that the agreement with plaintiff is not confirmed, still, perhaps, even then, the jurisdiction of the court would not be affected. *Id.*

337. In cases of this sort, where titles to real estate will be injuriously affected by holding probate courts to great strictness of proceeding, a fair and liberal construction should be given to their acts, whenever it can be legally done. *Id.*

338. Where the petition for the sale of real estate, after setting out the debts, proceeds, "that the personal property of said estate, which will appear by reference to the inventory now on file, is not more than is sufficient for the use and support of the family of said decedent, and is wholly insufficient to pay said indebtedness, and that it is necessary to sell real estate to pay the same;" and after giving some further matter, concludes: "Petitioner further alleges that the inventory heretofore filed gives a description of all the real estate of which the said intestate died seised, and the condition and value thereof, which said inventory is made a part of this petition." *Held*, that the petition contains a sufficient averment as to the "amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of," within the statute; that the reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition, and the amount of the personal estate is shown by the inventory, as is also the value. *Id.*

339. The petition for the sale of real property must show on its face two things: First, the **insufficiency of the personal property to pay the debts and charges**

against the estate; second, the **necessity of the sale** of the real property, or some portions thereof, for that purpose; and both must appear before the court can take jurisdiction of the proceeding.

Haynes v. Meeks, 22 Cal. 88.

340. The petition must show the insufficiency of the personal property, not by mere averment, but by a statement of the facts as to its amount and disposition, and as to the outstanding debts and charges, as prescribed by section 155 of the act for the settlement of the estates of deceased persons, and must show also the necessity for the sale of the whole or some portion of the real property, not by mere averment of such necessity, but by a description of all the real property of which the intestate died seised, and a statement of its condition and value, as required by the same section. *Id.*

341. A petition filed by an administrator for the sale of real property belonging to the estate averred that no personal property had come to his hands, and that there was none to his knowledge; that a former administrator of the same estate had disposed of the whole of it; that the petitioner, who was also a creditor, had made every effort in his power to collect from the former administrator the amount due to him on a judgment against the estate without success, but did not state the amount of the personal property which had come to the hands of the former administrator, or what disposition had been made of it, or that any effort had been made to ascertain the disposition of it, or to compel the former administrator to account, nor the condition or value of the real estate of which the intestate died seised, nor the condition of the parcels described: *Held*, that it was **fatally defective** in its allegations respecting both the real and the personal property; that the court acquired **no jurisdiction** of the proceedings for the sale; that the order to sell and the sale made in pursuance of it were void, and the purchaser acquired no title; and that the invalidity of the sale, by reason of the defect in the petition, might be shown in bar of a recovery by the purchaser in ejectment against one claiming under a conveyance from the heirs. *Id.*

342. A petition by an executor or administrator for the sale of the real property of an estate must set forth and **describe the property**, or the sale will be void. This is a jurisdictional fact.

Townsend v. Gordon, 19 Cal. 188.

343. Perhaps the omission in such petition of a portion of the real estate would not affect the proceedings ordering a sale of another portion described. *Id.*

344. Such petition must conform substantially with section 155 of the probate act, which requires it to set forth, among other things, "a description of all the real estate

of which the testator or intestate died seised, and the condition and value of the respective portions and lots." *Id.*

345. The general reasoning of the principal opinion in *Gregory v. McPherson*, 13 Cal. 562, as to what are the **jurisdictional facts** in a petition for the sale of the real property of an estate, affirmed. *Id.*

346. The fact that a petition for the sale of the real property of one estate embraces matters relating to **another estate**, as where letters testamentary are asked upon the estate of the wife and letters of administration upon the estate of the husband, although irregular, does not affect the jurisdiction of the probate court, if the petition contain the averments requisite to justify whatever action the court takes. The redundant matter may be rejected. *Id.*

347. The **heirs** of the deceased have a right to go behind the **allowance of claims** against the estate by the administrator and the approval by the probate judge, and to require proof of the original indebtedness, upon the hearing of the petition for the sale of real estate to pay debts.

Beckett v. Selover, 7 Cal. 215.

348. Under our system the petition to sell real estate is the **substitute for the action against the heir**; the latter must be cited, and has a right to be heard. *Id.*

349. Upon an application to sell the real estate of a deceased person to pay debts, the **heir may dispute the validity of the claims** on which the petition is based, although they have been allowed by the public administrator and probate judge. *Id.*

350. The petition by an executor for the sale of real property of an estate must state the **amount of the personal property** which has come to his hands; otherwise the order of sale made by the probate court on such petition and the sale thereunder will be void.

Gregory v. Taber, 19 Cal. 397.

351. It is not sufficient that the executor has filed an **account** of the personal property at or about the time of filing his petition for sale of the real estate. The petition itself must set forth the personal property, or the account must be referred to in the petition so as to become a part of it for the reference. *Id.*

352. To maintain a sale of a decedent's real estate, under the order of the probate court, the petition for the sale must state the facts required by the one hundred and fifty-fifth section of the act concerning the estates of deceased persons. *Id.*

353. Although a sale of the real estate of a deceased person has been made under order of the probate court, and the report of such sale confirmed by the court, and a deed ordered to be executed to the purchaser under the one hundred and seventy-first and one

hundred and seventy-second sections of the estate act, still the sale will be void, and the title of the property sold will not pass unless the petition for such sale contain the averments required by section 153 of that act. *Id.*

354. The one hundred and seventy-first and one hundred and seventy-second sections have effect only upon sales made under orders which the probate court had jurisdiction to make, and a petition with the averments prescribed in section 153, is essential to the jurisdiction. *Id.*

355. The **jurisdiction** of the court to order the sale depends upon the **sufficiency of the averments** of the petition, and not upon the truth of those averments. If the statements of a petition were untrue in fact, and in consequence thereof injustice should be done, this might furnish ground for setting aside the sale by a direct proceeding for that purpose; but it would not reach the point of jurisdiction, or authorize the sale to be treated as a nullity, when questioned collaterally. *Fitch v. Miller*, 20 Cal. 352.

356. The statute does not directly require, nor is it essential, that the **value of the several items** and parcels of property of which the estate consists should be stated. *Id.*

357. The petition must set forth the **condition of the estate**; but it is only necessary to state the condition in such manner as to enable the court to judge of the existence of one or more of the circumstances above specified. *Id.*

358. An order of the probate court made without notice to all the parties interested in the estate, awarding the **surviving widow** a certain portion of the **personal estate**, when the debts chargeable to the estate are not settled, is void; and this, although she be entitled to the same under specific devise in the will, for devises will not be exonerated from the payment of debts and expenses of administration, where the residue of the estate is insufficient for that purpose. *Abila v. Burnett*, 33 Cal. 658.

359. Where, under a void order of the probate court, portions of an estate passed into the hands of the surviving widow, who was also one of the executors administering on the estate, as her own, under a devise in the will, if still *in esse*, such portion must be considered as constituting part of the estate in her hands as co-executrix; and if not *in esse*, then as chargeable against her in her account with the estate. *Id.*

360. The **truth of the averments**, their sufficiency appearing, is a matter which must be determined at the hearing of the petition, and the judgment of the court thereon, if rendered upon legal notice, can not be questioned collaterally. It may be reviewed, and if erroneous, corrected on appeal, but not otherwise. *Haynes v. Meeks*, 20 Cal. 258.

361. Taking the petition and inventory together, in this case, the **description** of the real estate is not so defective as to render the sale void upon its face. To require an accurate or exact description is too strict a rule.

Stuart v. Allen, 16 Cal. 473.

362. The petition by an executor for the sale of real estate must set forth the **amount of the personal estate** that has come to his hands. This petition, with this averment, are jurisdictional facts, without which the order of sale is void.

Gregory v. McPherson, 13 Cal. 562.

363. The petition for the sale of land, and the subsequent proceedings, must be conducted by all the **executors who qualify**, or the sale is void.

Id.

364. A petition for the sale of real estate by an administrator is sufficient, if it shows that the **personal estate** is insufficient to pay the expenses of administration, etc., and for that purpose it may refer to and make the inventory a part of the petition.

Estate of Bentz, 30 Cal. 688.

365. The application of an executor or administrator for the sale of lands belonging to the estate is a **special and independent proceeding**, and the jurisdiction of the probate court to order the sale depends on the facts stated in the petition.

Pryor v. Downey, 50 Cal. 388.

366. In such proceeding the petition is the commencement of the proceeding, and the order of sale the judgment.

Id.

367. A petition by an executor or administrator for the sale of real estate must allege all the **material facts** required by the statute, and if it does not, the probate court acquires no jurisdiction to order the sale.

Id.

368. The existence of such material facts, and the proof of the same, do not give the court jurisdiction if the petition fails to aver them.

Id.

369. A petition for the sale of real estate, whether under section 1530, or under section 1537, code of civil procedure, must, in order to give the court jurisdiction, set forth the **condition of the property**, and, if under the latter section, it must be **verified**.

Estate of Boland, 55 Cal. 310.

370. Proceedings for the sale of real estate, in the probate court, are in the nature of an action, and the jurisdiction of the probate court depends absolutely on the sufficiency of the petition; in other words, upon its substantial compliance with the requirements of the probate law.

Id.

Sale under the Will.

371. Where the will of a husband makes his wife sole executrix and devisee, with authority to dispose of the estate at public or private sale without the previous order of

any court: *Held*, that she may sell without any order of the probate court; that the one hundred and forty-eighth section of the act relating to the estates of deceased persons, declaring that "no sale of any property of an estate shall be valid unless made under order of the probate court," applies only to sales in cases not provided for by the will; and that the statute is operative only in the absence of testamentary power.

Payne v. Payne, 18 Cal. 291.

372. Where the executor makes sale of the real estate of the testator in pursuance of a full power contained in a will, which directs the testator to sell and hold the proceeds in trust for another person, neither the executor nor any third person can take advantage of the sale on the ground that it was made in fraud of the rights of the cestui que trust.

Larco v. Casaneuava, 30 Cal. 560.

373. If an executor, claiming power under a will to sell, and in possession under judgment against C. as above, execute a deed to defendant, who takes possession thereunder, then defendant can set up **outstanding title** in the executor or his testator, as against C., even though he could not, from defects in his deed, or want of power in the executor, assert title against the estate of deceased.

Gregory v. Haynes, 13 Cal. 591.

374. When a will contains a **naked power authorizing the executors to sell** the property of the testator, the executors may sell without an order by the court, but must report an account thereof under oath, and must procure an order fixing the day for hearing the report and give notice thereof, and unless there are special directions in the will, must conduct the sale in all respects as if made by an order of the court, and have it confirmed by the court.

Estate of Durham, 49 Cal. 490.

375. Where a will contains **specific directions** for the disposition of the testator's estate, and empowers the executor to sell the testator's land without obtaining any order of the probate court, the executor's deed for the same, without any action of the probate court, conveys a **good title**.

Larco v. Casaneuava, 30 Cal. 560.

Private Sale.

376. W. died, leaving a widow and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intestate to the plaintiff for three thousand dollars, and to procure an order of court for the sale, asking the court to confirm this agreement; and asking, further, that, if the court should refuse so to confirm, then for a general order of sale upon the petition, which sets up other

facts, usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs, who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made, in the usual form: *Held*, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart v. Allen*, 16 Cal. 473.

377. *Held, further*, that to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale, upon consideration that a purchaser will give an agreed sum at the sale; that, so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way that, if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered, the propriety of ordering the sale, and confirming it afterwards, being still left to the court, uninfluenced by any such agreement. *Id.*

378. *Held, further*, that the decree is not void because of the defect in the petition, which prays not simply for a decree of sale, the proper course, but seeks, as its main object, the confirmation of the agreement for a private sale to plaintiff; that, though the petition was demurrable for this cause, asking, as it did, what the court could not grant, yet, as the petition presented all the facts necessary to give the court jurisdiction of the matter of sale, it was sufficient to support the decree when attacked collaterally. *Id.*

379. *Held, further*, that the decree and proceedings are not void, on the ground of inconsistency, in this, that the first order confirms the agreement with plaintiff, and then requires the parties to show cause why the land should not be sold; and the second decree orders the property to be sold, as usual in such cases; that this course was an irregular and improper exercise of jurisdiction, but that these irregularities and defects must be corrected on appeal, and can not be indirectly attacked. *Id.*

380. The court had no power to confirm this private sale, and the order to that

effect was void; but this act of the court, though an assumption of power, did not divest it of its rightful powers. It had power to order a sale of the land, and this power was exercised by its final or second decree. *Id.*

Sale of Personal Property.

381. A sale by the executors of the personal property of an estate is invalid, if the notice of the sale be by publication in a newspaper, unless there be an order of court directing such publication. The statute requires notice to be given by posting in three public places, or by publication if the judge so order. In the absence of such order, the notice must be given by posting.

Halleck v. Moss, 17 Cal. 339.

382. A sale by executors of the personal estate of their testator, upon insufficient notice thereof, is voidable, at least, if not void. *Id.*

383. Where it has been shown in proper form to the probate court, that a sale of personal property of an estate is necessary to pay the debts, a statement in the order of sale that it is "perishable property, and liable to assessment and taxation," may be treated as surplusage, and does not vitiate or affect the character of the order. *Id.*, 22 Cal. 266.

384. The validity of a sale of personal property made under an order of the probate court can not be attacked in a collateral action on the ground of an irregularity or defect in the order of sale, or proceedings under it. They can only be impeached by a direct action brought for that purpose. *Id.*

385. Thus, in an action upon an indemnity against loss in a sale of stock by executors: *Held*, that the defendants could not question the regularity of an order of sale made by the probate court, or of the sale made in pursuance thereof. *Id.*

386. Where the defendant covenanted with executors, that if, in the course of administration of the estate, certain stock should be sold at public auction "upon reasonable notice," and should bring less than a certain amount, he (defendant) would pay the deficiency: *Held*, that by the term "reasonable notice," was meant the general notice required in such sales by the probate act, and not any other or personal notice. *Id.*

Order for Sale of Real Property.

387. Where, upon petition by the administrator to sell real estate of the deceased, to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and, on the same day, a guardian *ad item* was appointed for such heirs, who, on the same day, appeared, and consented to an order of sale, which was accordingly then made: *Held*, that this order of sale is not void on the ground that the order to show

cause, etc., was not served on the **minor heirs**, and that the guardian was appointed and the order to show cause made on the same day. *Stuart v. Allen*, 16 Cal. 473.

388. The statute is silent as to the time when the **guardian ad litem** is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Id.*

389. The provision of the act regulating the settlement of the estates of deceased persons, declaring that no sale of any property of an estate shall be valid unless made upon an order of the probate court, applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the district courts, nor to sales in pursuance of **testamentary authority**.

Fallon v. Butler, 21 Cal. 24.

390. An order for the sale of real property of an intestate, made by the probate court, after notice to all the parties interested, in the manner required by the statute, and after examination of the proofs presented, is an adjudication that the sale of the property described is necessary, and unless appealed from, is **conclusive and binding** upon the administrator, and upon all parties interested in the estate. *Spriggs' Estate*, 20 Cal. 121.

391. It is the better practice for the court, in all cases where there are several distinct parcels of property, to insert in its order a direction that the sale cease when the **amount required** has been obtained; but the omission of such a direction does not invalidate the order or the sales made in pursuance of it. *Id.*

392. If an administrator procures an order of the probate court for the sale of real estate to pay a **debt** which the administrator had **previously paid** with funds of the estate, it is not a fraud which will enable the order to be attacked in a collateral proceeding.

Boyd v. Blankman, 29 Cal. 19.

393. An order of a probate court to sell all the real estate of an intestate to pay debts, when the sale of a small portion would have been sufficient, can not for this reason be set aside in a **collateral proceeding**. *Id.*

394. An order for the sale of real property, upon the petition of an executor, to meet the **expenses of administration**, may be made without a final adjudication of his account for such expenses. It is only necessary that the executor's petition for such order should show a legal necessity for a sale in the mode prescribed by the one hundred and fifty-fifth section of the probate act; and the only legal effect of an order of the probate court allowing such account upon such hearing, where no notice was given to all the parties in interest that such account would then be presented for allowance, is

that the court thereby ascertains that the legal necessity for a sale exists.

Abila v. Burnett, 33 Cal. 638.

395. One who does not claim any **interest in real estate** can not contest an order of the probate court, directing it to be sold to pay the debts of the estate.

Estate of Schroeder, 46 Cal. 304.

Publication of Notice, etc.

395a. Under the probate act of 1851, notice of an order of the probate court requiring all persons interested to show cause why the real estate of the intestate should not be sold to pay debts, was required to be published for four successive weeks before the day to show cause, in a paper designated by the court. If such notice was published three weeks in the paper designated by the court, and then the fourth week in another paper designated by the administrator, the court did not acquire jurisdiction by the publication. *Townsend v. Tallant*, 33 Cal. 45.

396. If the interval between the date of an order of the probate court to show cause why land left by the intestate should not be sold to pay debts, and the day fixed for the hearing of the petition is less than the time required for the publication of the notice, or is less than the time allowed by law from the date of the order for parties interested to appear and show cause, the order is void, and a sale made under proceedings based on the order is also void. *Id.*

Appointment of Attorney for Heirs.

397. If an administrator, after procuring from the probate court an order to sell real estate to pay debts, afterwards makes a settlement of his account in the court with the estate, a **minor heir** is not estopped by such settlement from afterwards contesting the validity of the sale.

Townsend v. Tallant, 33 Cal. 45.

397a. The probate court, under the act of 1851, had no **authority to appoint attorneys** for absent or minor heirs. Under said act, when the administrator applied for leave to sell land to pay debts, and there were minor heirs with no general guardian, a **guardian ad litem**, not an attorney, was required to be appointed, for the sole purpose of representing the minor heirs, before the petition was acted on. *Id.*

398. In proceedings to obtain an order for the sale of real estate belonging to the estate of a deceased person, it is the duty of the probate court to appoint an attorney for **heirs not represented**; and an attorney fee of fifty dollars for such services is not unusual or excessive.

Estate of Simmons, 43 Cal. 543.

399. The appointment by the probate court of an attorney to represent minor **heirs**

who reside in the county and were not served with citations to appear, and the appearance of the attorney for such minor heirs, are nullities, and do not give the court jurisdiction. *Randolph v. Bayue*, 44 Cal. 366.

400. Under section 159, probate act (as it stood prior to the amendment of 1861), it was not requisite that the attorney appointed to represent the minor heirs should have ten days' notice of the hearing of the petition. *Richardson v. Musser*, 54 Cal. 196.

Sale of Real Property.

401. The proceeding for the sale, though made in the general course of administration, is a **distinct and independent proceeding in the nature of an action**, of which the petition is the commencement, and the order of sale is the judgment.

Haynes v. Meeks, 20 Cal. 288.

402. The proceeding for the sale of the real estate of an intestate is in the nature of an action, of which the presentation of the petition is the commencement, and the order of sale is the judgment. This judgment can not be obviated, nor can its efficacy be impaired, by the fact that it may subsequently appear that too low an estimate was placed by the court upon the value of the property ordered to be sold, or as to the price it would probably bring.

Spriggs' Estate, 20 Cal. 121.

403. The necessity for the sale is not a matter for the executor or administrator to determine, but is a conclusion which the court itself must draw from the facts stated, and the petition must furnish the materials for its judgment.

Haynes v. Meeks, 20 Cal. 288.

404. The probate court may order a sale of real estate left by the deceased, upon petition of the administrator, to pay the **expenses of administration**, even if there are no debts, and there has been no family allowance. *Estate of Bentz*, 36 Cal. 687.

405. The question not decided whether a person who, after the death of the testator, has bought real estate left by him from the devisee, can contest an order of the probate court directing the sale of the same to pay the debts of the estate, so long as he holds possession of it adversely to the administrator, and refuses to account for the rents and profits. *Id.*

406. The probate court has the power to **compel the execution of the conveyance** of land by an administrator, in conformity with a sale made under its order, and duly confirmed. *Estate of Lewis*, 39 Cal. 306.

407. A probate court has no authority, on the petition of an executor, to order him, on the receipt of money loaned, to **reconvey real estate** conveyed to his testator by deed

absolute on its face, but intended only as **security for the repayment of such money**.

Anderson v. Fisk, 41 Cal. 308.

408. The mortgage can not be subjected to any **general expenses** of administration, but only those attending the sale of the property mortgaged. The one hundred and eighty-sixth section of the act concerning the estates of deceased persons is a special provision, uncontrolled by the general provisions of the act in reference to the distribution of assets and payment of debts.

Estate of Murray, 18 Cal. 686.

Ratification and Confirmation of.

409. The supreme court will not give an appellant the beneficial operation of the act of 1866, ratifying and confirming certain probate sales of real estate, in cases where the judgment in the court below was rendered before the passage of the act. In such cases said act must be made the basis of an original **proceeding in equity**, if the party would claim the benefit of its provisions.

Townsend v. Tallant, 33 Cal. 45.

410. The provisions of the statute allowing objections to be made to the sale, and requiring for its efficacy a confirmation by the court, are only intended to secure such an execution of the order of sale that a just and fair price may be obtained for the property for the benefit of the estate. The authority of the court is limited to such a **supervision and control** that this end may be effected. *Spriggs' Estate*, 20 Cal. 121.

411. An approval by the probate court of an **executor's accounts**, in which he has charged himself with money received from the sale of real estate, is not a confirmation of such sale, nor is a **clause in a decree of distribution**, confirming and approving all the acts of the executor, a confirmation of such sale.

Estate of Delaney, 49 Cal. 76.

412. If the will devises the real estate of the testator to the executor in trust, for the purposes mentioned in the will, and directs him to sell said real estate, sales made by him as executor do not require to be confirmed by the probate court. If the testator devises his land to his executors in trust, and directs the executor to sell the same, and does not speak of dispensing with an **order of the probate court** directing the sale or confirming it, the executor may sell without such orders. *Id.*

413. If a will gives the executors a **naked power, not coupled with an interest**, to sell the estate without any special directions, the sale must be reported to and confirmed by the probate court, and if not made at public auction, the judge must make an order fixing a day for hearing the report, and the

clerk must give notice thereof as required by section 1552 of the code of civil procedure.

Perkins v. Gridley, 50 Cal. 97.

414. In the absence of such order and notice by the clerk the probate court has no **power to confirm** the sale, and if it make an order of confirmation, may, on its own motion, set it aside. Id.

415. If the probate court makes an order authorizing an administrator to sell real estate upon his executing an **additional bond** in a sum fixed, with two or more sufficient sureties, and he files a bond with sureties, and makes the sale, and petitions for the confirmation, a person interested in the estate may object to the confirmation on the ground that the sureties on the bond were insolvent, and should be allowed to make proof that they were so insolvent.

Estate of Arguelli, 50 Cal. 308.

416. When a sale of the real estate left by an intestate is made by an administrator, and a person other than the purchaser afterwards offers to take the land at a price at least ten per cent. greater than that bid, and the probate court for this reason refuses to confirm the sale, it may, in its discretion, either order a **new sale** or accept the bid of the person who thus offers an increased price.

Griffin v. Warner, 48 Cal. 383.

417. When, in such case, the court refuses to confirm a sale, it may continue the matter for further proceedings, and, at a subsequent term, either accept the bid of the person who offers an increased price, or order a **new sale**. Id.

418. When, in an order of the court refusing to confirm a sale of land made by an administrator, because an offer is made of at least ten per cent. more, a clause is inadvertently included declaring the sale null and void, the court may, at a subsequent term, accept the **new bid**. Id.

Validity of Sale.

419. If the probate court acquires jurisdiction to direct a sale of the real estate left by the deceased, and the same is sold by the administrator with the will annexed, and a deed given to the purchaser, objections that the claim to pay which the sale was made was not a debt for which the land stood charged under the will, and that it was not presented to the administrator for allowance, should be taken in the probate court, or by appeal, and can not be raised in a collateral action to partition the land.

McCauley v. Harvey, 49 Cal. 497.

420. An attempted sale of land by one who assumes to act as an executor or administrator, but who has not been regularly appointed, and who has not given the bond and qualified and received letters as such, is

void, even if the sale is ordered and approved by the probate court.

Pryor v. Downey, 50 Cal. 388.

421. If the probate court makes an order appointing a person administrator, upon the execution of a bond, as required by the statute, and he does not give the bond, or qualify, he does not become an administrator, and if he acts as such, and procures an order for the sale of real estate, and sells the same, the sale is void. Id.

When Heir may Attack Sale.

423. If an administrator at his own sale, made under an order of the probate court, buys the land of the estate through another person, the sale is not void, but only **voidable at the election of the heirs** or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee.

Boyd v. Blankman, 29 Cal. 19.

424. In such case the deed of the heir conveys the **equitable title**, and his deed is evidence of his intention to disaffirm the sale. Id.

425. If an administrator becomes a purchaser, through another person, of land of the estate sold by him under an order of the probate court, the heir retains the equitable title, and his deed conveys such equitable title, while the legal title is vested in the administrator who holds it in **trust**. Id.

426. If, in proceedings set on foot by the administrator in the probate court to sell land to pay debts, the court acquires **no jurisdiction of minor heirs**, the order of sale is **void**, and the sale may be attacked collaterally by the heir.

Townsend v. Tallant, 33 Cal. 45.

427. An order of the probate court confirming such sale is void. There was no order of sale for the confirmation to act on. Id.

428. If a person procures himself to be appointed **administrator** of an estate, and at a sale of the property of the estate **purchases the same through a third person**, who pays no money, and agrees to hold the title for the administrator, the sale is a **fraud on the heirs**, and such third person, and all who buy from him with notice, hold the property in trust for the heirs.

Scott v. Umbarger, 41 Cal. 410.

429. If a claim secured by a **mortgage** made by the decedent during his life, is allowed by his executors, and the mortgaged property is sold by them, and the proceeds are applied on the claim, and the sale is approved by the probate court, the **purchaser does not take by relation** the title which the mortgagor had at the date of the mortgage, but only such title as the mortgagor

had at the time of his death, and such as the estate may have subsequently acquired.

Meyers v. Farquharson, 46 Cal. 191.

430. Where a **mortgage creditor** of an estate, there being no other debts, purchases the land mortgaged at an administrator's sale, and credits the mortgage debt with the amount of his bid, less ten per cent. which was paid to the administrator, it was held to be full **payment in discharge** of his purchase.

Estate of Lewis, 39 Cal. 306.

431. A deed of **conveyance by an executor**, of land belonging to the estate in which he himself **has an interest**, purporting to convey in his individual capacity and also as executor, passes to the grantee his individual interest, but not the rights and interests of the heirs therein, which the executor had no authority, under the will, to convey.

Morrison v. Bowman, 29 Cal. 337.

Vacating Sales.

432. If the probate court makes an order confirming a sale without legal notice having been given, it may set aside the order as having been made without jurisdiction.

Estate of Durham, 49 Cal. 490.

433. The court may vacate a sale made by the executors under a power contained in a will, if a sum exceeding the price obtained by them, by at least ten per cent., exclusive of the expenses of a new sale, is offered, and may direct a resale.

Id.

434. If the probate court finds that the sum for which the property was sold by executors under such power in a will was disproportionate to its value, and that a sum at least ten per cent. greater, exclusive of the expenses of a resale, can be obtained, it may vacate the sale and direct another to be had.

Perkins v. Gridley, 50 Cal. 97.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS AND PAYMENT OF DEBT.

Accounts.

435. Where an administrator makes **premature payment** of a claim, and takes a **bond of indemnity**, such a bond would be held legal and binding.

Comstock v. Breed, 12 Cal. 289.

436. If an administrator **advance money** to pay off a **mortgage debt** upon land for which the estate is not liable, because the estate has a junior mortgage upon the same land, and in order to relieve the land from the older mortgage, and let in the younger mortgage of the estate, and a loss thereby ensues, the probate court can not allow him in his account for any portion of the loss sustained by the advancement thus made.

Tompkins v. Weeks, 26 Cal. 50.

437. If there is a **debt** due the estate of a

deceased person, **secured by a mortgage** on land, and another person has a prior mortgage on the same land, and the administrator, in good faith, and under the belief that the land is worth the amount due on both mortgages, forecloses the mortgage owned by the estate, and bids in the land for the amount due on both mortgages, and advances the money to pay the **prior mortgage**, or uses money of the estate for that purpose, the probate court can not allow him, in his account, a credit for the money lost by the purchase if the land proves to be of less value than the amount paid to discharge the prior mortgage. If the lands thus purchased are regarded as assets of the estate, the loss can not be determined until sold by order of the probate court. If, however, the creditors and heirs repudiate the purchase, and charge the administrator with the entire amount paid, the land will belong to the administrator.

Id.

438. The administrator has no authority, nor has the probate court any power, to authorize him to advance money, or **use funds** belonging to the estate for the purpose of **carrying on business** with the surviving partner of the intestate, and if he does so, and loss thereby accrues to the estate, he can not be allowed for the same in his account. The administrator has no authority to intermeddle with **partnership affairs**, except to call upon the surviving partner to close up the same and account to him.

Id.

439. A **proceeding** commenced by a creditor of an estate in the probate court to **compel** an executor to render an **account**, and to obtain a decree requiring the executor to pay the claim of the creditor, is in the nature of an action for the recovery of the money which the executor has in his hands, and to which the creditor is entitled, and a decree in such proceeding against the executor is a judgment.

Magraw v. McGlynn, 26 Cal. 420.

440. A decree made by the probate court, requiring an executor to pay over to creditors or legatees money in his hands, may compel the payment of the **kind of money** received by the executor.

Id.

441. The probate court may require an executor, in his account, to state the kind of money received by him from the proceeds of the estate.

Id.

442. Where a **bill** is filed in **chancery** against an administrator to compel him to account, by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement.

Clarke v. Perry, 5 Cal. 58.

443. A settlement in the probate court is a **final settlement**, but a complainant who was no party to it may treat it as a nullity, and proceed to invoke the **equitable power**.

ers of the district court, and compel the administrators to a full account. *Id.*

444. Where an administrator filed in the probate court his account for final settlement, and an issue of fact was made thereon, which was certified to the district court for trial, and trial was had, the jury finding on each issue, and the judge rendering his decision on such findings; and this was certified back to the probate court, which court refused to give effect to the decision and judgment of the district court, but gave judgment on such findings as it construed them: *Held*, that there was no error in the judgment of the probate court.

Pond v. Pond, 10 Cal. 495.

445. The probate court has no authority to cite the administrator of an administrator to settle the account of his intestate of which he was the administrator.

Bush v. Lindsey, 44 Cal. 121.

446. When executors or administrators have sold the property of the estate for, and received pay in, legal tender notes, for the payment of creditors, it is error for the probate court to order payment to be made in gold coin.

Estate of Den, 39 Cal. 70.

447. If an administrator occupies and uses the real estate of his intestate, he becomes the tenant of the estate, and must not only account to the estate for the rental value of the land, but must, if he makes a profit, account to the estate for that also. If he sustains a loss, the loss is his; he must at all events pay the rental value of the land. *Id.*

448. An administrator can not be charged with the rental value of land of the estate, after it has been sold by the sheriff under a foreclosure sale. From that time the purchaser at the sale is entitled to the value of the use and occupation.

Walls v. Walker, 37 Cal. 424.

449. If, in an annual account of an administrator, certain charges are rejected because the necessary vouchers are not produced, the administrator may include them in a subsequent account, and by producing vouchers have them allowed. *Id.*

450. An account of an administrator is not conclusive, even as against the heirs and creditors, except as to such items as are included in it and actually passed upon by the probate court. *Id.*

451. Section 237 of the practice act prescribes the effect of a settlement of an administrator's account as against "all persons any way interested in the estate," viz., heirs, legatees and creditors. *Id.*

452. The presentation of an account of the affairs of a partnership, and of a claim against the estate, by the surviving partner of a deceased person, made to the administrator, and an allowance of the same, and a final settlement of the administrator's

account by the probate court, are a bar to an action afterwards brought against the surviving partner to settle the copartnership affairs, under the claim that the account rendered was fraudulent.

Kingsley v. Miller, 45 Cal. 95.

453. Services rendered and money advanced, at the request of an administrator, for the benefit of an estate, are "expenses of administration;" and the probate court has exclusive original jurisdiction to adjust and enforce such demands.

Gurnee v. Maloney, 38 Cal. 85.

454. The employment of an attorney for the mere purpose of procuring letters of administration is a contract made in advance of any authority on the part of the client to deal with the assets of the estate in any wise; and whether the application is successful or not, the estate is not to be charged with the fees of the attorney for the applicant.

Estate of Simmons, 43 Cal. 543.

455. The administrator, after he has become such, has the right, and it is ordinarily his duty, to employ competent counsel to aid him in the management of adversary suits in which the estate may be involved while under his care, and fees for such services may be allowed from the assets of the estate. *Id.*

456. A ruling of a probate court in fixing the amount of compensation to be allowed an administrator in payment of counsel in the settlement of an estate, will not be disturbed, unless there is a plain abuse of discretion.

Estate of Gasq, 42 Cal. 289.

457. An administrator acting in good faith is entitled to the aid of counsel in all litigation touching the estate, and to be allowed, in his account, the reasonable compensation paid such counsel.

Estate of Minor, 46 Cal. 565.

Settlement of Accounts.

458. If by the terms of a will the executor is directed to keep invested the money belonging to the estate in first-class real estate security, and the executor loans said money upon real estate security which is not good, he can not, in his account, charge the estate with the expenses of litigation, attorney fees, etc.; nor can such items be allowed to the executor in the settlement of his accounts.

Estate of Holbert, 48 Cal. 627.

459. In such case the executor, in the settlement of his accounts, is to be charged with the sum lost by the loan; but if the loan was made in good faith, he must not be charged with the stipulated rate of interest upon the sum lost, nor even with the statutory rate of interest, unless it appears that he could, with ordinary diligence, have loaned the money to others at that rate. *Id.*

460. In case of such a loan, the advice of

his attorney can not shield the executor from responsibility, if the money was loaned on land already incumbered, and no examination was made of the records, and no abstract was furnished to the attorney upon which his opinion could be had. *Id.*

461. Where the statute requires notice to be served upon the administrator as to the settlement of his accounts, a settlement without such citation and in his absence will not bind him nor his sureties.

Estate of Aveline, 53 Cal. 259.

462. Under our system, the probate court has jurisdiction to settle the accounts of an administrator, and to ascertain and determine his liability to the estate; and the decree of that court, settling the accounts and fixing the amount of liability, is conclusive. Accordingly, where the final account of an administrator, upon his resignation, was settled and approved, and he was discharged; and afterward an action was brought against him by his successor, for neglect in failing to bring suit within the period prescribed by the statute of limitations, for land in the possession of adverse claimants, whereby the land was lost: *Held*, that if the defendant had incurred any liability, it was full and complete at the time of the settlement of his final account, and might then have been ascertained and determined; and that the order settling his account and discharging him was conclusive against his liability. Reynolds v. Brumagim, 54 Cal. 254.

462a. If an administrator, acting in good faith and for what he believes the best interest of the estate, forecloses a mortgage given to the intestate, he is entitled, in the settlement of his account, to be allowed the costs paid out by him on the foreclosure.

Estate of Minor, 46 Cal. 565.

462b. If an administrator forecloses a mortgage given to his intestate upon land on which there is a prior mortgage, and at the sheriff's sale becomes the purchaser, at a sum too small to satisfy the costs and both mortgages, the court on the settlement of his account should not charge him with the amount of the mortgage debt and stipulated interest, but with the amount of his bid, less the sum paid by him for costs and to satisfy the former mortgage, and with legal interest thereon. *Id.*

463. Where it appears that by reason of irregularities in the proceedings, parties in interest have not been heard in the settlement of the annual account of an administrator, the cause will be remanded for further proceedings. Estate of Runyon, 53 Cal. 196.

464. If executors exercise their best judgment in employing an agent abroad to receive and forward to them money belonging to the estate, and employ one who is well recommended to them, they are not charge-

able in the settlement of their account with money lost by the insolvency of the agent.

Estate of Taylor, 52 Cal. 477.

Contesting Accounts.

465. The right to appear in a probate court and contest the account of an administrator is restricted to persons who are interested in the estate.

Garwood v. Garwood, 29 Cal. 514.

466. However remote or contingent the interest of a person may be, who asks to be allowed to contest an administrator's account, his right to contest should not be denied. *Id.*

467. A creditor of a deceased person is interested in his estate, and is entitled to appear in the probate court and file objections in writing to the account of an administrator, and to contest the same.

Tompkins v. Weeks, 26 Cal. 50.

468. If there is a reasonable doubt as to whether a person who applies to be allowed to contest the account of an administrator has any interest in the estate, that doubt should be resolved in favor of the applicant.

Garwood v. Garwood, 29 Cal. 514.

469. The probate court is not bound by the statement in the petition of an applicant to contest an administrator's account, that he has an interest in the estate, but may take testimony as to whether he has any interest. *Id.*

470. Where the contestants to an administrator's account stated in their exceptions that they were creditors of the deceased, and they were allowed to contest by the probate court, and the administrator appealed, but the transcript did not show that any proof was introduced on the subject of their being creditors, the presumption is that the probate court acted correctly.

Tompkins v. Weeks, 26 Cal. 50.

471. If the final account of an executor is attacked for fraud and embezzlement, and he is acquitted of these charges, but a sum is deducted from his account as improperly paid, it is not an error for the probate court to direct the jury fee to be paid out of the funds of the estate.

Estate of Mullins, 47 Cal. 450.

473. One who files an opposition to the settlement of the final account of an executor, and to a decree of distribution, on the ground that he has a contingent claim against the estate, must state in his opposition facts showing that such claim exists. It is not sufficient for him to aver that for certain reasons he has been unable to determine whether such claim exists, and that upon the happening of a certain event it may exist.

Estate of Halleck, 49 Cal. 111.

Marshaling Assets to Pay Debts.

474. Where the testator dies leaving both

personal and real estate, and owing debts secured by mortgage on the realty, and bequeaths all the personal estate and one half of all the realty to one devisee, and the remaining half of the real estate to another devisee, and makes no mention of the debts, the legacies and devises are all general, and the real and the personal estate devised, under sections 180 and 181 of the probate act, must contribute **pro rata** to the payment of the debts, in proportion to the value or amount of the several devises or legacies.

Estate of Woodworth, 31 Cal. 595.

475. Under the common law, where no different order is prescribed in the will, the assets of the deceased, for the purpose of paying the debts of the estate, will be marshaled, and the debts paid out of them in the following order: First, the **personal estate** not specifically bequeathed, or expressly or by implication excepted; second, **lands expressly devised** for the payment of debts; third, **lands descended** to the heir; fourth, **lands devised**. Id.

476. Order of marshaling the assets is not to be disturbed by the fact that lands are devised **subject to a mortgage** thereon. Id.

477. The **personal estate** is first to be applied and exhausted, even for the payment of debts charged upon the real estate by mortgage, if the debt so charged was the **personal debt** of the testator. Id.

478. It requires express words in the will, or an intent clearly manifest upon an examination of the entire will, to disturb this order. Id.

479. The making of a **specific bequest** is regarded as indicating an intention to discharge the particular personal property specifically bequeathed from the debts of the testator. Id.

Payment of Debts.

480. Where the administrator, under order of the probate court, sells land of deceased which is subject to a mortgage, the proceeds of sale, after deducting the necessary expenses thereof, must be applied first to the **satisfaction of the mortgage**, and the residue, if any, in due course of administration. Estate of Murray, 18 Cal. 686.

481. Neither the administrator nor the probate court have any **power to change the order** in which the debts of the estate are directed to be paid by the act relating to the estates of deceased persons, and an order to the probate court, made with the consent of the administrator, directing him to pay partnership debts, before the debts of the estate are paid, is void, and if he obey the same he can not be allowed in his account the money used until all the debts of the estate are paid. Id.

Tompkins v. Weeks, 26 Cal. 50.

482. Under our law generally the **per-**

sonal estate which comes into the hands of the executor is **first chargeable** with the payment of the debts of the deceased.

Estate of Woodworth, 31 Cal. 595.

483. The **rents and profits** of the real estate accruing subsequent to the death of the testator are not personal property in the hands of the executor to be first applied to the payment of debts in exoneration of the general personality. Id.

484. Under our law, as between the **legatee of the personality** and the **devisee of the realty**, the executor is not authorized to appropriate the rents of the real estate which accrued subsequent to the decease of the testator, to the satisfaction of a debt of the deceased secured by a mortgage on the realty, in exoneration of the personality. Id.

485. An **executor de son tort** at common law, though his acts are for many purposes valid, can not derive from such acts any benefit to himself. He can not retain assets to pay a debt of his own, and if the estate be insolvent, it is no answer to an action to recover the assets, that he has paid debts equal to or exceeding their value.

De la Guerra v. Packard, 17 Cal. 182.

486. Where an **equitable assignment** of certain funds in trust for the payment of certain debts before the death of the testator or intestate vests the funds for the purposes of the trust, and they come into the hands of the administrator, they are not general assets for the benefit of the creditors at large, but are subject in his hands to the same trust which attached before decease of the intestate.

Pierce v. Robinson, 13 Cal. 116.

PARTITION, FINAL SETTLEMENT, AND DISTRIBUTION.

487. Under the two hundred and sixty-fourth section of the act of May 1, 1851, to regulate the settlement of estates, the probate court has jurisdiction to make partition of the real estate of the deceased among the alienees of the "heirs or devisees." The design of the statute is to place the owner of the real estate, whether he be owner by direct purchase from the heir or devisee, or by descent, devise, or judicial sale, in the situation of the heir or devisee for the purpose of partition.

Estate of De Castro v. Barry, 18 Cal. 96.

488. A **surviving partner** being entitled to the possession and control of the partnership effects, can proceed directly in the district court to obtain the control, and to have a **partition of the real estate** belonging to the partnership, but standing in the name of his deceased partner.

Gray v. Palmer, 9 Cal. 616.

489. It was necessary to file this bill, and make the administrator, the widow, and the infant, parties, to rebut the **presumption**

of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of the deceased, and the administrator had possession of the personal property. These objects could only be accomplished by proceedings in the district court, as the probate court did not possess the judicial means of giving relief. *Id.*

490. The proceedings for the settlement of an estate, and matters connected therewith, are not civil actions within the meaning of sections 18 to 21 of the practice act.

Estate of Scott, 15 Cal. 220.

491. An order of a probate court distributing an estate is void, unless the order to show cause why a decree of distribution should not be made is published at least four successive weeks, or personally served on all persons interested in the estate, or all persons so interested shall signify, in writing, their assent to the distribution.

Pearson v. Pearson, 46 Cal. 610.

492. Where, in the proceedings for the distribution of an estate, jurisdiction of the person is acquired by publication of notice, and the order for publication is made May 8, and it directs persons interested to appear June 4 and show cause, and the facts appear on the face of the decree, the decree is void as to the persons interested in the estate who do not appear, and may be attacked in a collateral action. *Id.*

493. A final decree of the probate court making distribution of an entire estate is, until reversed or modified on appeal, an investiture of the absolute right and title to the same in the distributees; and a further order of the court making a different disposition of a portion of the estate, made pending an appeal which was perfected from said final decree, is void. *Estate of Garraud*, 36 Cal. 277.

494. After the decree of distribution, money in the hands of the administrator, distributed to an heir or devisee, may be garnished by a creditor of the distributee, or may be reached by proceedings supplemental to execution.

Estate of Nerac, 35 Cal. 392.

495. The contestants of a will entered into a stipulation with the proponent thereof, and by the terms of the stipulation the contestants were, in effect, substituted as legatees and devisees, the proponent being the executor. The stipulation was duly filed, and was made the basis of the subsequent proceedings in the probate court. The final account of the executor was settled without opposition, the estate was fully distributed, and the executor finally discharged. Subsequently the contestants sued the executor for property alleged to have been wrongfully omitted from the inventory: *Hedt*, that the final settlement under the stipulation was an estoppel.

Grady v. Porter, 53 Cal. 680.

496. When a decree of distribution has been made the probate court has no longer jurisdiction of the property distributed (unless to compel delivery), and the distributee thenceforth has an action to recover his estate, or, in proper cases, its value.

Wheeler v. Bolton, 54 Cal. 302.

497. Upon a final settlement of the accounts of the executor or administrator the court must distribute the residue of the estate, if application is made therefor, even if the time has not expired within which a minor or a non-resident may contest the will.

Estate of Pritchett, 52 Cal. 94.

498. The heir or devisee is entitled to have the estate distributed when the final account of the administrator has been settled, although a year has not elapsed since the will was probated, and there are persons living who are interested in the estate and may yet contest the validity of the will.

Id., 51 Cal. 568.

DISCHARGE OF EXECUTORS AND ADMINISTRATORS.

499. When an administrator has presented his final account and been discharged, he is no longer the representative of the estate, and has no authority to appear for or bind it in any manner.

Willis v. Farley, 24 Cal. 490.

500. The allowance of the final account of an executor does not discharge him from his trust, nor is it a decree of distribution or the equivalent of such a decree. Until the entry of a decree discharging an executor from liability he is not discharged from his trust.

McCrea v. Haraszthy, 51 Cal. 146.

APPEALS.

501. On an appeal from a decree of a probate court made upon a final accounting and settlement of an administrator's accounts, the petition and account filed with the view to a final settlement, are a part of the record to be used on appeal, without being made so by a bill of exceptions or statement.

Estate of Isaacs, 30 Cal. 105.

502. Section 338 of the practice act, prescribing what statements on appeal shall contain, applies to statements made on appeal from the probate courts.

Estate of Boyd, 25 Cal. 511.

503. If a statement on appeal from the probate court does not state specifically the particular errors or grounds upon which the appellant intends to rely, and the appeal rests on the statement alone, the appeal will be dismissed on motion of the respondent. *Id.*

504. The evidence taken in a proceeding in the probate court will not be reviewed by the supreme court on appeal, unless embodied in a statement. *Estate of Arnaz*, 45 Cal. 259.

505. The heirs and devisees or legatees of an estate are made parties to the proceedings for a distribution, and any one of them feeling aggrieved may appeal from the final order. *Bates v. Ryberg*, 40 Cal. 463.

506. The executor of an estate can not maintain an appeal from a final order of distribution, upon the grounds that the property was improperly divided among the legatees. *Id.*

507. If the probate court refuses to admit a will to probate, and this court, on appeal, directs the will to be so admitted, it will not direct the probate court to issue letters of administration with the will annexed to the petitioner, unless the probate court has found, as a fact, that the petitioner is a proper person to receive letters. *Estate of Wood*, 36 Cal. 75.

508. The judgment of the supreme court, settling the right of two persons to be appointed executors of an estate, should be carried into effect by the probate court, notwithstanding the death of one the persons before the probate court acts on the matter. *Estate of Pacheco*, 29 Cal. 224.

509. An order of the probate court setting aside a judgment of that court refusing to admit a will to probate, is not an appealable order, because not within the statute. *Peralta v. Castro*, 15 Cal. 511.

510. An executor, as such, has no interest in the question, as to how the estate in his hands is distributed, and can not maintain an appeal from an order of distribution made by the probate court, on the ground that the order distributes to one party too large a portion. *Estate of Wright*, 49 Cal. 550.

511. An appeal from any order, decree, or judgment of a probate court, or from some specific part thereof, may be taken and perfected by filing with the clerk of said court a notice stating such appeal, and by executing an undertaking, or giving surety on such appeal in the manner and to the extent as upon an appeal to the supreme court from a district court. The notice need not be served. *Will of Bowen*, 34 Cal. 682.

513. A notice appealing from all orders made by a probate court in the case on a certain day is sufficient to cover any appealable order made on that day. *Estate of Pacheco*, 29 Cal. 224.

514. An appeal does not lie from an order of the probate court setting aside its own proceedings had before a final order, upon application of the surviving wife to have the homestead set aside to her. *Estate of Johnson v. Tyson*, 45 Cal. 257.

515. From an order of a probate court setting aside a judgment of that court refusing to admit a will to probate, because not within section 297 of the act to regulate the

settlement of the estate of deceased persons. *Peralta v. Castro*, 15 Cal. 511.

516. Where a party is dissatisfied, he can only have a review of the evidence, to test its sufficiency to support such findings, by moving for a new trial. *Rice v. Innskeep*, 34 Cal. 224.

517. When the probate court has fixed the basis upon which an administrator's account is to be settled, an error in directing the creditors of the estate to restate it, if the administrator does not restate it himself, will not justify a reversal of the judgment, as the administrator sustains no injury by it. *Estate of Miner*, 46 Cal. 565.

518. Upon an appeal from an order directing a resale of real property, which had been previously sold by the administratrix, and confirmed to the appellant as purchaser: *Held*, that the appellant, though not an actual party to the proceedings in the court below, was a party aggrieved, and entitled to appeal under sections 963, 938, code of civil procedure. *Estate of Boland*, 55 Cal. 310.

519. An appeal does not lie from an order denying a petition for the revocation of letters. *Estate of Montgomery*, 55 Cal. 210.

520. If the instructions of the court to the jury are contradictory so as to confuse them in their deliberations, the verdict can not be allowed to stand. *Estate of Cunningham*, 52 Cal. 465.

PUBLIC ADMINISTRATORS.

521. Under the fourteenth chapter of the act concerning the estates of deceased persons, the public administrator has a right, and should at once take possession of the estate of all persons dying without known heirs. This is sustained by the eighty-eighth section of the act. *Beckett v. Selover*, 7 Cal. 215.

522. As to the right of the public administrator to take possession of any particular estate under the three hundred and fourth and three hundred and fifth sections, it would seem to be in the virtue of his office, and he must deliver it up to the person showing himself entitled thereto. *Id.*

523. The public administrator is an officer of the law. He is entitled to the administration of all estates not otherwise administered, and he has only such powers as are given him by law. *Id.*

524. In both cases he holds as special administrator, and subject to the direction of the court. *Id.*

525. It seems that all the provisions of the law relating to the powers and duties of the public administrator, and inconsistent with the general probate law, are special provisions, which must be given their full force. *Id.*

526. By the eighty-eighth section, which has reference to special administration, the court is authorized to "direct the public administrator to take charge of the estate." The phrase, "take charge of the estate," is qualified by the scope of the section, and only means to give the public administrator the same powers over the particular estate as he would have over the class of estates referred to in the fourteenth chapter. *Id.*

527. The public administrator of the city and county of San Francisco can take upon himself the duties of an administrator of a given estate only by virtue of a **special grant from the probate court**, made upon a petition therefor, filed in the matter of such estate. He does not, by virtue of his office, acquire the right to administer upon any particular estate.

Estate of Hamilton, 34 Cal. 464.

528. As the public administrator is required to give bond, and take the official oath, it seems to have been the intention of the statute to dispense with the **bond and oath** required of other administrators in each particular case.

Beckett v. Selover, 7 Cal. 215.

529. There must be a **judicial grant of administration** to the public administrator in each particular case. His commission, therefore, can not prove that he is the regular administrator upon the particular estate; he must show a grant of administration, like any other administrator. *Id.*

530. But where the court made a regular order that letters should issue to the public administrator, as no bond or oath was required as a condition precedent, the omission to issue the letters is not fatal. *Id.*

531. The public administrator is **personally liable** upon a contract made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract.

Dwinelle v. Henriquez, 1 Cal. 387.

532. While one administrator of an estate is in office, there is **no power** in the probate judge or court to **appoint a new one**. *Id.*

533. A public administrator, having administration of an estate, **continues** such administration after the expiration of his term of office, and **until** his **authority** is directly **set aside** or indirectly revoked by another appointment.

Rogers v. Hoberlin, 11 Cal. 120.

534. Rogers v. Hoberlin, 11 Cal. 120, was not designed to decide more than that the public administrator must show a grant of administration upon the particular estate.

Abel v. Love, 17 Cal. 233.

535. If there is a **contest** in the probate court between the public administrator and a **creditor** of an estate as to which shall administer, and other creditors request the

court to appoint the public administrator, it is within the discretionary power of the court to appoint the public administrator.

Estate of Doak, 46 Cal. 573.

536. Is a person who purchases a **claim** against an estate after the death of the decedent a creditor who is entitled to be preferred to the public administrator as administrator of the estate? *Quære?* *Id.*

537. It is competent for the public administrator to petition for, and by order of the probate court to receive, letters of administration upon the estate of an intestate, notwithstanding the deceased may have expressed a **wish to have another person settle the estate**.

Estate of Morgan, 53 Cal. 243.

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PROHIBITION.

1. The writ of prohibition ought not to issue to arrest the **progress of any legislation** pending in a board authorized by the laws to legislate with respect to matters of public interest.

S. V. W. v. S. F., 52 Cal. 111.

2. The writ of prohibition mentioned in the constitution is the writ of prohibition as

known to the **common law**, and its office is to restrain subordinate courts and inferior judicial tribunals from **exceeding their jurisdiction**. *Maurer v. Mitchell*, 53 Cal. 289.

3. The word "**counterpart**," as employed in section 1102 of the code of civil procedure, is designed to illustrate the operation of the writ of prohibition when issued in a proper case, but it is not intended to enlarge or add to the class of cases in which it may be resorted to. *Id.*

4. In an action by citizens of the state, against a citizen and an alien, upon a joint and several obligation (the amount in controversy being over five hundred dollars), the alien defendant applied to the court in due form and time, for a **removal of the cause to the United States circuit court**; and, his motion being refused, applied to this court for a writ of prohibition: *Held*, that he was entitled to the writ.

Sheehy v. Holmes, 55 Cal. 485.

5. The trial of a case after the taking of an appeal from an order denying a motion for a change of venue is not a proceeding without or in excess of the jurisdiction of the court, within the meaning of section 1102, code of civil procedure, so as to authorize the issuing of a writ of prohibition.

People v. Whitney, 47 Cal. 584.

6. A writ of prohibition will not issue to arrest the proceedings of a **board of supervisors**, unless the proceedings themselves are absolutely without or in excess of the jurisdiction of the board.

Brundage v. Kern Co., 47 Cal. 81.

7. A writ of prohibition will not lie to restrain a superior court from passing upon a **motion to dismiss an information**.

Wreden v. Sup. Ct. Stanislaus, 55 Cal. 504.

8. Upon an application for a writ of prohibition to the **board of election commissioners of San Francisco**, to arrest their proceedings in ordering an election for fifteen freeholders, to prepare and propose a charter to be submitted to the voters of the city and county, as provided in section 18 of article XI of the constitution: *Held*, that their action was not judicial, and therefore the writ would not lie.

People v. Election Com'rs, 54 Cal. 404.

9. If the question of the **jurisdiction of an inferior court** in a case before it has been submitted to that court by an appropriate pleading or objection, a writ of prohibition will not issue to restrain such court from proceeding in the case while the question of its jurisdiction remains undetermined by such court.

Chester v. Colby, 52 Cal. 516.

10. Under the constitution, as amended, the **supreme court** has original **jurisdiction** to issue writs of prohibition.

Tyler v. Houghton, 25 Cal. 26.

11. The supreme court may exercise its **appellate jurisdiction** by means of the writ of prohibition. *People v. Turner*, 1 Cal. 143.

12. The **affidavit** to a petition for a writ of prohibition should state that the affiant has either knowledge or information concerning the matters stated in the petition.

Cariaga v. Dryden, 30 Cal. 244.

13. If the application for a writ of prohibition is submitted on the petition and answer, and the answer denies the material allegations of the petition, the petition will be **dismissed**. *Id.*

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QUIETING TITLE.

1. CLOUD ON TITLE, WHAT CONSTITUTES.
17. WHO MAY BRING ACTION.
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CLOUD ON TITLE, WHAT CONSTITUTES.

1. The **true test** by which the question, whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; otherwise not.

Pixley v. Huggins, 15 Cal. 127.

2. Every deed from the **same source** through which plaintiff derives his real property must, if valid on its face, necessarily cast a cloud upon the title. Id.

3. And a deed from a **sheriff** upon an execution sale against the vendor of plaintiff would have the same effect in casting a cloud upon the title, as if the deed were made directly by such vendor. Such a deed from the sheriff, put on record, would create doubts as to the validity, as against the judgment creditor, of the previous transfer to plaintiff. Id.

4. Where a **homestead** is sold by the sheriff on an execution against the husband, or husband and wife, and a deed given to

the purchaser therefor, it is a cloud upon the title, and a court of equity will remove it.

Riley v. Pehl, 23 Cal. 70.

5. The right of homestead having once attached, and not having been alienated, a deed from the sheriff, under an execution against the husband, would be a cloud upon the title, and prevent the free alienation of the property by the husband and wife.

Dunn v. Tozer, 10 Cal. 167.

6. A sale by a **sheriff** of real estate upon an execution against the grantor will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale.

Englund v. Lewis, 25 Cal. 337.

7. The plaintiff claims no title to the soil, but only to the **franchise**; therefore, the sale of the wharf can work no irreparable damage, or throw a cloud on his title.

De Witt v. Hays, 2 Cal. 463.

8. Where Lick held a sheriff's deed to certain property under a judgment and execution, in an attachment suit against James H. Ray, and James Ray held another sheriff's deed to the same property, under another judgment and execution, against James H. Ray, the latter judgment and deed being earlier in date than the former, but not so early as the attachment lien in the former suit, and it appeared by averment that James Ray held his deed in trust for his father, James H. Ray, and it was conceded that Lick's was the superior title, but Ray claimed that his deed did not amount to a cloud: *Held*, that the **apparent title** held by Ray under his deed was a cloud, and that Lick was entitled to relief in equity to remove it.

Lick v. Ray, 43 Cal. 83.

9. If a title against which relief is prayed as a cloud be of such a character that, if asserted by action and put in evidence, it would **drive the other party** to the production of his own title in order to **establish a defense**, it constitutes a cloud, which the latter has a right to call upon equity to remove. Id.

10. If a title be **void on its face**, if it be a nullity, a mere *felo de se* when produced, so that an action based upon it would "fall of its own weight," it does not constitute a cloud; and an action can not be maintained to remove it as such, except upon a showing of special circumstances entitling the party to relief. Id.

11. A **tax deed**, based upon an assessment made under an unconstitutional act of the legislature, will not constitute a cloud on the title. Williams v. Corcoran, 46 Cal. 553.

12. The plaintiff, in an action to enjoin the collection of an unconstitutional tax, is pre-

sumed to know the law, and to know that a deed given at such a tax sale would be void.

Id.

13. A tax is not a cloud upon a title to real estate; and its unlawful collection, by distress or seizure of chattels, is no more than an ordinary trespass.

Ritter v. Patch, 12 Cal. 298.

14. A threat by the collector to sell lands for taxes, made before the taxes become delinquent, does not amount to coercion.

Williams v. Corcoran, 46 Cal. 553.

15. A mortgage executed by the grantee of the husband upon property purchased with funds belonging to the separate estate of the wife, and deeded to the wife during coverture, is a cloud upon the wife's title which a court of equity will remove.

Ramsdell v. Fuller, 28 Cal. 37.

16. F., defendant, began suit against the Volcano water and mining company to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, cabins, etc., in enforcement of a mechanic's lien. Subsequently, the ditch, etc., was sold on a judgment in favor of one Harris, and purchased by S., from whom plaintiff, as judgment creditor of the company, redeemed and in due time received the sheriff's deed. Afterwards, F. had a decree directing a sale of the ditch, etc., to satisfy his lien. Plaintiff sues to quiet title; alleging that F.'s decree is fraudulent; that he had no lien; and that he is about enforcing the decree, which is a cloud on plaintiff's title: *Held*, that, aside from any question of fraud, the action lies; that the existence of a decree, founded upon proceedings taken prior to plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon that title.

Head v. Fordyce, 17 Cal. 149.

See secs. 62, 68, 69.

WHO MAY BRING ACTION TO QUIET TITLE.

17. The act of March, 1856, "for the protection of actual settlers, and to quiet land titles in this state," was passed for the benefit of those who are desirous of building up homes in the country, and for that purpose are seeking, in good faith, lands for settlement and occupation; and hence, the eleventh section of the act does not apply to miners engaged simply in extracting gold from a quartz vein. They are not "settled upon" their vein in the sense of the statute, and the two years' limitation of that section can not avail them. *Fremont v. Seals*, 18 Cal. 433.

18. The statute, giving a right of action to a party in possession of real estate to determine adverse claims, does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable

title; but the statute embraces every description of claim whereby the plaintiff might be deprived of the property, or its title be clouded, or its value be depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an **outstanding title** already held or to grow out of the adverse pretension. *Head v. Fordyce*, 17 Cal. 149.

19. Plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation, or a loss to him of the property. *Id.*

20. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld.

Guy v. Hermance, 5 Cal. 73.

21. Under this section, a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained.

Curtis v. Sutter, 15 Cal. 259.

22. A person in the possession of property is in a position to bring an action, under the two hundred and fifty-fourth section of the practice act, to quiet his title thereto, and on the trial no other evidence on his part than proof of possession is necessary in the first instance. *Horn v. Jones*, 28 Cal. 194.

23. A judgment creditor need not be in possession of land to enable him to maintain a suit in equity, after he has a sheriff's deed, to cancel a deed of the same given by the debtor to defraud him before he recovered judgment. *Hager v. Shindler*, 29 Cal. 47.

24. A sale by an administrator of land once the property of the intestate, but which he is alleged to have sold during his life-time, will cast such a cloud on the title of the intestate's prior grantee as will enable him to maintain an action to restrain the sale.

Thompson v. Lynch, 29 Cal. 189.

25. Under the code of civil procedure, section 738, the owner of an estate or interest in land less than an estate in fee can maintain an action to determine an adverse claim made by another person.

Pierce v. Felter, 53 Cal. 18.

26. If one who has a paper title to a tract of salt-marsh tide land, which is not susceptible of occupation, except during three months in the year, and in which there is a dry knoll, has actual possession of the knoll, and there is no adverse possession to the remainder, he may resort to his title deeds to extend his possession to the remainder of the tract, so as to enable him to sue in equity to quiet the title.

Coleman v. S. R. T. R. Co., 49 Cal. 517.

27. One who is in actual possession of a

small piece of dry land in a tract of salt-marsh tide land, which is not susceptible of actual occupation, except for grazing during two or three months of the year, and who uses and controls the marsh land by himself and tenants, so far as the same is capable of use and control, may sue to quiet the title to the same, if there is no adverse possession, or his tenant may sue when the premises are thus held by him. *Id.*

ACTIONS, WHEN CAN BE MAINTAINED, AND PROCEED-INGS THEREIN.

28. Section 254 of the practice act enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previous bills of peace would not lie. *Curtis v. Sutter*, 15 Cal. 259.

29. The eleventh section of the act of 1856, for the protection of actual settlers and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Martin v. Folger*, 15 Cal. 275.

30. Suit under section 254 of the practice act only lies with reference to property of which the plaintiff is in possession; and where suit is brought, under that section, to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyances would not cloud plaintiff's title. And if the grantees under such conveyances should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. *Curtis v. Sutter*, 15 Cal. 259.

31. In such suit the court sitting in equity may direct, when proper, an issue to be framed upon the pleadings and submitted to a jury, if questions of a purely legal character in relation to the title arise. *Id.*

32. To maintain an action to quiet title, under the two hundred and fifty-fourth section of the civil practice act, it is essential that the plaintiff have possession of the premises when the action is commenced. *Rico v. Spence*, 21 Cal. 504.

33. An action can not be maintained for the purpose of determining an adverse claim to, or estate or interest in real property, under section 254 of the practice act, unless the plaintiff, at the time of the commencement of the action, is in the actual possession of the property himself, or in possession by his tenant. *Lyle v. Rollins*, 25 Cal. 437.

34. One in possession of property, claiming title under a sheriff's deed executed on a mortgage foreclosure, may maintain an action to quiet his title against another who

claims a title against him which would be good against the mortgagor, although void as against the plaintiff.

Horn v. Jones, 28 Cal. 194.

35. An action can not be maintained to quiet a legal title to land vested in the plaintiff, unless the plaintiff is in possession of the property in dispute at the commencement of the action. *Ferris v. Irving*, 28 Cal. 645.

36. Possession in plaintiff is necessary in an action to quiet title; but if the possession exist it matters not how it was acquired. *Reed v. Calderwood*, 32 Cal. 109.

37. In an action brought under the two hundred and fifty-fourth section of the practice act, to quiet title to a quartz mining claim, located on the public lands of the United States, a possessory title thereto is sufficient to maintain the action by a party in possession as against one out of possession. *Pralus v. Pacific M. Co.*, 35 Cal. 30.

38. In an action to determine an adverse claim to land, under section 254 of the practice act, the plaintiff can not prevail without proof of possession at the time of commencing the action, if the allegation of possession is denied by the answer. *Brooks v. Calderwood*, 34 Cal. 563.

39. The possession necessary to maintain an action, under section 254 of the practice act, must be such as would enable the plaintiff, without the aid of any other title, to maintain an action to eject a mere intruder therefrom. *Sepulveda v. Sepulveda*, 39 Cal. 13.

40. If adverse possession to a part of the land should be shown in a third person, the suit would be considered as brought to determine the adverse claim of the defendant only, to the land remaining in the possession of the plaintiff. *Id.*

41. In an action by the plaintiff to quiet title to a portion of the said land, against one claiming under a deed, subsequent to the act, from the board of tide land commissioners, the complaint alleging that the plaintiff was seised of the land: *Hehl*, that the action could not be maintained, for want of title in the plaintiff, and that it was, therefore, unnecessary to examine the title of defendant. *San Francisco v. Ellis*, 54 Cal. 72.

42. If the owner has full dominion and control of his property (which he has if not held adversely), he may well be said to be in possession, in every sense of the word. *Sepulveda v. Sepulveda*, 39 Cal. 13.

43. I think the true rule under the statute is that whenever the owner has a possession, whether actual or constructive, which may be intruded upon, he may bring suit to determine an adverse claim, and thus prevent an intrusion under claim of title. *Id.*

44. To maintain an action to quiet title to mining claims on the public domain, under

section 254 of the practice act, the plaintiff must establish an actual or constructive possession in him at the time of commencing the action. *Pralus v. Jefferson M. Co.*, 34 Cal. 558.

45. A possessory title thereto is sufficient to maintain the action by a party in possession, as against one out of possession.

Pralus v. Pacific M. Co., 35 Cal. 30.

46. The purchaser of an outstanding adverse claim to land by one in possession claiming adversely to all others, for the purpose of quieting his title, does not estop him from setting up the statute of limitations against a third party also claiming under an adverse title.

Cannon v. Stockmon, 36 Cal. 535.

47. One who, by collusion with a tenant, acquires possession of the leased premises, has such a possession as enables him to maintain an action under the two hundred and fifty-fourth section of the practice act, to quiet title to the same.

Calderwood v. Brooks, 45 Cal. 519.

48. To support a decree quieting title based on actual possession of mining ground, the findings must show that the party has had possession of a definite part of the ground. *Gelich v. Moriarty*, 53 Cal. 217.

49. Constructive possession can only be established by the proof of three facts, to wit, first, that there was local mining customs, rules and regulations in force in the district embracing the claims; second, that particular acts were required by such mining laws or customs to be performed in the location and working of claims, as authorized by such laws; and, third, that plaintiff has substantially complied with these requirements.

Pralus v. Jefferson M. Co., 34 Cal. 558.

50. An apparently good record title to land constitutes a cloud upon a title thereto which has been subsequently acquired by adverse possession under the statute of limitations, which the holder by adverse possession is entitled to have removed. This statute would have performed but half its mission as a statute of repose, if the party relying upon it, as to a party claiming under a written title, must wait till he is attacked before he can reduce the evidence of his title, which otherwise rests only in parol, to the form of a permanent record.

Arrington v. Liscom, 34 Cal. 365.

51. A court of equity has jurisdiction at the suit of the judgment creditor who has purchased land at sheriff's sale, and received a sheriff's deed therefor, to annul and set aside, as a cloud upon title, a deed of the land given before the recovery of judgment by the judgment debtor, without consideration, and to defraud the creditor.

Hager v. Shindler, 29 Cal. 47.

52. The circumstances that the plaintiff

is an infant in present need of money, and that the lot is covered with water and not now productive, do not aid in giving a court of equity jurisdiction to remove a cloud on title.

Cohen v. Sharp, 44 Cal. 29.

53. If, in an action to remove a cloud from the title to land, the court finds that neither party has title to the premises in controversy, neither is entitled to a judgment as against the other; but the action should be dismissed. The fact that the plaintiff is in possession does not entitle him to judgment, for possession is not title, but only evidence from which title may be presumed. *San Diego v. Allison*, 46 Cal. 162.

54. If the plaintiff in an action to remove a cloud from the title to land has no title, an abortive attempt by the defendant to purchase the land from another, not authorized to sell it, can not constitute a cloud on the plaintiff's title, nor depreciate the value thereof.

Id.

55. To maintain a suit to quiet title by a party in possession, it is enough that he claims under a deed which creates an equitable estate, or even a right of possession. *Smith v. Brannan*, 13 Cal. 107.

56. A jury being waived, it is immaterial whether an action under section 254 of the practice act is an equitable or a legal proceeding.

Id.

57. The proceeding by bill in equity, which an individual is allowed to take to set aside a patent or control its operation, is in the nature of a bill to quiet title, to determine an estate held adversely to him, to remove what would otherwise be a cloud upon his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complainant must therefore possess a title superior to that of his adversary, and of course, to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name.

Boggs v. Merced M. Co., 14 Cal. 279.

58. Where an action has been commenced to quiet title to a tract of land and to remove a cloud therefrom caused by certain deeds on record, and a *lis pendens* has been filed, one who purchases from defendant during the pendency of the action, and after the *lis pendens* is filed, is bound by the judgment rendered therein.

Haynes v. Calderwood, 23 Cal. 409.

EVIDENCE IN.

59. One claiming title to property under a sheriff's deed, executed on the foreclosure of a mortgage, may, in an action brought by

him to quiet his title against one who claims under a sheriff's deed executed on the foreclosure of a **mechanic's lien**, in which foreclosure he was not a party, go behind the decree foreclosing the mechanic's lien, and show that no lien in fact existed.

Horn v. Jones, 28 Cal. 194.

60. In an action brought by one in possession of land to try and determine an adverse claim set up by one out of possession, when the complaint avers that the defendant sets up an adverse claim without stating what it is, and the answer admits plaintiff's possession, and sets up the particulars of the defendant's alleged title, the **burden of proof** is cast upon the defendant.

Crook v. Forsyth, 30 Cal. 662.

61. Action to determine an adverse claim to land, the complaint averring that plaintiff, who was in possession, derived title through a deed from G. Answer that previous to the execution of G.'s deed the land was attached at suit of a creditor of his, and was subsequently in due course sold by the sheriff, at which sale defendant became the purchaser. Replication that a portion of the debt on which the attachment issued was secured by a collateral note, and that the attachment was therefore void: *Hehl*, that on these pleadings, in the absence of proof, judgment was properly entered for defendant; that if plaintiff had the right to attack the attachment in this form (a point not decided) the burden of the proof was on him to show that the attachment debt was collaterally secured.

Bostwick v. McCorkle, 22 Cal. 669.

62. Where, in such action, plaintiffs alleged that by reason of defendant's adverse claim, "they were greatly embarrassed in the use and disposition of their mining claims," and "that thereby their value was greatly depreciated," *Hehl*, that this was a **sufficient averment** of injury to sustain the action.

Pralus v. Pacific M. Co., 35 Cal. 30.

63. In such action the defendant will not be exonerated from payment of **costs**, under section 253, by disclaiming any title or interest in himself, if he answers denying the allegation of possession contained in the complaint, thereby compelling the plaintiff to prove that issue, and the plaintiff finally succeeds on the issue.

Brooks v. Calderwood, 34 Cal. 563.

64. When, in such action, the plaintiff succeeds in part and fails in part as to some of the defendants, the judgment will not be reversed because the district court awards costs against such defendants. *Id.*

65. In such action, if the court finds and adjudges that a defendant has no just claim or title, legal or equitable, the judgment will not be reversed because it also contains a clause perpetually restraining the defend-

ant from further setting up the claim so adjudged to be invalid. *Id.*

66. In this case plaintiff can not set aside the decree of F. as a cloud upon his title without showing affirmatively that F. had **no claim on the property**, or any right to subject it, or any part of it; and as the findings do not show any particular description of the aqueducts, flumes, cabins, etc., their value, nor the value of the materials furnished, nor that F.'s claim was solely for furnishing materials for building the cabins, flumes, etc., the court can not pass on the question of F.'s lien.

Head v. Fordyce, 17 Cal. 149.

67. In this case it was not necessary that the bill should aver that plaintiff had **no notice**, at the time of his purchase under the Harris sale, of F.'s proceedings to enforce his lien. Such notice is not presumed. *Id.*

68. When, in an action to quiet the title to land, both parties show an **equal equity**, but one has also the legal title, he who has the legal title must prevail.

Maina v. Elliott, 51 Cal. 8.

69. If one who holds the legal title, subject to an equity in the hands of another, conveys such **legal title** to an innocent purchaser without notice, the purchaser will hold the legal title discharged of the equity. *Id.*

RELIEF.

70. Where one has an **outstanding deed**, which improperly clouds the title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled. *Shattuck v. Carson*, 2 Cal. 588.

71. On such application, chancery will prevent a sale, and the consequent **execution of an improper deed**. *Id.*

72. A decree pronouncing that a **conveyance is fraudulent and void**, has the effect to remove any cloud resulting from its execution without an express direction that it be set aside. *Gibbons v. Peralta*, 21 Cal. 629.

73. Some two hundred persons, of whom plaintiff was one, claimed each separate parts of a tract of land called the "Encinal," deriving their several titles from a common source, and all through a deed of the whole tract from Peralta to Hays. Plaintiff brought the action for himself and on behalf of the others, whose titles were similarly situated, for the purpose of obtaining equitable relief against certain subsequent conveyances of the Encinal made by Peralta, alleged to be fraudulent, and to constitute a cloud upon the title derived through the deed to Hays, and asked, as a portion of the relief, a perpetual injunction against any further alienations by the fraudulent grantees (defendants). The decree pronounced the subsequent conveyances fraudulent and void, and granted the injunction asked as to

the plaintiff's separate portion of the land, but not as to that of the others for whom he sued: *Held*, on appeal by plaintiff from this decree, that it was not in this respect erroneous; that there was no such **community of interest** between the plaintiff and those whom he represented in the action as entitled him to an **injunction** in their favor.

Id.

74. If plaintiff prevail in an action to quiet title, a decree inserted in the judgment **injoining** defendant from making any **further contest** on plaintiff's title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an **after-acquired title**.

Reed v. Calderwood, 32 Cal. 109.

75. A judgment in favor of the plaintiff, against one of several defendants, in an action to set aside a deed as a cloud upon the plaintiff's title, is an **adjudication that the title is in the plaintiff**.

Marshall v. Shafter, 32 Cal. 176.

76. Arrington had been in the exclusive adverse possession of lands for twelve years, under a deed from one Harris, whose sole title was derived through a sale under a judgment foreclosing a mortgage executed by one Light. The title of Harris was defective, because one Liscom, a subsequent grantee of the mortgagor, Light, held the legal title at the time when said foreclosure suit was instituted, and not having been made a party to the action, his title was unaffected by the foreclosure and sale. After said twelve years' adverse possession, Arrington brought an action against Liscom, alleging his title acquired under the proceeding of foreclosure and through his said **adverse possession**; that Liscom claimed title adverse to him under his conveyance from Light; that said title had ceased to have any validity as against said plaintiff, but being an apparently good title of record, it cast a cloud upon his title, which diminished the value of his estate; and upon the case stated, asked that Liscom's adverse claim be determined, adjudged to be void, and that the said cloud be removed. Liscom, in his answer, admitted the facts alleged, but claimed title in himself, subject only to the mortgage, denying that it was a cloud on plaintiff's title, and as a ground for affirmative relief, restated the facts, set up his record title, and asked to be allowed to redeem from the mortgage, and that Arrington be required to account for the rents and profits of the land: *Held*, first, that Liscom's right to redeem is barred by the **statute of limitations**; second, that the action, upon the facts averred in the complaint, is not an action in substance or form for a strict foreclosure of the mortgage as against Liscom, and that there was no recognition by the plaintiff of a present subsisting mortgage,

nor any waiver of the bar of the statute; third, that Arrington had become vested with a **perfect title** to the land through his **adverse possession** during the period prescribed by the statute of limitations; and, fourth, that Liscom's title, as against Arrington, had become extinct, but being an **apparent title from a common source**, regular upon its face, casts a cloud upon Arrington's title, and that Arrington is entitled to have the adverse claim of Liscom determined and adjudged invalid, and the cloud removed.

Arrington v. Liscom, 34 Cal. 365.

77. A plaintiff can not come into a court of equity, and ask for a decree debarring the defendant from asserting a claim under an instrument executed by the former, without restoring the **consideration** received by him.

Chandler v. Chandler, 55 Cal. 267.

78. In an action to quiet a plaintiff's title to land, alleged to be clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of **ejectment** pending, in which the defendant does not ask for affirmative relief, is not available as a defense.

Ayres v. Bensley, 32 Cal. 620.

See secs. 63, 64, 65.

ACTION, 62, 63.

DEFENSES, 43.

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PLEADING, 870, 1323-1334.

PROBATE, 147.

SPECIFIC PERFORMANCE, 85.

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QUITCLAIM.

DEED, 407-417.

QUO WARRANTO.

1. JURISDICTION.

5. WHEN ACTION WILL LIE.

16. PROCEEDINGS IN.

16. Complaint.

21. Answer—Defense.

25. Judgment.

JURISDICTION.

1. On petition of the attorney-general for a writ of *quo warranto* against a tax collector: *Held*, that the court had no jurisdiction, and the prayer of the petition was denied. *Ex parte Attorney-general*, 1 Cal. 85.

2. This court is strictly an appellate tribunal, and has no original jurisdiction except in cases of *habeas corpus*, and conse-

quently is not empowered to issue a writ of *quo warranto* for the purpose of inquiring by what authority a person exercises the duties of a collector of the foreign license tax. *Id.*

3. The act of giving jurisdiction over the subject of contested elections to the judge of the county court, is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 145.

4. This is one of the "special cases," of which the constitution provides that the county judge may take cognizance when authorized by the legislature. *Id.*

WHEN ACTION WILL LIE.

5. This writ is to prevent the **usurpation of any office, franchise, or liberty**, as also to afford a remedy against corporations for a violation of their charters, tending to a forfeiture thereof.

Ex parte Attorney-general, 1 Cal. 85.

6. The code provides a remedy against any person who usurps, intrudes into, or unlawfully holds or receives any public office, civil or military, or any franchise in the state.

People v. Olds, 3 Cal. 167.

7. The distinction between writs of **mandate and quo warranto**, as held in England, is not abolished by the statutes of this state, but is fully recognized. *Id.*

8. An information in the nature of a *quo warranto* is the proper proceeding to try the **title to an office**.

People v. Scannell, 7 Cal. 432.

9. *Quo warranto* lies to test the right of an **appointee of the board of pilot commissioners**. *Palmer v. Woodbury*, 14 Cal. 43.

10. An action under section 310 of the practice act may be maintained against one in possession of an office to which he has not been duly elected, who holds a **certificate of election** proper in form from the board of election canvassers.

People v. Jones, 20 Cal. 50.

11. A person holding a certificate of election without the right and legal title to the office, is an **intruder** within the meaning of the act. *Id.*

12. The real **right or title to the office comes from the will of the voters** as expressed at the election. If the office was in fact given by the voters to another, the possession by the defendant of the **certificate** affords him, at most, but a color of title, and does not invest him with the right which belongs to another. *Id.*

13. A certificate of election is not necessary to enable a party, claiming to have been elected, to bring his action by *quo warranto*. *Magee v. Calaveras Co.*, 10 Cal. 376.

14. Such certificate is only **prima facie evidence of title to the office**—not conclu-

sive. Nor is it the only evidence by which the title may be established. It is the **fact of election** which gives title to the office, and this fact may be established, not only without, but against the evidence of the certificate. *Id.*

15. In the case of an election to office by the people, the **issuance of a commission** is a mere ministerial act.

Conger v. Gilmer, 23 Cal. 75.

See sec. 18.

PROCEEDINGS IN.

Complaint.

16. In *quo warranto* to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority, is a **sufficient allegation of intrusion and usurpation**.

Palmer v. Woodbury, 14 Cal. 43.

17. If the complaint be defective in this particular, the **defect** must be reached by special demurrer. *Id.*

18. The use of an abbreviated **corporate name** by the officers of a corporation organized under a particular name, is not an usurpation, nor will it support a proceeding by *quo warranto* to oust them from the enjoyment of their franchise.

People v. Bogart, 45 Cal. 73.

19. In an action by one claiming to have been elected to an office against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show *prima facie* that a **vacancy** existed in the office, and that he was elected to fill it. *Doane v. Scannell*, 7 Cal. 393.

20. Pleadings in proceedings by *quo warranto* to try rights to the exercise of corporate powers.

O. & V. R. Co. v. Plumas Co., 37 Cal. 354.

Answer—Defense.

21. In *quo warranto* for an alleged usurpation of office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp, and enjoy the office without a license, and also certain allegations as to the right of relator to the office: *Held*, that these allegations as to relator's right can not be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office.

Flynn v. Abbott, 16 Cal. 358.

22. In a proceeding to contest the election of defendant as district judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense; because this matter, if true, could not protect the incumbent

from the consequences of an unauthorized possession of the office.

Saunders v. Haynes, 13 Cal. 145.

23. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible, does not give the office to the next highest on the list. Id.

24. In a special case to contest an election under the statute, the county court has no power to grant a new trial, and an appeal to the supreme court must be taken from the judgment, and a statement on appeal be made and settled to enable the supreme court to review the proceedings below outside the judgment roll.

Casgrave v. Howland, 24 Cal. 457.

Judgment.

25. In an action of *quo warranto* to determine the right to an office where the relator claims the incumbent, the court may not only determine the right of the defendant, but of the relator also; and if it determine in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office.

People v. Banvard, 27 Cal. 470.

26. Contestant can not take judgment by default. Keller v. Chapman, 34 Cal. 635.

27. In regard to a person holding two or more offices at the same time, see People v. Provines, 34 Cal. 520, where all the authorities are discussed, and many overruled.

MANDAMUS, 163.
OFFICE, 43.

PILOT, 4.
PLEADING, 576.

RAILROADS.

1. FORMATION AND POWERS OF COMPANIES.
6. PROPERTY OF.
8. RIGHT OF WAY.
19. BONDS.
25. STREET RAILROADS.
41. SUBSIDIES.

FORMATION AND POWERS.

1. The statute relating to the formation of railroad corporations is substantially complied with, if the only defect in the papers necessary to constitute a corporation is the omission of the words "in good faith," in that portion of the affidavit attached to the certificate relating to the payment of the ten per cent.

People v. S. & V. R. R. Co., 45 Cal. 306.

2. The treasurer of a company about to form a railroad corporation may receive from the subscribers payment of the ten per cent. required by law to be paid to him, in bank checks drawn by the subscribers, and pay-

able in *presenti*, provided they are drawn against a sufficient fund and the banks will pay the checks on presentation, and the same are drawn in good faith and with no intention to evade the law. Id.

3. Under the act of May 20, 1861, providing for the incorporation of railroad companies (stats. 161, p. 607), and requiring at least one thousand dollars per mile to be subscribed, and ten per cent. thereof in cash, to be actually and in good faith paid in before incorporation: *Held*, that payment of such ten per cent. could not be made in a check on a bank, drawn by a person who had not on deposit funds sufficient to meet it, even though it appeared that such check would have been paid if presented.

People v. Chambers, 42 Cal. 201.

4. Under the act for the incorporation of railroad companies, passed May 20, 1861, railroad corporations possessed all the powers and privileges, for the purpose of carrying on the business of the corporation, that private individuals and natural persons had. The power to make and execute contracts the act has committed to the directors of the corporation, and declared, among other things, that "no contract shall be binding upon the company unless made in writing."

Pixley v. W. P. R. R. Co., 33 Cal. 183.

5. The provision in the act concerning railroad corporations, that "no contract shall be binding on the company unless made in writing," refers only to contracts wholly executory; but the action against the corporation on such verbal executory contracts must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation.

Foulke v. San Diego & S. P. R. R. Co., 51 Cal. 365.

PROPERTY OF.

6. The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation.

S. F. & N. P. R. R. Co. v. Bee, 48 Cal. 398.

7. When railroad lands, granted to the Pacific railroads, are withdrawn from pre-emption and sale by the direction of the secretary of the interior, it will be presumed that the railroad company had filed a map designating the general route of the road.

Weaver v. Fairchild, 50 Cal. 360.

RIGHT OF WAY.

8. The act of congress of August, 1852, which gives to railroads and other companies, on complying with certain conditions, a right of way over the public lands, does not confer upon the companies availing themselves of its provisions the right to enter upon premises in the actual occupancy of a

settler without compensating him for the damage done to his possession.

N. R. R. Co. v. Gould, 21 Cal. 254.

9. The purpose of the act of congress was merely to give a right to enter upon the public lands, assuming them to be vacant, and its effect is to relinquish to the companies complying with its requirements any claim for compensation that might belong to the United States, as proprietor, under any proceeding, by virtue of a state law, to appropriate the land for public use. Id.

10. The grant by congress of the right of way over the public lands to the Central Pacific railroad company vests in the company the full and ample right to enter upon the four hundred feet in width and use the same for railroad purposes, and a mere naked possessor can not prevent such entry, or recover damages for an injury necessarily done to his possession or improvements by such entry.

Doran v. C. P. R. R. Co., 24 Cal. 245.

11. The right of way over a strip of land two hundred feet in width on each side of its road, granted to the Central Pacific railroad company by the second section of the act of congress, passed July 1, 1862, extends to and covers all public lands, whether mineral or not. Id.

12. The proviso to section 3 of the act, excepting mineral lands from its operation, refers to the alternate sections granted to the Central Pacific railroad company, and has no reference to the grant of the right of way in section 2. Id.

13. The right of way granted to the Central Pacific railroad company of California, over the public lands of the United States, for its road, became perfect upon the filing of the plat of the location of the railroad in the proper land office, as against pre-emptioners who had not perfected their pre-emption right by payment of the price of the land. W. P. R. R. Co. v. Tevis, 41 Cal. 489.

14. Congress has the power to grant a right of way for a railroad over public lands which are occupied by persons who have the right to pre-empt, but have not yet perfected that right by proving up and making payment for the land. Id.

15. A claimant of public land, within the meaning of the third section of the act of congress granting a right of way over the public lands to the Union and Central Pacific railroad companies, is one who has an interest in the land recognized by the laws of the United States. One who is a pre-emptioner, but has not paid for the land, is not such claimant. Id.

16. The neglect of the company to build the fence does not operate to dispossess the occupant of his entire field, or prevent him from making a lawful use of it.

McCoy v. Cal. P. R. R. Co., 40 Cal. 532.

17. There is no statute in this state requiring railroad corporations to fence in their track.

Richmond v. S. V. R. R. Co., 18 Cal. 351.

18. The act of 1861, requiring railroad companies to maintain a sufficient fence on both sides of their property, without prescribing what a sufficient fence shall be, must be considered as referring to and adopting the general law fixing the standard of lawful fences.

Enright v. S. F. & S. J. R., 33 Cal. 230.

See secs. 33, 34.

BONDS OF.

19. The act of 1860 (stats. 1860, p. 90), authorizing Butte county to purchase and hold two hundred thousand dollars of the first mortgage bonds of the California Northern railroad company, and to issue county bonds in payment of the same, as amended by the act of 1860 (stats. 1860, p. 133), the fourth section of which authorizes the supervisors to issue the bonds if, at the election by the people, to whom the matter is submitted, the issuance of the bonds be authorized, is a law, and not a mere transfer to the people of the county of the power to pass laws. The fact that the issuance of the bonds depends upon the will of the people is a mere condition affixed by law; and as the legislature, in the absence of constitutional restrictions, have the right to exercise an unqualified power, they may add, as is done here by this condition, a qualification to the power. Hobart v. Butte Co., 17 Cal. 23.

20. Under the second section of the act no proceedings can be taken by the company against the board for refusal to issue the bonds until ten days from the time of this decision upon the "estimate of expenditures" presented by the company. During that period any taxpayer has a right to institute proceedings in the district court to review the action of the board.

C. N. R. R. Co. v. Butte Co., 18 Cal. 671.

21. Under the act of 1860 (stats. 1860, p. 133), relative to the issuance of the bonds of Butte county to the California Northern railroad company in certain contingencies, the basis upon which the supervisors are to proceed in estimating the work done by the company, so as to entitle it to bonds, is the actual expenditure by the company, and not the value of the work. This actual expenditure, connected with proof of the other facts required by the statute, *prima facie* constitutes the company's claim on the county for the bonds. Id.

22. The county might refuse to issue the bonds if the expenditures were not really made, or if fraud had been committed in the contracts for such expenditures. Id.

23. The act of the legislature, passed April 4, 1864, authorizing the board of supervisors

of the city and county of **San Francisco** to compromise and settle all claims upon the part of the Western Pacific railroad company and the Central Pacific railroad company, for bonds claimed by said companies for said city and county, under the act of April 22, 1863, fully empowered said board of supervisors to make a settlement with said Central Pacific railroad company, by the terms of which the company released its claim for the six hundred thousand dollars of bonds claimed under the act of 1863, and accepted in place thereof bonds of said city and county to the amount of four hundred thousand dollars, and the city and county released its right to stock in the company, and withdrew its subscription to the capital stock of the same. Said act also fully empowered and authorized the said city and county to compromise with the Central Pacific railroad company, without compromising with the Western Pacific railroad company also.

People v. Coon, 25 Cal. 635.

24. A railroad corporation has power, upon a **sufficient consideration**, to guarantee the **payment of the bonds** of another railroad corporation.

Low v. C. P. R. R. Co., 52 Cal. 53.

STREET RAILROADS.

25. The act of 1870 (stats. 1869-70, p. 786), granting to city councils the power to authorize street railroads to be laid down in streets in a city, does not prohibit such councils, when there is one railroad track in a street, from granting the right to construct another in the same street.

O. R. R. Co. v. O. B. & F. V. R. R. Co., 45 Cal. 365.

26. While a street railroad company has a right to run its cars on a public street, yet the public have also a right to travel on the street, and the railroad company must exercise such care and precaution for the purpose of avoiding accidents and endangering property or person as a reasonable prudence would suggest.

Shea v. P. & B. V. R. R. Co., 44 Cal. 414.

27. A street railroad company has only an equal right with the **traveling public** to the use of the street where its track is laid, with a few exceptions, such as that the cars run on a track, and when a vehicle meets a car it must give way.

Id.

28. A person is entitled to walk on a street railroad track in a public street, using reasonable care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the **carelessness of the company**, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part.

Id.

29. The mere **consequential disadvantages** of a street railroad to a particular locality, and its consequential detriment to property along its line, can not be the subject of a private action, and such injury must be regarded as **damnum absque injuria**.

Carson v. C. R. R. Co., 35 Cal. 325.

30. If an act of the legislature grants the right to build a street railroad with the proper and necessary **switches and turnouts**, and a turnout and short side track are made from the main track towards and along the sidewalk, upon which the cars run for the purpose of standing until other cars pass and stop to allow passengers to make an exchange of cars, this is a switch and turnout within the meaning of the act, and the presumption is that it is a proper and necessary turnout.

Id.

31. When a company is authorized by law to construct a railroad in a public street, and necessary switches and turnouts, and the road is built having switches and turnouts, the presumption of law is that the switches and turnouts are necessary, and one complaining that they are a **nuisance** has cast upon him the burden of proving that they are so.

Id.

32. Where a street railroad company is authorized by law to build necessary switches and turnouts, and constructs them, a plaintiff who sues to abate a turnout as a nuisance can not introduce evidence of the damage he has sustained until he has first introduced evidence tending to show that the switch and turnout are not necessary.

Id.

33. If a party dedicates a public street through his land, and a railroad company afterwards procures a **condemnation of land** along the street for its track, and **damages** are awarded to him therefor, this is no reason why he should not be awarded further damages, to be paid by another railroad company, which seeks to build another track on the same street.

S. P. R. R. Co. v. Reed, 41 Cal. 256.

34. If the authorities of a city grant to a railroad company the right to lay its track along a public street, this grant does not preclude the owners of lots along the line of the street from recovering such damages as they sustain thereby.

Id.

35. A person who owns **lots fronting** on a street dedicated by himself to the public use, is entitled to damages, if a railroad company lays its track along the street, and by that means obstructs it for the use of teams and vehicles, and if the value of his lots is diminished thereby.

Id.

36. Under section 499 of the civil code, in no case may a street be occupied by **two railroads**, whether belonging to corporations or private persons, for a distance of more than five blocks; and an ordinance permitting is void.

People v. Rich, 54 Cal. 74.

37. The maintenance of a horse railroad on the streets of a city is a mere special mode of using the street, and does not exclude the public from the use of the street, nor prevent the crossing of its track by another railroad, provided the crossing is effected with as little damage as may be.

Market St. R. Co. v. C. R. Co., 51 Cal. 583.

38. If one street railroad company is occupying or using a street without proper license to do so, it is no concern of another railroad company having a railroad on the same street, but must be inquired into by proceedings on behalf of the public. Id.

39. A franchise conferred by the legislature on private persons, to construct a railroad track through the streets of a city, and to run cars thereon, and prescribing certain conditions to be performed by the grantees, is not a contract in such sense as to exempt the corporation operating the road from proper police regulations, or from taxation by the municipal authorities in cases authorized by law.

San Jose v. S. J. & S. P. R., 53 Cal. 475.

40. The fact that the railroad extends and cars are run beyond the corporate limits does not exempt the occupation from taxation by the municipality. Id.

SUBSIDIES TO RAILROADS.

41. A board of supervisors may call a special meeting for the purpose of calling an election to vote on the question of issuing the bonds of the county to a railroad company, to aid in the construction of a railroad, under the act of April 4, 1870, commonly known as the five per cent. act.

Cohlan v. Board of Supervisors, 50 Cal. 493.

42. Aid under said act may be voted and granted to a railroad company which is organized for and proposes to build a railroad between certain points, even if not incorporated until after the order has been made calling the election. Id.

43. Under said act, after a company has proposed to build a road upon a certain route, and the question has been submitted to the electors and they have voted to grant aid, and the board of supervisors has accepted the proposition and resolved to extend the aid, it may authorize the railroad company to deliver from the proposed line of road in part. Id.

44. If a subsidy in bonds is granted by a city to a railroad company to aid in the construction of a railroad from the city in the direction of another city, the bonds to be delivered when a certain number of miles of railroad are constructed, the company does not forfeit its right to the subsidy by the fact that it purchases and adopts as a part of its line a section of a railroad already con-

structed on a portion of the route on which the proposed railroad was to be built.

Stockton R. R. Co. v. Stockton, 51 Cal. 328.

45. If a subsidy in bonds is granted by a city to a railroad company, to aid in the construction of a railroad from said city through the county in which it lies, up the valley of a river in the direction of a town in another county which lies south of the city, the company does not forfeit the subsidy by the fact that the first few miles of a railroad runs east from the city, and then turns south, provided it is built in the valley of the river and in the direction of the town. Id.

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RECEIVER.

1. APPOINTMENT—JURISDICTION.
20. BONDS OF.
21. RIGHTS AND DUTIES OF.
33. VACATING ORDER OF APPOINTMENT—REMOVAL OF.

APPOINTMENT OF.

1. Under the statute, the county judge may grant an injunction in cases in the district court, but he can not appoint a receiver; at least, not a thing distinct from the injunction. *Ruthrauff v. Kresz*, 13 Cal. 639.

2. Courts of equity have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver. *Ex parte Cohen*, 5 Cal. 494.

3. The purchaser at judicial sale of a mining claim, may, where the judgment debtor remains in possession, working the mining claims, and is insolvent, have a receiver appointed to take charge of the proceeds, during the period allowed by the statute for redemption. *Hill v. Taylor*, 22 Cal. 191.

4. In proceedings supplementary to execution, the court may appoint when it has all the parties before it.

Hathaway v. Brady, 26 Cal. 581.

5. A court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any

breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation; hence, in this case, it was error in the court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Neall v. Hill*, 16 Cal. 145.

6. In this case it was error in the court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Id.*

7. Such decree necessarily results in the dissolution of the corporation, and would be doing indirectly what the court has no power to do directly. *Id.*

8. When the allegations of the bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver, the withdrawal of property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business. *Williamson v. Monroe*, 3 Cal. 383.

9. In a case where one partner has filed his bill for a dissolution of the partnership and the appointment of a receiver, it seems that until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and thereby gaining a preference.

Adams v. Hackett, 7 Cal. 187.

Adams v. Woods, 8 Id. 152; 9 Id. 24.

Naglee v. Lyman, 14 Id. 450.

10. Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time. *Adams v. Hackett*, 7 Cal. 187.

11. The transfer to a receiver by order of court of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the insolvent act of 1852, according to any decision of the supreme court, but only void against the claim of creditors.

Naglee v. Lyman, 14 Cal. 450.

12. After verdict and judgment for plaintiff, in an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it.

Whitney v. Buckman, 26 Cal. 447.

13. If notice is given of an application for

an **injunction**, and the petition prays for an injunction, the judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, and no objection is made on the ground of want of notice of the application. *Id.*

14. In an action to recover the possession of land, after verdict and judgment for the plaintiff, if the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed, pending the further litigation on motion for new trial. *Id.*

15. Under the provisions of the code of civil procedure, section 939, a direct appeal from an order made before judgment appointing a receiver is not allowed, nor is such an order subject to be reviewed upon an appeal from the final judgment. Such an order, if it is in excess of the jurisdiction of the court in which it is entered, is therefore subject to review under section 1068 of the code of civil procedure.

French Bank case, 53 Cal. 495.

16. The general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against the corporation by a private person, but such power, if it exist at all, must be derived from a statute conferring it upon the court. *Id.*

17. Section 564 of the code of civil procedure does not confer it. *Id.*

18. Under the code of civil procedure, the district court had no jurisdiction to appoint a receiver in an action of ejectment; and an order making such appointment should be annulled.

Bateman v. Superior Court, 54 Cal. 285.

19. Subdivision 6, of section 564 of the code of civil procedure, is but declaratory of the equity jurisdiction conferred upon the district courts by the former constitution, in giving them jurisdiction of "all cases in equity," and includes only the suits in which it has been the usage of courts of equity to appoint a receiver; their jurisdiction in this respect would have been the same in the absence of the statutory provision. *Id.*

BONDS OF.

20. Where plaintiff filed a bill in equity for the appointment of a receiver and other relief, and the court refused to appoint a receiver on condition that defendant file a bond to account as receiver, which defendant did, a judgment for twenty thousand dollars was rendered against defendant in this suit, and proper demand being made and refused, suit was brought by plaintiff on the bond, which was made payable to the people of the state

of California: *Held*, that the plaintiff could recover thereon. *Baker v. Bartol*, 7 Cal. 551.

RIGHTS AND DUTIES OF.

21. Receivers, or other custodians of money in the hands of a court, who are receivers except in name, as they are bound to obey the orders of the court in their relation to the fund, as well as regards its safe custody as its return, are correlatively entitled to the protection of the court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as a receiver, would have been justified in expending.

Adams v. Haskell, 6 Cal. 475.

22. An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with, or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership. *Id.*

23. And this, although the claim is for disbursements, etc., incurred by the custodian of the fund, under an appointment as assignee in a proceeding in insolvency, which was afterwards held to be void. *Id.*

24. Upon the application of the receiver, in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment creditor of the partnership.

Adams v. Hackett, 7 Cal. 187.

25. A fund in the possession of a receiver can only be distributed by the order of the court in whose custody it is, and no party can, by adverse proceedings, acquire a lien over it. *Id.*

26. A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the court thereon, he can appeal therefrom. *Adams v. Woods*, 8 Cal. 306.

27. In such a case it would only be necessary for the court below to order the receiver to retain the amount of the disputed items; and the interest of all parties concerned is better subserved by a single appeal upon the entire allowance. *Id.*

28. A receiver is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in custodia legis. *Id.*

29. In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff; and so is the employment of counsel by the receiver. Id.

30. Generally a receiver can pay out nothing except on order of court, but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects to obtain the order, especially in a court of equity.

Adams v. Woods, 15 Cal. 206.

31. Where a receiver was authorized, by order of the court appointing him, to prosecute suits for the recovery of assets of the estate he represents, and, certain important mercantile books belonging to such estate being lost, the receiver paid one thousand one hundred and twenty-seven dollars for their recovery, without an order of court: Held, that he was entitled to a credit for this sum as part of the necessary or appropriate expenditures of his office. Id.

32. On an application to the court, after final judgment, for an order for a receiver to pay over to the prevailing party money in his hands as receiver, it will not be presumed that the receiver has transcended his duties and took possession of property to which he was not entitled, nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands.

Whitney v. Buckman, 26 Cal. 447.

VACATING ORDER OF APPOINTMENT—REMOVAL OF.

33. On an appeal from an order made after final judgment, directing a receiver to pay over to the prevailing party moneys in his hands, the supreme court can not review the order appointing the receiver.

Whitney v. Buckman, 26 Cal. 447.

34. The appointment of a receiver rests in the sound discretion of the court upon a view of all the facts; one of which is, that the party asking the appointment should make out a *prima facie* case; and after an *ex parte* appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing.

Copper Hill M. Co. v. Spencer, 25 Cal. 11.

35. Where, pending an action, a receiver has been appointed, and on the trial judgment of nonsuit is rendered against the party at whose instance the receiver was appointed, a motion for a new trial suspends the operation of the judgment so as to prevent it from operating as a discharge of the receiver, unless an order is made discharging the receiver. Id.

36. The pendency of a motion for a new trial does not operate as a stay of proceed-

ings, so as to deprive the court of the power of vacating an order appointing a receiver made before the trial. Id.

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RECOGNIZANCE

SURETY, 7, 8.

RECORDER.

DEED, 141.

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RECORDER'S COURT.

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RECORDS.

37. The supreme court has no authority to correct the records in the lower courts. Applications to correct errors in the records of the district courts, if any exist, must be made in the lower courts.

Boston v. Haynes, 31 Cal. 107.

38. An error in the record of the proceedings of the supreme court can not be attacked collaterally, but should be brought seasonably to the notice of the court by a direct motion to correct it.

Wilson v. Broder, 24 Cal. 190.

ALTERATION, 1.

CRIMINAL LAW, 1257.

EVIDENCE, 281, 286-293.

MINE, 58-61.

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CHattel Mortgage, 34-37.	FORECLOSURE, 183-211.
EJECTMENT, 267, 268, 326.	MORTGAGE, 96, 97, 107, 111, 136, 200, 250, 287, 291.
EQUITY, 77.	TAXATION, 453-460.
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REFERENCE, AND TRIAL BY REFEREE.

1. ORDER OF REFERENCE.
- 28a. POWERS AND DUTIES OF REFEREES.
34. HEARING AND EVIDENCE.
42. FINDINGS OF REFEREE.
48. REPORT OF REFEREE.
66. OBJECTIONS TO REPORT.
70. CONFIRMING REPORT.
74. SETTING ASIDE REPORT.

ORDER OF REFERENCE.

1. An **order of court** is necessary to constitute a reference under the code, and no reference would be good, as such, without an order. *Heslep v. San Francisco*, 4 Cal. 1.

2. A **reference or arbitration** in which there is no order of court or agreement filed with the clerk or entered on the minutes, is a **voluntary withdrawal** of the case from the jurisdiction of the court, by which it loses all control over the case, and has no authority to enter judgment upon the finding, except by consent of parties. *Id.*

3. A **stipulation** to refer the whole matter, is a **waiver** of any objection that the motion for a new trial and to set aside the award was not made within the statute time. *Id.*

4. The whole issue in **divorce** cases can not, even by stipulation of parties, be referred; and where a reference is had, the referee can not pass upon the testimony. If he make any statement or finding of facts, the court is

obliged to disregard it, and base its decree only upon the legal testimony taken.

Baker v. Baker, 10 Cal. 527.

5. The court has no power, without the **consent** of the parties, to order a reference for the trial of any other issue of fact than that involved in the examination of an account in an equity case.

Williams v. Benton, 24 Cal. 424.

6. The court has no power, when either of the parties object, to order a reference, with directions to the referee to report a judgment. *Id.*

7. The court may order a reference in **equity cases** without consent of parties.

Smith v. Rowe, 4 Cal. 6.

Still v. Saunders, 8 Id. 261.

8. The **consent** of a party to an order of reference must be in writing, or entered on the minutes. *Smith v. Pollock*, 2 Cal. 92.

9. When this court decided in *Pollack v. Smith & Wilson*, that a reference could not be ordered without the consent of the parties, it intended that decision to apply to a case of common law, in which the party was entitled to a jury trial, and not to extend to cases in equity. *Smith v. Rowe*, 4 Cal. 6.

10. An order of reference can not be made without the consent of the adverse party.

Benham v. Rowe, 2 Cal. 261.

11. Where an entry upon the minutes recites that "the parties came by their attorneys, and defendant by his attorney moved the court that the cause be referred:" *Held*, that such reference was made on the appellant's motion, and in one of the modes pointed out by law, "by oral consent, in open court, entered on the minutes."

Bates v. Visher, 2 Cal. 355.

12. Defense, payment by a promissory note. Replication, that plaintiff was induced to receive the note by fraudulent representations: *Held*, that the case was not referable under the statute, without the **written consent** of both parties.

Seaman v. Mariani, 1 Cal. 336.

13. In an equity case, where the trial of an issue of fact is involved, requiring the examination of a long account on either side, the court may order a reference, with directions to the referee to report upon the **account**, or any issue of fact involved in the account. *Williams v. Benton*, 24 Cal. 424.

14. In an action to **dissolve a partnership** and obtain a settlement of the partnership accounts, the court has power to order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts; but it has no power, if objection is made, to order a reference of the trial of any other issue or issues in the case, nor to direct the referee to report a judgment. *Id.*

15. Where the taking of an account is re-

quired, it is in the discretion of the court to take the account, or to refer it to a commissioner or referee to state it.

Hidden v. Jordan, 28 Cal. 301.

16. The court may order a reference to ascertain the damages sustained by reason of an injunction issued without cause.

Russell v. Elliott, 2 Cal. 245.

17. A reference, with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid on the judgment.

Solomon v. Maguire, 29 Cal. 227.

18. If the order of reference fails to direct a return of the evidence to the court, the party objecting to the report must see that such testimony as he relies on is properly certified.

Goodrich v. Marysville, 5 Cal. 430.

19. An order of reference can not go beyond the pleadings of the parties.

Brauger v. Chevalier, 9 Cal. 353.

20. The appointment of referees in actions for partition is governed by the general provisions of the practice act, and can only be made upon the agreement of all the parties, except in cases falling within the provisions of section 183 of the act.

Hastings v. Cunningham, 35 Cal. 549.

21. It is erroneous for the court to order a reference for the purpose of trying all the issues in an action for partition, in which there is a party whose name is unknown, and whose consent can not, therefore, be procured; and all proceedings thereon must fall.

Id.

22. A court has no power to send an ordinary suit at law to a referee for trial against the objection of either party; and this, whether the suit requires the examination of a long account or not. And a statute authorizing a reference in such case would be unconstitutional.

Grim v. Norris, 19 Cal. 140.

23. Our statute, as to referring cases, applies solely to equity causes. The right of trial by jury in all common law actions is secured by the constitution of this state. *Id.*

24. In an action of law, the necessity of taking a long account will not authorize the court to refer the case without the consent of parties. *Id.*

25. And even if one of the parties subsequently waived his objection to the reference, that will not be sufficient. *Id.*

26. The court has no power, without the consent of the parties, to order a reference for the trial of any other issue of fact than

that involved in the examination of an account in an equity case.

Williams v. Benton, 24 Cal. 424.

27. The court has no power, where either of the parties object, to order a reference with directions to the referee to report a judgment. *Id.*

28. When the court has decided the principles upon which an account should be taken and settled, upon an order of reference, it is not competent for the referee to review the action of the court; but it is his duty to take the account in pursuance of the principles thus settled.

Smith v. Walker, 38 Cal. 385.

POWERS AND DUTIES OF REFEREES— TRIAL BY REFEREES.

Powers and Duties.

28a. Referees have no power to allow the parties to alter the pleadings after a case has been submitted to them.

De la Riva v. Berreyesa, 2 Cal. 195.

29. Under a reference to try the issues and report a judgment the referee can exercise all the powers of a judge in relation to the trial of the cause referred to him.

Plant v. Fleming, 20 Cal. 92.

30. The referee in divorce cases, under the statute, is simply a master to take testimony.

Baker v. Baker, 10 Cal. 527.

31. It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts.

Hihn v. Peck, 30 Cal. 280.

Smith v. Walker, 38 Cal. 385.

32. If the legislature had intended that referees should be sworn it would be presumed in this case that they were sworn, the contrary not appearing.

Sloan v. Smith, 3 Cal. 406.

33. The statute concerning references does not require that referees should be sworn. The imposition of an oath by the court would be of no effect, other than to put it in the power of the referee to commit a moral perjury, without becoming amenable at law. *Id.*

HEARING AND EVIDENCE.

34. A trial before a referee should be conducted in the same manner as before a court, and the evidence should be embodied in a bill of exceptions, and certified by the referee. *Goodrich v. Marysville*, 5 Cal. 430.

35. Trials before a referee are conducted in the same manner as before courts; and exceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a court; and such exceptions must be em-

bodied in the report of the referee, or made part thereof by his proper certificate.

Phelps v. Peabody, 7 Cal. 50.

36. Hearsay and irrelevant testimony should be excluded by referees.

De la Riva v. Berreyesa, 2 Cal. 195.

37. Referees should exclude items barred by the statute of limitations, if objected to.

Id.

38. Where a referee admits the testimony of a witness against the objection of the defendant, such testimony can not, after the case has been submitted, be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony.

Monson v. Cooke, 5 Cal. 436.

39. Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal.

Marziou v. Pioche, 10 Cal. 545.

40. If a conveyance is set aside at the suit of the grantor, because of his insanity at the time of its delivery, the account taken under the decree should include such property only as passed into the hands of the grantee under the transfer.

Crowther v. Rowlandson, 27 Cal. 376.

41. When the referee excludes proper or admits improper evidence, or does any other act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report.

Branger v. Chevalier, 9 Cal. 353.

FINDINGS OF REFEREE.

42. Finding of a referee conclusive as to the facts, on conflicting evidence.

Knowles v. Joost, 13 Cal. 620.

Muller v. Boggs, 25 Id. 179.

Peck v. Vanderberg, 30 Id. 11.

43. Where the record on appeal contains a report of a referee by whom the case was tried below, in which is a finding of the facts by him, and no statement on motion for new trial appears in the transcript, it will be presumed that the findings of the referee were based upon sufficient evidence.

Donahue v. Cromartie, 21 Cal. 80.

44. Where a cause is tried by a referee, and the testimony is conflicting, the supreme court will not disturb his findings of fact.

Muller v. Boggs, 25 Cal. 175.

45. A finding of facts by a referee that an alleged judgment more than five years old was properly entered, and is a good and valid judgment, does not support a judgment

reported by him, that the plaintiffs have execution on the judgment.

Solomon v. Maguire, 29 Cal. 227.

46. When the order of reference requires the referee to try the issues, and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect.

Id.

47. A case was submitted to a referee to find the interest of R., and the value of such interest, in a vessel and cargo. He found such interest and value in the ship, but not in the cargo, and reported that he was unable, for want of evidence, to find the value of R.'s interest in the cargo: Held, that this was equivalent, for the purpose of legal adjudication, to finding no value whatever.

Montfiori v. Engels, 3 Cal. 431.

REPORT OF REFEREE.

48. The report of a referee upon the facts of a case will be considered the same as the verdict of a jury.

Walton v. Minturn, 1 Cal. 362.

49. The report of a referee upon conflicting testimony must be treated in the light of a verdict of a jury, and will not be disturbed in this court upon an appeal from an order refusing to grant a new trial in the court below.

Kitchie v. Bradshaw, 5 Cal. 228.

50. The facts found in the report of a referee are conclusive in the absence of the testimony, or where the testimony is not properly brought before the court.

Goodrich v. Marysville, 5 Cal. 430.

51. The report of a referee, like the finding of a court, should state the facts found, and the conclusions of law thereupon.

Lambert v. Smith, 3 Cal. 408.

52. When the report of a referee found generally a sum of money for the plaintiff, without finding the facts out of which this finding arose: Held, that it was error.

Id.

53. The report of a referee can not be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial upon exceptions taken at the trial, or the evidence certified.

Goodrich v. Marysville, 5 Cal. 430.

54. The provision of section 187 of the practice act, as to the time within which a referee must file his report, is merely directory. A failure to file within the time will not invalidate the report or the judgment rendered thereon.

Keller v. Sutrick, 22 Cal. 471.

55. A jury was waived by the parties, and the case submitted to the court; the trial made some progress, when, on motion of plaintiff's attorney, the case was referred, "to ascertain the damages sustained by plaintiff:" Held, that the case having been

submitted to the court, it was the duty of the court to find upon the facts adduced by the parties, and not the facts presented in a referee's report.

Geeseka v. Brannan, 2 Cal. 517.

56. If a report of a referee under the statute contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with the report, so far as it concerns the matter referred; and it has no right to entertain any objection whatever.

Headley v. Reed, 2 Cal. 322.

57. The report of a referee under the statute has the same legal effect as the award of an arbitrator. *Id.*

58. Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles.

Tyson v. Wells, 2 Cal. 122.

59. The report of a referee, and the award of an arbitrator, are in all essentials the same.

Grayson v. Guild, 4 Cal. 122.

60. When a referee reports his decision upon the whole case, his report stands as the decision of the court; when he reports the facts only, his report is a special verdict.

Harris v. S. F. S. R., 41 Cal. 393.

61. When a collateral question, not made an issue by the pleadings, is referred to a referee, his finding of the facts does not take the place of a special verdict, as provided in section 187 of the code, and is not binding on the court until adopted by it. *Id.*

63. If a referee tries a collateral question, not made an issue of fact by the pleadings, his action thereon may be reviewed by the court, by exceptions to the report, without a motion for a new trial, and his report is not binding on the court until adopted by it. *Id.*

64. When a case has, by the stipulation of the parties, been referred to a referee, and he reports a judgment which is entered, and the court grants a new trial, it can not, without a new consent of the parties, again refer the case to the same or any other referee. Upon the report of the referee, and the entry of the judgment, the stipulation ceased to have further effect.

Daverkosen v. Kelley, 43 Cal. 477.

65. A referee appointed to try and determine a case is, *quoad* the trial of the case, in the place of the court, and his findings and report are the equivalent of the findings and decision of the court itself.

Thompson v. Patterson, 54 Cal. 542.

OBJECTIONS TO REPORT.

66. Errors in the report of a referee must be taken advantage of by written objections to entering judgment on it, or by a motion for a new trial. *Porter v. Barling*, 2 Cal. 72.

67. The supreme court will not review a

judgment entered on the report of a referee if no objection was made to the report in the court below. *Id.*

68. A report which is not made immediately after the close of the testimony, by the one hundred and ninety-first section of the practice act is deemed as excepted to.

Headley v. Reed, 2 Cal. 322.

69. A specification in an objection to the confirmation of the report of the commissioners appointed to estimate benefits and assess damages to lot-owners for widening Kearny street in San Francisco, that "the commissioners have assessed some lots far beyond, and others much below the proper sum," is too general to admit proof that a lot in which the objector had no interest was assessed relatively too low in comparison with another lot in which the objector has no interest. *Brooks v. Josepha*, 32 Cal. 559.

See sec. 63.

CONFIRMING REPORT.

70. Where a referee reported as facts the existence and validity of a judgment more than five years old, and also reported a judgment that execution issue on the same, but stated that he had not passed on the question whether the judgment had been paid by an alleged accord and satisfaction: *Held*, that an order of court confirming the report of the referee does not authorize the issuance of an execution on the judgment.

Solomon v. Maguire, 29 Cal. 227.

71. The decision of referees upon a question of fact will be regarded on appeal as conclusive as the verdict of a jury, and will not be interfered with.

Gunter v. Sanchez, 1 Cal. 45.

Walton v. Minturn, *Id.* 362.

72. A referee has no right to bring in and file an additional or amended report. Where such amended report is filed, the case will be reviewed with reference to the original report alone. *Headley v. Reed*, 2 Cal. 322.

73. The supreme court will not review the findings of a referee to ascertain whether they are contrary to the evidence, except on appeal from an order denying a new trial.

Peck v. Vandenberg, 30 Cal. 11.

SETTING ASIDE THE REPORT.

74. Failure to appear and prosecute a motion to set aside the report of a referee and for new trial, is an abandonment of motion, and the order made denying the motion for such failure to appear is not the subject of review on appeal.

Mahoney v. Wilson, 15 Cal. 42.

Frank v. Doane, *Id.* 302.

75. If the commissioner, to whom a case has been referred to take an account, commits an error at the threshold, which unsettles the account, the court is not bound to

go over the account and correct the error, but may set aside the report and again refer the case.

Hidden v. Jordan, 32 Cal. 397.
28 Id. 301.

76. A reference is a **substitution for a jury**; and a judgment should be had upon their report as upon a verdict, and a motion to set aside the report of referees is necessary before the appellate court be required to examine the report, and set the same aside.

Gunter v. Sanchez, 1 Cal. 45.

77. Court has power to **set aside report** of referee, and grant **new trial**, on the ground that the evidence before the referee did not justify his decision.

Cappe v. Brizzolara, 19 Cal. 607.

78. The provisions of the practice act relating to new trials are general, and vest in courts the same power in cases tried by a referee as in cases tried by the court itself, or by a jury.

Id.

79. If a referee tries a question of fact raised by the pleadings, the court can not review his action on such issues, unless a motion is made for a new trial.

Harris v. S. F. S. R. Co., 41 Cal. 393.

80. If there be no **exception** taken to the ruling of a referee, and the rule of law by which he arrived at his conclusions be not disclosed, the court can not disturb the report, and an order granting a new trial in such case will be reversed.

Tyson v. Wells, 2 Cal. 122.

Grayson v. Guild, 4 Id. 122.

Butte Co. v. Morgan, 19 Id. 609.

81. The court will not disturb the award of an arbitrator or report of a referee, unless the **error** complained of, whether of law or fact, appear on the face of the award or report.

Tyson v. Wells, 2 Cal. 122.

82. If there be no exceptions embodied in the report, showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions be not disclosed, the court can not disturb the report; and an order granting a new trial in such cases will be reversed.

Id.

Butte Co. v. Morgan, 19 Cal. 609.

83. The decision of a referee can only be set aside for **fraud** or **gross error** in law.

Headley v. Reed, 2 Cal. 322.

84. After the rendition of the judgment, the court may award a **new trial**, and set aside the report for any reason that would be sufficient to set aside the award of an arbitrator, and for no other.

Id.

85. **Judgment** is entered upon a report of referees as matter of course, and the only mode to take advantage of it is by **moving** to set it aside, as on motion for a **new trial**.

Sloan v. Smith, 3 Cal. 406.

86. When a case is referred to a referee under the statute to hear and determine the

issues of fact and of law, and report the same to the court, and he makes a report, on the face of which no errors of law or fact appear, or if there have been any, no exceptions have been taken before him to point them out, or to show that his decision was objected to, it is erroneous in the court below to set aside the report and grant a new trial.

Grayson v. Guild, 4 Cal. 122.

87. A court can interfere and set aside the report of a referee, upon the same ground as it will proceed to set aside the verdict of a jury.

McHenry v. Moore, 5 Cal. 90.

88. In a **suit in chancery** it is perfectly competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause.

Id.

89. Where there is a large mass of **contradictory evidence** reported, it will be presumed that the court below weighed the evidence properly, in setting aside the finding of the facts by the referee.

Id.

90. It is error for the court to set aside the report of a referee upon an examination of testimony which was not properly before it.

Goodrich v. Marysville, 5 Cal. 430.

91. If the order of reference fails to direct a return of the **evidence** to the court, the party objecting to the report must see that such testimony as he relies on is properly certified.

Id.

92. It would be a **gross abuse of discretion** for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge.

Id.

93. The decision of a referee upon a question of fact will not be set aside where the **evidence** upon such question is **conflicting**, and where the testimony of some of the witnesses, if credited, supports the finding.

Brady v. Brown, 20 Cal. 520.

94. A finding of fact by a referee will not be set aside where the evidence is conflicting.

Keeler v. Sutrick, 22 Cal. 471.

95. Though a **plea** would be **bad** upon demurrer, yet, if no objection be taken at the time, and the case be submitted to a referee, the defect of the plea is not sufficient reason to set aside the report.

Ritchie v. Davis, 5 Cal. 453.

96. When the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report, and for a new trial.

Branger v. Chevalier, 9 Cal. 353.

97. If a referee reports the facts upon all the issues but draws an **erroneous conclusion** of law from the facts found, and also

reports a judgment in accordance with his conclusions of law, the court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered. *Calderwood v. Peyser*, 31 Cal. 333.

98. The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend on the character of the reference; whether it be special, to report the facts, or general, to report upon the whole issue. *Peabody v. Phelps*, 9 Cal. 213.

99. In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the court, and judgment may be entered thereon, exceptions taken, and reviewed, as if the action had been tried by the court. *Id.*

100. Upon facts found, whether by report of the referee, or special verdict of a jury, the direct action of the court must be invoked before judgment can be entered. Hence, the time within which the notice of motion to set aside the report or verdict must be given should date from the filing of the report, or the rendition of the verdict. *Id.*

101. A mandamus lies to compel the judge of a district court to enter judgment on the report of a referee.

Russell v. Elliott, 2 Cal. 245.

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INJUNCTION, 271.	265, 278.
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MINES, 36-57.

REHEARING.

APPEAL, 61, 885, 896.	RULES OF COURT, 35-
REMITTITUR, 6.	44.

RELATION.

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RELEASE

1. A. sued B. & C. for forcible entry and detainer, and obtained judgment against them, with damages, and afterwards took a deed from B. for the premises, procured D. to indemnify B. against the judgment, and verbally promised not to prosecute B. on the judgment: *Hell*, that C. was thereby released from the judgment as to the damages.

Ransom v. Farrish, 4 Cal. 386.

2. A release of one joint debtor is a release of the others, but it must be a technical release under seal.

Armstrong v. Hayward, 6 Cal. 183.

3. A receipt given to one joint debtor on a note, for a part payment, coupled with the words, "which is in full on his part on the within note, and the said A. B. is hereby discharged from all obligation on the same," is not such a release as will discharge the others. *Id.*

4. Nor would the non-payment of the consideration expressed in the release affect the instrument as a valid release. The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action. See facts.

Paige v. O'Neal, 12 Cal. 483.

5. Where there is no estate in a releasee to support a release, or upon which it can operate, a release is void.

Branham v. San Jose, 24 Cal. 585.

6. A release, unless the releasee is in possession, is void. Id.

7. A **covenant not to sue** made to a portion of joint debtors does not release any of them. *Matthey v. Gally*, 4 Cal. 62.

8. The **second of a foreign bill** of exchange, drawn here, payable at sight, was presented to the drawee, and payment being refused, it was duly protested. Afterwards, and before suit was brought, the first bill of exchange was paid to the holder with interest and protest fees: *Held*, that the **drawer** was released from payment of damages for the dishonor of the second of exchange.

Page v. Warner, 4 Cal. 395.

9. A release of the **indorser** of a note by the indorsee, such indorsee being a secret partner of the maker, will not release the maker. *Tomlinson v. Spencer*, 5 Cal. 291.

10. Where a creditor of a corporation, by an instrument under seal, releases a **stockholder** from all **personal liability** for his debt, he thereby discharges the corporation, and other stockholders, to the same extent as the one to whom the release is executed.

Prince v. Lynch, 38 Cal. 528.

11. If the release be for the releasee's proportion of the indebtedness of the corporation, the company and the other stockholders are only released *pro tanto*. Id.

12. Such release will be sufficient to support the **plea of payment** made by a stockholder in an action against him for his proportion of the debts of the corporation, under the sixteenth section of the act concerning corporations, as amended by act of 1863. Id.

13. The entering of a **discharge** of a mortgage by the mortgagee does not of itself discharge the debt, but only the security. *Sherwood v. Dunbar*, 6 Cal. 54.

14. **Neglect to sue** a contractor for his breach of contract does not operate so as to release his sureties for subsequent breaches.

Sacramento v. Kirk, 7 Cal. 419.

15. A **voluntary release** of the property levied on by the plaintiff in execution could not revive the obligation on the mortgage given to secure the judgment.

People v. Chisholm, 8 Cal. 30.

16. A **part payment** of a demand of one of two debtors will not discharge such debtor making the payment from the payment of the balance. His obligation is to pay the whole. *Griffith v. Grogan*, 12 Cal. 317.

17. Where the **vendee** of a lot of wheat released his **vendor** from all damages, by reason of an implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. *Paige v. O'Neal*, 12 Cal. 496.

18. Nor would the **non-payment** of the

consideration expressed in the release affect the instrument as a valid release. The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action. Id.

19. If much time intervenes between **demand and notice**, in transfers after maturity of bills of exchange and promissory notes, the question may arise whether the delay has not released the indorser after maturity. *Thompson v. Williams*, 14 Cal. 160.

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REMITTITUR.

1. The court below can not refuse to give effect to the judgment of this court; and a judgment entered by the clerk, in such case, is just as binding as if entered in the supreme court itself.

McMillan v. Richards, 12 Cal. 467.

2. Where a case is appealed from the district court to the supreme court, and the supreme court reverses the judgment of the district court, and directs the entry of a final judgment, such judgment can be entered by the clerk of the district court in the vacation. Id.

3. The act of the clerk in entering the judgment is a mere **ministerial** act. Id.

4. The remittitur from this court is, by the direction of the three hundred and fifty-eighth section of the practice act, to be attached by the clerk of the district court to the judgment roll, and a minute of the judgment entered on the docket, against the original entry; the judgment of this court then stands as the judgment of the district court. If it award a new trial, the clerk will place the cause on the calendar; if costs, he will, on the application of the party, issue execution for the same.

Marysville v. Buchanan, 3 Cal. 212.

5. When a remittitur has been duly and regularly issued from the supreme court, and filed in the court below, and all the proceedings have been regular, the **supreme court loses all jurisdiction** over the case, and from that time can exercise no further control. *Rowland v. Kreyenhagen*, 24 Cal. 52.

6. If a petition for rehearing is deposited in an express office (the usual mode of conveyance), addressed to the clerk, in time to have reached him before the period for rehearing expires, and is delayed, or lost without fault of the attorney, so that it does not reach the clerk's office in time, and a remittitur issues, the remittitur will be recalled.

and the attorney will be allowed to file the petition. *Bernal v. Wade*, 46 Cal. 640.
See *De Baker v. Carillo*, 52 Cal. 473.

7. When a remittitur is improperly issued, the court still retains jurisdiction of the case, and the remittitur will be recalled.

Hanson v. McCue, 43 Cal. 178.

8. Where an order of the supreme court reverses an order of the district court, by which a judgment in a county court modifying a judgment in a justice's court, has been modified, and remands the cause with directions to vacate the judgment of the county court, the district court has power under the remittitur from the supreme court to do nothing further than to vacate the order of the county court; it can not render judgment for the defendant unless so expressly ordered by the supreme court.

Will v. Sinkwitz, 41 Cal. 588.

9. Where, in such a case, the district court renders judgment in accordance with the order of the supreme court, but the clerk of the district court uses an improper form in entering the judgment, by which the court is represented as dismissing the cause, the mistake of the clerk does not change the judgment; it is a clerical blunder. Id.

10. In the case stated, the result of the judgment of the supreme court was to leave the cause in the county court in the condition in which it stood when the papers were filed therein on appeal from the justice's court. Id.

11. Where an order of a superior court is filed in a county court, vacating a previous order of the latter court which modified a judgment in a justice's court, and the county court directs its previous order to be vacated in accordance with the decision of the superior court, it is error for the county court to grant a motion for judgment on the pleadings and the justice's record in the case, the motion having been made prior to its order vacating the previous judgment. Id.

12. In such a case, the annulling of the judgment of the county court makes a new trial of the cause indispensable. Id.

13. The district court has no authority to prevent the immediate execution of the judgment of this court so remitted.

Marysville v. Buchanan, 3 Cal. 212.

14. The judgment of this court upon appeal, and the costs consequent thereon, are final. Id.

15. The clerk of this court, in entering up the judgment, adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed. These words are a sufficient awarding of costs for the clerk of the court below to issue execution for the same. Id.

16. The court loses all control and ju-

isdiction over a case after the remittitur has been filed in the court below.

Blanc v. Bowman, 22 Cal. 23.

17. A motion, therefore, to vacate a judgment, on the ground that it was not rendered by the proper members of the court, can not be entertained after the remittitur has been filed below. Id.

18. District court has no power to modify judgment of supreme court.

Argenti v. San Francisco, 30 Cal. 458.
Meyer v. Kohn, 33 Id. 484.

19. When a remittitur is sent down, the clerk of the district court may issue execution for costs.

Mayor of Marysville v. Buchanan, 3 Cal. 212.
Affirmed in 20 Cal. 51.

20. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for the damages and costs.

McMillan v. Vischer, 14 Cal. 232.

21. The clerk of the court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum, and the costs of the clerk of the supreme court as certified by him on the remittitur. Ex parte Burrill, 24 Cal. 350.

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RESIDENCE.

1. The desertion of the husband entitles the wife to her own domicile.

Moffat v. Moffat, 5 Cal. 280.

2. The phrase "resident of this state," used in the second section of the homestead act, means an actual and not a constructive presence.

Rix v. McHenry, 7 Cal. 89.

3. A person who is domiciled in and has become a resident of a place does not lose his residence by going to and stopping at another place, not to reside there permanently, but only for a limited time.

Dow v. Gould & Curry M. Co., 31 Cal. 629.

4. The domicile of the husband is also the domicile of the wife.

Id.

5. The fact of the residence of defendant in a particular township is jurisdictional, but the practice act does not require its existence to be recorded in the justice's docket, or be made to appear in any written evidence of the proceedings in the action, nor does it provide in what manner such facts as are not required to be entered in the docket or other written proceeding, shall be made to appear or be proved: *Held, further*, that in such case it was error for the court to reject parole evidence that said defendant, at the time said action was commenced, resided in the township where it was commenced.

Jolly v. Foltz, 34 Cal. 321.

6. Such proffered evidence in no respect contradicted the docket, but on the contrary was entirely consistent with it and supported the judgment.

Id.

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LAW, 205, 263.PROBATE, 27.
STATUTE, 146.**RETURN.**

7. A sheriff's return is not traversable, and a court will not permit it to be attacked

collaterally, even if the officer is shown to have been guilty of **fraud and collusion**.

Egery v. Buchanan, 5 Cal. 56.

8. A sheriff failing to pay over money collected on execution, should be prosecuted for a **false return**. Id.

9. The return of an **attachment** can not be amended so as to postpone the **rights of creditors** attaching subsequently, but before the correction. Newhall v. Provost, 6 Cal. 87.

10. The **presumptions** are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient, *prima facie*, to show a due and proper execution of the writ.

Ritter v. Scannell, 11 Cal. 248.

11. The **title** of a purchaser of real estate on execution at sheriff's sale does not **depend upon** the return of the officer of the writ. Cloud v. El Dorado, 12 Cal. 133.

12. A sheriff, under his general powers, can not take anything but **legal currency** in satisfaction of an execution, and where he takes a note, indorses it on the execution, and then returns it satisfied, the return is not conclusive, and perhaps not *prima facie* evidence of satisfaction, unless it shows some authority for receiving the note.

Mitchell v. Hackett, 14 Cal. 661.

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143-145, 218.	SHERIFF, 42, 43.
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REVENUE STAMPS.

1. The act of congress to provide internal revenue, passed June 30, 1864, which provides that certain instruments, unless stamped in the manner therein required, shall not be "recorded or admitted, or used as evidence, in any court," etc., embraces only proceedings had and acts done in public offices and courts established under the constitution of the United States, and by authority of acts of congress framed in pursuance thereof. Duffy v. Hobson, 40 Cal. 240.

2. The waiver, by an indorser of a promissory note, of presentation, demand, notice of non-payment, and protest, written upon the back of the note, need not be stamped in order to be valid.

Pacific Bank v. De Ro, 37 Cal. 538.

REVIEW.

CERTIORARI, 7.

REVOCATION.

LICENSE, 26.
PROBATE, 203.

POWER OF ATTORNEY,
17, 44-51.

REWARD.

1. An agreement by one who has lost property by **fire or theft**, to pay a certain sum to any one who will secure the arrest and conviction of the criminal, is not a nude pact; but may be enforced by a person performing the service. Ryer v. Stockwell, 14 Cal. 134.

2. The **offer of a reward** or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a **conditional promise**; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until performance, the offer may be revoked at pleasure. Id.

3. Such **advertisements**, upon acceptance of their terms and performance of the service, become written contracts. Id.

4. Where the reward was for such **information** as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and conviction. The statute of limitations begins to run from that time, and the limitation would be for four years, as on a written contract. Id.

5. Where a reward is offered in the usual way in the **public newspapers** or by **hand-bills** for the arrest and delivery to the proper authorities of persons suspected of the crime, and a party accordingly arrests and delivers the persons suspected, who are tried and convicted: *Held*, that the demand for the amount of the reward is neither an "unliquidated demand," nor an "account," within the fourth section of the practice act; and hence, that the assignor of such demand is a competent witness for the assignee in suit against the persons offering the reward.

Rochester v. See Yup Co., 18 Cal. 413.

6. In an action brought to recover a reward which had been offered by the defendants for the arrest and conviction of the person guilty of a robbery, the **record of a con-**

viction of a person for the robbery is admissible in evidence to show a conviction, but not admissible to show that the person convicted was the robber.

Burke v. Wells Fargo & Co., 34 Cal. 60.

7. If a reward is offered for the **arrest and conviction** of a robber, and an arrest is made and conviction had, and the reward paid, and it turns out that the person arrested was not the robber, it is doubtful whether the persons offering the reward are liable for the subsequent arrest and conviction of the real robber. Id.

8. An offer, by a party who has been robbed, of a reward for the arrest and conviction of the robbers, is not earned by one who merely **communicates** to the party robbed his **suspicion** that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly towards him, and who does not claim the reward until after the arrest and conviction of the robbers. Id.

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RIGHT OF WAY.

1. Where a party uses a way over land belonging to another, by agreement with the owner of the land, and the land is sold to a third party without notice of the arrangement as to the right of way, the third party is not bound by the arrangement.

Barbour v. Pierce, 42 Cal. 657.

2. In order to maintain a right of way acquired by parol license, as against a purchaser from the one who gave the license, the one claiming such right of way must show a right based on prescription. Id.

3. The use of a way which began under a parol license, may, by prescription, ripen into a perfect title; but in such case the user must have been exercised under a claim of right for the period prescribed for the statute of limitations. Id.

4. A right of way over private lands for a road does not vest in the public until the land-owner has been paid or tendered the damages awarded or adjudged to him for the land taken. The recovery by the land-owner of a judgment for his damages does not authorize the public to remove his fences and open the road.

Brady v. Bronson, 45 Cal. 640.

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ROADS AND HIGHWAYS.

1. GENERAL PRINCIPLES.

10. OPENING ROADS.

18. CONDEMNING LAND—COMPENSATION.

30. INJUNCTION.

33. DEDICATION.

42. TURNPIKES.

57. TOLL ROADS.

65. LOCAL LAWS.

72. INJURIES TO ROADS.

GENERAL PRINCIPLES.

1. All that part of a **bay or river below low water or low tide** is a public highway, common to all citizens, and if any person appropriates it to himself exclusively, the **presumption** is that it is a detriment to the public. Gunter v. Geary, 1 Cal. 462.

2. The phrase "**private road**" is unknown to the common law. All "roads" are public. Sherman v. Buick, 32 Cal. 241.

3. Roads leading from the residences or farms of individuals to the main road which runs through the country, called in the statute "**private roads**," are of public concern, and under the control of the government, and are open to every one who may have occasion to use them, and are therefore public roads. Id.

4. A person through whose lands a proposed road will pass is beneficially interested, and is a proper **party to contest the legality of the proceedings** for the establishment of the road.

Danrell v. San Joaquin Co., 40 Cal. 154.

5. The **viewers** of a road, appointed under the act of April 19, 1859, must view and mark out the line of the road as proposed in the application, and state the probable cost of its construction, and must also give notice to the owners of the land through which the proposed road will pass, of the time and place of the meeting of the viewers, in accordance with the provisions of the act. Id.

6. The application must state that the proposed road will be located within some portion of the county in which the application is made. Id.

7. The provisions of the San Mateo county road law (stats. 1867-8, p. 283), in reference to the notice to be given of a proposed alteration of a public road, and requiring persons claiming compensation for land to be taken to present their claims within a certain time, or be deemed as waiving all right to dam-

ages, do not violate section 8 of article I of the constitution. *Potter v. Ames*, 43 Cal. 75.

8. Where a statute for the alteration of a public road required as a preliminary, the publication of a notice stating, with particularity, the starting point, and the course and terminus of the proposed alteration, and that those claiming compensation for land to be taken should present their claims within a certain time thereafter, or be barred (stats. 1867-8, p. 283): *Held*, that a notice of an alteration to run northerly from one point to another, "over the most practicable route for a road," was insufficient. *Id.*

9. Where a public road in San Mateo county was altered, and the owner of land taken therefor brought suit against the township trustees for damages, *quare clausum fregit*, and it appeared on the trial, and the court found, that the notice of the proposed alteration required by law (stats. 1867-8, p. 283) was such that the plaintiff could not ascertain therefrom the amount and character of his land which would be affected by the proceedings, and that his damages, if such notice was insufficient to authorize the alteration, amounted to five hundred dollars: *Held*, that plaintiff was entitled to judgment on the findings for that amount. *Id.*

OPENING ROADS.

10. An order of a board of supervisors laying out a road, which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law. *Leach v. Day*, 27 Cal. 643.

11. Whether a given road will subserve the public need or convenience is a question for the government alone to determine. The courts have nothing to do with it. *Sherman v. Buick*, 32 Cal. 241.

12. If an applicant for damages for laying out a road refuses to accept the sum awarded him by the road viewers, and commences suit in the district court, the public do not acquire a right of way until the damages are ascertained in the suit, and a final judgment is rendered thereon, and the damages are paid or provided to be paid. *Grigsby v. Burnett*, 31 Cal. 406.

13. Until the question is finally settled as to the amount of damages a person is entitled to for opening a road over his land, and the money is paid or provided to be paid, neither the supervisors nor the road master can remove the fences or open the road. *Id.*

14. Where lots are sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant, and vests in the grantee in common

with the public the right of way over the same. *Kittle v. Pfeiffer*, 22 Cal. 484.

15. If a statute for opening public roads requires a petition for opening the road to be filed with the board of supervisors, and the board to appoint viewers, who are to view the proposed location, and decide whether such proposed location is required for the public convenience, and report the same to the board, the viewers must concur with the petitioners as to the location of the entire road petitioned for, or the board of supervisors have no jurisdiction to act. If the viewers report in favor of the location of a part only of the road petitioned for, the board of supervisors have no jurisdiction to open such part.

Brannan v. Mecklenburg, 49 Cal. 672.

16. An administrator, as such, has no power to bind the heirs by consenting to a proceeding under the provisions of the political code for laying out a highway over the lands of the estate, by which such heirs are divested of their estate in the lands.

People v. Turley, 50 Cal. 471.

17. The consent of an administrator to the laying out and opening a highway under the provisions of the political code across the land of the estate, confers no right and is void. *Id.*

See secs. 5, 6, 8.

CONDEMNATION OF LANDS, AND COMPENSATION FOR.

18. Where the compensation for land taken by a county for public use, as for a road, does not precede or accompany the taking, the entire action of the county authorities is void.

Johnson v. Alameda Co., 14 Cal. 106.

19. A suit, in such case, against the county for the compensation, does not lie. *Id.*

20. It is competent for the legislature to fix the mode of condemnation of land for public highways, and the method by which damages shall be ascertained, and the proceedings to be had for their recovery, and as strict a compliance with the act is required by those claiming damages as by the public making the condemnation.

Lincoln v. Colusa Co., 28 Cal. 662.

21. A statute for the condemnation of the land owned by individuals for road purposes, which fails to provide a method of ascertaining the compensation to be paid to the owner, and the way and means of paying the same before the road is opened, is unconstitutional. *Curran v. Shattuck*, 24 Cal. 427.

22. The tender of the money awarded by the road viewers to an applicant for damages for opening a road does not give a

right to open the road if the applicant sues to recover his damages.

Grigsby v. Burtnett, 31 Cal. 406.

23. A person through whose land a road has been projected, in accordance with the provisions of the road law of 1861, and who presents his claim for damage to the road viewers, must thenceforward pursue the remedy pointed out by that statute, by either accepting the award of the viewers, agreeing with the board of supervisors, or commencing within the time limited an action against the county. By neglecting to follow the **statutory remedy**, he waives his claims and is barred from bringing any action for damages.

Harper v. Richardson, 22 Cal. 251.

24. A law providing for opening a road from the farm or residence of A., across the land of B., to a main road leading through the country, upon just compensation being made, does not have the effect of taking the private property of B. and applying it to the private use of A.

Sherman v. Buick, 32 Cal. 241.

25. In proceeding by a board of supervisors to take private land for a public highway, an **appearance** before the board of one of the persons whose land is about to be taken, is a waiver of **service of notice** upon such person.

Kimball v. Supervisors, 46 Cal. 19.

26. **Boards of supervisors**, if authorized by law, may exercise the judicial powers necessary to be called into exercise in taking private lands for public highways, and the exercise of such powers is not repugnant to that clause in the constitution which declares that private property shall not be taken for public use without due process of law. **Id.**

27. The statute devolves upon boards of supervisors the management and control of bridges in their respective counties, and upon road overseers of the county the duty of keeping bridges on the public highway in repair; and if any remedy exists for injuries resulting from neglect to keep such bridges in repair, it must be sought against the road overseers or supervisors personally.

Huffman v. San Joaquin Co., 21 Cal. 456.

28. The relation between a county and its **road overseer** bears no resemblance to that of master and servant, nor to that of employer and employee.

Crowell v. Sonoma Co., 25 Cal. 313.

29. The levy upon and **sale of a road**, by virtue of an execution, gives to the purchaser no right or title to the same; for, being the property of the public, the defendant in the execution has no interest therein which can be conveyed by the officer.

Wood v. Truckee T. Co., 24 Cal. 474.

See secs. 9, 12, 13.

See **EMINENT DOMAIN**.

INJUNCTION.

30. Injunction is the proper remedy to stay a threatened injury to a right of way.

Kittle v. Pfeiffer, 22 Cal. 484.

31. Where the statute under which proceedings for the condemnation of land for road purposes is taken is unconstitutional, or its provisions are not strictly pursued, or notice is not given to the owner of the land, or the compensation is not tendered to him, a perpetual injunction against opening the road will be granted.

Curran v. Shattuck, 24 Cal. 427.

32. Where all the proceedings required by law have been taken to condemn land for a public highway, and the damages to the owner have been assessed, and a warrant, drawn by the auditor on the treasurer of the county for the amount of the damages has been tendered to the owner of the land, but refused by him, a court of equity will not enjoin the road overseer from tearing down the fences and opening the highway for the public.

Creanor v. Nelson, 23 Cal. 464.

DEDICATION OF.

33. A dedication of land to the public use as a street or highway may be made by **deed or other overt act**, or may be presumed from the lapse of time or acquiescence of the party.

San Francisco v. Scott, 4 Cal. 114.

34. Where there is no abandonment or dedication of the land, the use for a limited time by the public can not fairly raise the **presumption** of a dedication. **Id.**

35. To constitute a dedication of land for the purposes of a **rural highway**, no particular formality is necessary. The intention on the part of the owner to so dedicate is the vital question.

Harding v. Jasper, 14 Cal. 642.

36. Dedication is a **conclusion of fact** to be drawn by the jury from the circumstances of each case. And the *quantum* and kind of evidence of the intention to dedicate depend somewhat upon the peculiar circumstances of the country. **Id.**

37. This **intention** may be manifested with or without writing, by any act of the owner, as throwing open his land to public travel, platting it and selling lots bounded by streets designated on the plat, or acquiescence in the use of land as a highway; and, hence, time is not an essential ingredient to the act of dedication. **Id.**

38. **Time**, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If the soil be accepted and used by the public in the manner intended by the owner, the dedication is complete, precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. **Id.**

39. Stronger proof of dedication is required in cases of roads in the country than in cases of streets or lands in a town or city. Id.

40. Where a portion of land claimed under a Mexican grant, being uninclosed and waste, has been used as a road for public travel for a series of years, pending proceedings by the claimant for confirmation of his grant, the land being for the most part in the actual occupation of settlers, and the claimant being aware that the land was so used, and not objecting to it: *Held*, that this does not constitute a dedication of the land used as a road to public use; that, the land being in litigation between the government and claimant, both as to the right and the boundaries, the claimant had a right to wait, under the statute, until after a patent issued, without prejudice to his right of action by lapse of time; that he was not bound to fence in the whole land to rebut the presumption of dedication of a small part. Id.

41. An order of the board of supervisors of a county, that "all roads now traveled by wagons and pack mules within the limits of the county be, and the same are, hereby declared public highways," though not valid as transferring the title of the land to the public, still may be good evidence, in connection with other proof, to show a control on the part of the county over a road as a public highway, and a knowledge of such control on the part of the owners of the land, and thus to furnish a circumstance from which a dedication may be inferred. Id.

TURNPIKES.

42. If a corporation has constructed a turnpike road for the purpose of collecting tolls from travelers, and the board of supervisors has once fixed the rates of toll, a person who, as the agent of the company, demands and receives toll, is a "toll gatherer" within the purview of section 518 of the civil code, which fixes a penalty for demanding or receiving too much toll, even if more than one year has elapsed since the rates of toll were fixed.

Brown v. Rice, 51 Cal. 489.

43. The directors of a corporation formed for the construction of plank or turnpike roads are not vested with any power by the statute until the stockholders have adopted by-laws defining their powers, and the same have been filed in the recorder's office.

Hall v. Crandall, 29 Cal. 567.

44. An order of the board of supervisors authorizing the directors of such corporation to establish toll-gates at such places as the directors may designate, does not confer on the corporation the franchise to collect tolls.

Waterloo T. R. Co. v. Cole, 51 Cal. 381.

45. In such case, a person traveling on

the road may defend successfully in an action brought against him to collect the tolls. Id.

46. A promise made by one who has traveled on a turnpike road to pay tolls, is *nudum pactum* if the promisor was under no obligation to pay the tolls. Id.

47. Under the act of May 12, 1853, for the incorporation of turnpike road companies, it is competent for a majority of the stockholders, assembled in stockholders' meeting, to authorize the board of directors to execute a promissory note of the company; but if a note is executed by the board of directors without such authority, a subsequent resolution adopted by a majority of the stockholders levying an assessment to pay the note, is a ratification, and makes the note the note of the company.

Forbes v. San Rafael T. Co., 50 Cal. 340.

48. It requires the vote of two thirds of the stockholders of a turnpike company to enable the board of directors to mortgage the property of the company, and if, without such vote, a mortgage is given, it requires a two third vote to ratify it. The facts, that by a majority vote of the stockholders an assessment is levied to pay the mortgage, and that two thirds of the stockholders pay the assessment, do not prove a ratification. Id.

49. A promissory note of a turnpike company is not void because made before it has filed a copy of its by-laws with the county recorder. Id.

50. Corporations organized for the construction of a plank or turnpike road can not acquire or hold lands, or the possessory right thereto, or any interest therein, beyond the easement or right of way over the same.

Wood v. Truckee T. Co., 24 Cal. 474.

51. A corporation organized for the purpose of building a turnpike road and collecting tolls thereon must have the number and location of its toll-gates fixed by an order of the board of supervisors of the county; and in the absence of such order it has no power to collect tolls, even if the board of supervisors fixes the rates of toll.

Waterloo T. R. Co. v. Cole, 51 Cal. 381.

52. Corporations for the construction of turnpike roads can hold only such real estate as the purposes of the corporation may require.

Coleman v. S. R. T. R. Co., 49 Cal. 517.

53. Although the act for the formation of plank and turnpike road companies denominates companies which may be formed under its provisions "joint stock companies," still the powers, rights, and liabilities of these companies, as provided for in the act, show that they are corporations.

Blanchard v. Kaull, 44 Cal. 440.

54. If a plank and turnpike road company effects a preliminary organization and adopts a code of by-laws, and in good faith thereafter acts as a corporation, it becomes a **corporation de facto**, although a final organization is not effected.

S. & L. G. R. Co. v. S. & C. R. Co., 45 Cal. 680.

55. If a corporation *de facto* is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere **trespasser** can not justify his entry thereon on the ground that it was only a corporation *de facto*, and was not *de jure* entitled to the franchise. *Id.*

56. A mere intruder upon the property of a corporation *de facto* can not inquire into its right as a corporation to hold such property. *Id.*

TOLL ROADS.

57. The state does not possess the exclusive authority to construct a road over the public domain, or over any land within the state; but any person who can procure from the land-holder a right of way, may construct and maintain a road.

Bartram v. Central T. Co., 25 Cal. 283.

58. The right to collect tolls on a road when constructed is a **franchise**, and can not be exercised except it be granted by the legislature or some branch of the government vested by the legislature with the power to grant the franchise. *Id.*

59. The grant of a franchise to collect tolls on a particular road does not, by implication, prohibit the construction of roads parallel to the one vested with the franchise. *Id.*

60. Every traveler has the same right to use the road of a turnpike company upon paying the toll established by law that he has to use any other public highway.

Wood v. Truckee T. Co., 24 Cal. 474.

61. The road of a turnpike company is not the **private property** of the company, but belongs to the public, and all the interest the company has in it is the right and power to collect tolls on the line of the road as a compensation for building it. *Id.*

62. A board of **supervisors of a county** have no authority to convert a public highway into a toll road, and to grant to an individual the right to collect tolls of persons traveling on the same.

El Dorado Co. v. Davison, 30 Cal. 520.

63. The grant by a board of supervisors to an individual of a right to collect **tolls on a public road** is a grant to do an illegal act. *Id.*

64. If the owner of land used and occupied by another as a toll road is excluded from the same unless he pays toll and then

is allowed to use it only for the purpose of passing over it, the exclusion is a **disseisin**.

Mahan v. San Rafael T. R. Co., 49 Cal. 269.
Sec. sec. 29.

LOCAL LAWS.

65. The effect of the proviso in the twelfth section of the act of 1860, concerning roads and highways in the counties of **Humboldt, Napa and Siskiyou**, is to limit the power of contracting, in reference to roads and highways, to the mode there pointed out; and this limitation applies as well to the **board of supervisors** as to the **overseer**; and a contract made in any other manner is not binding upon the county.

Murphy v. Napa Co., 20 Cal. 497.

66. The plaintiff proved that he did work and furnished materials for repairing a public bridge in **Napa county**, at the request of the board of supervisors of the county, and that the board promised to pay him for the same; but he neither proved nor attempted to prove a **compliance with the statute** of 1860 in awarding the contract: *Hehl*, that he was properly nonsuited at the trial. *Id.*

67. There is nothing contained in the act of 1857, submitting to the people of Sacramento and El Dorado counties a proposition to appropriate money for the construction of a wagon road from Sacramento county, through El Dorado county, to Carson valley, or in the acts amendatory thereof, which gives to the two counties, or either of them, the exclusive right to construct or maintain a road along the intended route; nor does the act of 1862, authorizing the board of supervisors of **El Dorado county** to lease said road, grant to El Dorado county or the lessee such exclusive right.

Bartram v. Central T. Co., 25 Cal. 283.

68. The provisions of the act of 1861, entitled "an act to provide for the establishment, maintenance, and protection of public and private roads," apply to the **county of San Mateo**. Perry v. Ames, 26 Cal. 372.

69. The prohibitory provisions of the ninth and tenth sections of the act of April 18, 1857, entitled "an act to reorganize and establish the county of San Mateo," are inconsistent with and repugnant to the fifteenth section of the act of 1861, entitled "an act to provide for the establishment, maintenance, and protection of public and private roads, and are repealed by it as to the subject-matter of the act of 1861. *Id.*

70. The act of March 24, 1863, entitled "an act to allow James E. Nuttman, Marcus Harlow, and their associates or assigns, to construct a toll road in the county of **San Mateo**," does not confer upon said Nuttman and Harlow, and their associates or assigns, the right to appropriate the county road

then in use in San Mateo county to their use and purposes for such toll road.

Mahoney v. Nuttman, 27 Cal. 342.

71. The act for opening roads in Santa Clara county provides for compensation to be made for the land taken for the road.

Sherman v. Buick, 32 Cal. 241.

INJURIES TO ROADS.

72. The use of a public highway for storing merchandise is not the use of the same as a public easement, and the persons who thus use it are trespassers.

Coburn v. Ames, 52 Cal. 385.

73. The owner of the fee of the land, subject to an easement over the same for a public highway, may maintain ejectment against an intruder who takes possession of it and uses it for other than road purposes. Id.

74. The owner of the fee of the land over which a public road has been established may, if he suffers special damage from an obstruction of the same, beyond that suffered by the public, maintain an action for damages, and to abate the nuisance. Id.

CONST. LAW, 127, 254.
CORPORATION, 41, 42,
146, 180, 185.
ESTRAYS, 2.
EVIDENCE, 687.
EXECUTIONS, 96.

FRANCHISE, 1.
HUMBOLDT CO., 5.
MANDATE, 50, 147.
NUISANCE, 32-35, 56.
PLEADING, 1420.
SUBPENA, 23.

ROBBERY.

CRIMINAL LAW, 186, 439.

RULES OF COURT.

1. IN GENERAL.

14. RULES OF SUPREME COURT.

IN GENERAL.

1. A rule of court which deprives a party of a statutory right is void.

People v. McClellan, 31 Cal. 101.

2. Parties have no unqualified right to stipulate for the abrogation of rules prescribed by this court.

Reynolds v. Lawrence, 15 Cal. 359.

3. Rules adopted by a court are always under its control, and if there is any reason to apprehend that they will work injustice if strictly adhered to, they should be made to yield to the superior calls of justice.

People v. Williams, 32 Cal. 280.

4. The court, equally with suitors, is

bound by its rules, and they must be construed as statutes would be construed.

Hanson v. McCue, 43 Cal. 178.

5. The appellate court will not presume what are the rules of the court below when they are not in the record.

Warden v. Mendocino Co., 32 Cal. 655.

6. A rule of a district court, requiring a party, on motion for a new trial, or for judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery cause.

Purcell v. McKune, 14 Cal. 230.

7. If there is a rule of the district court requiring instructions to be handed to the judge by a certain time in the progress of the trial, it is not error for the court to refuse to give instructions not handed to the judge in time. Waldie v. Doll, 29 Cal. 555.

8. A rule of court which requires each counsel to submit such instructions as he intends to ask, to the opposite counsel, before his final argument, under the penalty of having the same refused, may in many cases work injustice if strictly adhered to.

People v. Williams, 32 Cal. 289.

9. Instructions upon a material point in a criminal case should not be refused because not submitted to the opposing counsel before his final argument in obedience to a rule of court requiring it to be done. Id.

10. When a rule of court requiring counsel to file and submit to the court any instructions they may offer before the argument is closed, to the jury, does not operate where the cause is submitted without argument. Tinney v. Endicott, 5 Cal. 102.

11. Courts have the right to make a rule in criminal cases, that written instructions must be handed to the court before the argument of the case commences.

People v. Sears, 18 Cal. 635.

12. The supreme court does not take judicial notice of the rules of the district courts. When a party relies on such rules he should have them incorporated in the record. Cutter v. Caruthers, 43 Cal. 178.

13. Rules of court are but a means to accomplish the ends of justice; and it is always in the power of a court to suspend its own rules; or to except a particular case from their operation, whenever the purposes of justice require it.

Pickett v. Wallace, 54 Cal. 147.

RULES OF SUPREME COURT.

Reinstating Cases.

14. The supreme court has the power, under its rules, to reinstate cases which have been dismissed at a previous term.

Haight v. Gay, 8 Cal. 297.

15. An appeal, which had been dismissed

for failure to file the transcript in time, was reinstated upon cause shown.

Stark v. Barnes, 2 Cal. 162.

16. Where an appeal has been dismissed by reason of the failure of the appellant to file the transcript of the record in the supreme court within the time required by the rules, the order of dismissal will not be vacated and the appeal restored, unless the appellant shall make it appear, not only that there has been no want of diligence on his part, but also shall show that, at least in the opinion of his counsel, the appeal has been taken in good faith, and that there are substantial errors in the record which ought to be corrected by the supreme court.

Hagar v. Mead, 25 Cal. 599.

Clerk's Fees.

17. When an appeal is dismissed upon a certificate filed in accordance with rule 4 of the supreme court, the same fees must be paid as when a transcript is filed.

Bolander v. Gentry, 36 Cal. 105, 127.

Original Transcript.

18. The justices of the supreme court do not take from the clerk's office, or examine, the original transcript, unless it contains the only copy of a map or survey.

Franklin v. Goodman, 31 Cal. 458.

Transcript—Certificate and Service.

19. Rule 9 of the supreme court is in harmony with the three hundred and forty-sixth section of the practice act, as amended in 1864.

Estate of Boyd, 25 Cal. 511.

20. The object of the rule allowing attorneys to stipulate to the correctness of a transcript, was to enable the attorney for the appellant, with the consent of the opposite attorney, to make up the record, and omit all useless and superfluous matter, and thereby save expense, and facilitate the examination, and hasten the decision of causes. *Id.*

21. The failure of the attorney for appellant to serve a copy of the transcript upon the attorney for respondent before or at the time of filing is not a ground for dismissing the appeal, if reasonable diligence is used; but the respondent may object to a hearing at the first term, if service is not made in time for him to prepare for argument. *Id.*

22. When the appellant prints the transcript, service should be made before or at the time of filing, and when sent to the clerk to be printed, the appellant should direct the clerk to forward him copies, as soon as printed, for service. *Id.*

Dismissal of Appeal, etc.

23. Where the record contains a stipulation that there is no error therein to the prej-

udice of the appellants, provided the title to the whole of a tract of land did not pass by a certain deed in controversy, and the case is argued by appellant's counsel on that theory in his opening brief, and the court holds that the title to the whole tract did not pass, it will not notice other alleged errors on petition for rehearing.

Hihn v. Courtis, 31 Cal. 398.

24. On motion to dismiss an appeal on the ground that an undertaking on appeal is not shown by the transcript to have been filed, the appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking to the appellate court.

Wakeman v. Coleman, 28 Cal. 58.

Defects in Transcript.

25. Appeal dismissed under peculiar state of facts.

Lynch v. Dunn, 34 Cal. 518.

26. The objection that the transcript does not contain all that is required by the thirty-fourth section of the practice act must be made before the argument, so that appellant may have an opportunity of supplying the missing papers. *Solomon v. Reese*, 34 Cal. 28.

Death of Party.

27. The death of an appellant after the argument of his case on appeal does not constitute any ground for delaying a decision or departing from the ordinary course of procedure, except as to the entry of judgment which may be rendered. The entry should be a day anterior to the appellant's death.

Black v. Shaw, 20 Cal. 68.

28. The rule is different if the death occurs previous to the argument; in that event further proceedings can only be had upon leave given after suggestion of the death is made. *Id.*

29. Where, after the death of the appellant, the appellate court, not being aware of the death, rendered a judgment of affirmance, upon subsequent suggestion of the fact the judgment will be vacated and a judgment of affirmance rendered as of a day previous to the death, *nunc pro tunc*. *Id.*

Placing Cause on Calendar.

30. A party moving under rule 15, to place a cause on the calendar for failure to comply with rule 2 as to filing briefs, must show the opposite party was in default at the time the calendar was to be made up.

Himmelman v. Haskell, 45 Cal. 269.

Appellants' Points.

31. Points upon which the appellant relies to reverse the judgment should be made in his opening brief.

Hihn v. Courtis, 31 Cal. 398.

32. Where a cause is submitted on briefs to be filed in a specified time, and no briefs are filed within the time, and the transcript contains no assignment of error, the judgment will be affirmed.

Hickinbotham v. Monroe, 28 Cal. 489.

Holm v. Roach, 25 Id. 37.

Edmondson v. Alameda Co., 24 Id. 349.

33. When an appeal is taken on the judgment roll alone, and no statement is made, a specification of grounds of error is not required to be inserted in the transcript. But when the court comes to examine the case, and no brief or statement of points and authority has been furnished by the appellant as required by rule 17, the judgment will be affirmed without examination.

Hutton v. Reed, 25 Cal. 478.

Limiting Argument of Counsel.

34. The establishment and enforcement of rules limiting the argument of counsel to a certain time, are matters resting in the sound discretion of the court, and unless it appear that injustice has thereby been done, form no ground of appeal.

People v. Tockchew, 6 Cal. 636.

Rehearings.

35. This court may, after its judgment has been pronounced, direct a rehearing at any time before the remittitur has been sent to and filed in the clerk's office of the court below; after that has been done, the jurisdiction of this court to order a rehearing ceases: but *held*, that after an order had been made granting the rehearing, and the remittitur was filed with the court below, the jurisdiction to reconsider the cause was not taken away. Grogan v. Ruckle, 1 Cal. 193.

36. On a rehearing a party will not be permitted to raise any point which was not urged on the first argument. Id.

37. Hereafter, the rule is established that rehearings will not be granted with the same indulgence as formerly.

Andrews v. Mok. Hill Co., 7 Cal. 330.

38. A refusal to give an instruction can not be urged as error for the first time on a petition for rehearing in the supreme court. Payne v. Treadwell, 16 Cal. 220.

39. The employment of new counsel, after decision rendered, is no ground for an extension of the time prescribed by the rules of the court for filing a petition for a rehearing. Ferris v. Coover, 10 Cal. 589.

40. A cause can not be reheard in the supreme court on application of counsel, except upon petition filed, and the party applying for the rehearing should include in his petition all the grounds upon which the rehearing is claimed, and those not included are deemed waived.

Willson v. Broder, 24 Cal. 190.

41. An equal division of the justices of the supreme court upon the question of granting a rehearing is a denial for the rehearing asked for.

Ayres v. Bensley, 32 Cal. 632.

42. Where a cause in the supreme court is submitted on briefs, the order of submission providing that a copy of the briefs be served on the opposite party, he to have a certain time thereafter to answer, and no copy is served, and the court decides the case against him without any brief on his part, a rehearing will be granted on his application without reference to the merits of the case. Patterson v. Ely, 19 Cal. 23.

43. It is not the practice of the supreme court to make a material modification of the judgment rendered by that court on a petition for rehearing, but if made at all, it is to be done after a hearing is granted.

Argenti v. San Francisco, 30 Cal. 458.

44. Counsel should state all the points on which they rely in their briefs; and if they fail to do so, and reserve points to be urged in a petition for a rehearing after a decision of the case, a rehearing will not be granted. Dougherty v. Henarie, 49 Cal. 686.

Remittitur.

45. The presiding judge of the highest court in a state has no power to grant a stay of proceedings on a judgment rendered in that court until an application can be made to some justice of the supreme court of the United States to issue a citation on a writ of error. Greely v. Townsend, 25 Cal. 605.

46. A remittitur will not be recalled on the ground that before it was issued a petition for a rehearing had been forwarded to the clerk, but had failed to reach him through excusable neglect, if upon an examination of the petition it appears that a rehearing would not be granted.

De Baker v. Carillo, 52 Cal. 473.

See Bernal v. Wade, 46 Cal. 640.

See REMITTITUR.

SACRAMENTO.

1. LOCATION.

3. INCORPORATION, POWERS OF.

5. OFFICERS—POWERS, RIGHTS, AND DUTIES.

22. FLOATING DEBT.

30. MISCELLANEOUS DECISIONS.

LOCATION.

1. The land upon which the city of Sacramento is situated is within the exterior

limits of the grant to Sutter, of June 18, 1841. *Cornwall v. Culver*, 16 Cal. 423.

2. The territory of the county includes the city, but the city forms but a portion of the county, and their respective limits are kept distinct in the act; the powers of the board of supervisors being different in respect to the two. The county and city constitute a corporation for some purposes, while they are distinct as to others.

People v. Mullins, 10 Cal. 20.

INCORPORATION, POWERS OF.

3. It was not the intention of the legislature, by the passage of the act of April 24, 1850, repealing certain acts, "and to incorporate the city and county of Sacramento," to repeal the law by which the county of Sacramento was created. *Id.*

4. Where the city authorities have the right to erect, repair, and regulate wharves and the rates of wharfage, and the banks of the river in front of the city are dedicated to the public, it follows that the right to collect wharfage devolves on the corporation.

Sacramento v. New World, 4 Cal. 41.

OFFICERS — POWERS, RIGHTS, AND DUTIES.

5. If the auditor of the city of Sacramento, in drawing a warrant on the treasurer, incorrectly designates the fund out of which the demand should be paid, it is not the duty of the president of the board of trustees to sign it. *People v. Swift*, 28 Cal. 397.

6. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit.

Sacramento v. Crocker, 16 Cal. 119.

7. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant, is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Id.*

8. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action in creating such office and raising such salaries may be reviewed on certiorari.

Robinson v. Sacramento, 16 Cal. 208.

9. That act is an enabling statute, creating a board with special powers and jurisdiction, and the board has only the power conferred by the act. *Id.*

10. As to how far and when the proceedings of such boards are judicial, and hence reviewable on certiorari, and how far and when legislative, and hence not so to be reviewed, discussed. *Id.*

11. The president of the board of trustees of the city of Sacramento has no authority to sign a warrant drawn by the auditor on the treasurer, payable out of the "water-works fund," for fitting up the police court-room, though the room is in the water-works building. *People v. Swift*, 28 Cal. 397.

12. Suits brought by the district attorney of the city and county of Sacramento to collect delinquent taxes under the acts of 1860 and 1861 (stats. 1860, p. 139; stats. 1861, p. 119), and pending when his successor in office was qualified, must be turned over to such successor. *Cole v. McKune*, 19 Cal. 422.

13. *Seemle*, that a ratable proportion of the percentage received by the successor after the termination of the suits, should go to the district attorney commencing them; but this point is not decided. *Id.*

14. Prior to the consolidation act the recorder of the city of Sacramento was entitled to collect the same fees as a justice of the peace for service in criminal cases; but he was bound to pay them over to the city treasurer. *Curtis v. Sacramento*, 13 Cal. 290.

15. Such recorders are not within article VI, section 2 of the constitution, inhibiting judicial officers, except justices of the peace, from taking fees. *Id.*

16. The constitution, when it exempted justices from the operation of this restraint, meant to exempt, also, those by whatever name called, who are intrusted with the duties assigned by the law to those officers. *Id.*

17. The recorder of the city of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer.

Cronise v. Carghill, 4 Cal. 121.

18. It is the duty of the treasurer of Sacramento county to advertise for proposals for the redemption of bonds issued to the Central Pacific railroad company, whenever there are two thousand dollars or upward remaining of the "interest tax" after payment of the interest then due.

Crocker v. Wolson, 30 Cal. 663.

19. Under the consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only three thousand dollars per annum. He is not entitled to the percentage allowed by the state to county treasurers for money paid by them into the state treasury. This percentage belongs to the city and county of Sacramento.

Sacramento v. Bird, 15 Cal. 294.

20. An action against a defaulting treasurer and his securities, for money belonging

to the county of Sacramento, if the defalcation occurred after the passage of the act of April 25, 1863, providing for the government of the county of Sacramento, is properly brought in the name of the board of supervisors of the county of Sacramento, instead of that of the people of the state of California. *Sacramento v. Bird*, 31 Cal. 66.

21. The warden of the county jail, appointed by ordinance, in pursuance of the fifty-third section of the consolidation act of the city and county of Sacramento (stats. 1858, p. 284), is not bound to pay into the treasury of the said city and county moneys received by him from the authorities of Yolo county for keeping prisoners from that county. Such money is received by the warden in his own right. In taking charge of prisoners from Yolo, he acts as an officer of that county, and he alone is responsible to it. *Sacramento v. Hardy*, 18 Cal. 412.

FLOATING DEBT.

22. The act of 1854, to fund the floating debt of the city and county of Sacramento, forbidding the redemption of any warrants accruing prior to a certain date, is obligatory upon county officers. The legislature is the paramount political power, and can control and direct them in this respect.

McDonald v. Maddux, 11 Cal. 187.

23. The board of supervisors, therefore, has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *Id.*

24. The act of 1854, entitled "an act to fund the floating debt of Sacramento county and to provide for the payment of the same," authorizing the issuance of bonds, payable in ten years, for the indebtedness of the county then due, and making it the duty of the county authorities to assess annually, in addition to the taxes then authorized by law, a tax of one fourth of one per cent. upon all the taxable property of the county as a sinking fund for the gradual redemption of the bonds issued under the act, when executed by the county creditors, by accepting the bonds in lieu of their former claims, became an inviolable contract, and the county authorities are bound to levy the tax for the sinking fund.

English v. Sacramento, 19 Cal. 172.

25. This provision in the act, for assessing an annual tax as a sinking fund, becomes, upon the execution of the bonds and cancellation of the original claims, a part of the contract, and is the sanction and security provided by the law for the performance of the contract. This annual tax is a fund pledged. *Id.*

26. The case might be different if the bonds had been executed before the passage of the law, and then provision had been made by the act for levying the tax for their payment.

The act in such case would be an ordinary act of legislation, subject to repeal, a mere voluntary provision by the debtor, or on his behalf, for payment of his debt. *Id.*

27. When the county issued the bonds and received therefor the evidences of its original indebtedness, the county made a contract with the creditors to collect their tax; and this contract can be enforced as well as the claim of the creditors to the money, if it were collected and in the treasury, could be enforced; and such a claim would be perfect. *Id.*

28. The facts that the act of 1854 cast the duty of levying this tax upon the court of sessions, and that by the general act of 1855 the powers other than criminal, conferred on such court by any law were cast upon the board of supervisors, do not impair the obligation of the provisions of the act of 1854 as a contract between the bondholders and the county. Such a change in the tribunal directed to levy the tax is within the power of the legislature. *Id.*

29. If the consolidation act for Sacramento be in conflict with the fifth section of the act of 1854, the former must yield. *Id.*

MISCELLANEOUS DECISIONS.

30. The "interest tax" collected under the act of April 25, 1863, to authorize the city and county of Sacramento to subscribe to the capital stock of the Central Pacific railroad company, must be paid solely for interest on the bonds issued under said act, and for the redemption of the same.

Crocker v. Wolson, 30 Cal. 663.

31. The defendant attempted to show an ordinance of the city of Sacramento, but offered only a newspaper copy of it. In support of this, as secondary evidence, the counsel for the defendant swore to a search for the original, which he himself had made in a book of ordinances handed by the keeper of the city archives: *Held*, that the evidence was properly excluded, because this was an insufficient predicate.

Norris v. Russell, 5 Cal. 249.

32. A demand against the city of Sacramento for work performed without any contract with the city, does not become a claim to be paid out of the revenues of the year in which it originated, until it has been assumed by an ordinance, and it is to be paid out of the revenues of the year in which it was assumed, and not of the year in which the work was performed.

People v. Swift, 31 Cal. 26.

ACTION, 34.	STATUTE, 116.
COUNTY WARRANTS, 20.	STREET, 18, 89, 131, 142.
ELECTIONS, 62.	TAXATION, 479.
MUNICIPAL CORPORATION, 10, 11.	

SALARY.

1. The legislature having, by a general law, fixed the compensation of **county treasurers** at a certain percentage on money received by them, boards of supervisors have no power to allow such treasurers a salary out of the county funds, unless specially authorized by law; and the act of March 20, 1855, creating such boards, confers no such authority. *San Joaquin v. Jones*, 18 Cal. 327.

2. A law which provides for the amount of fees attached to the service to be performed in an office, and at the same time provides that the officer shall pay a part of these fees into the treasury, the title to which is, "an act to regulate fees in office," is not liable to the constitutional objection that it embraces more than one object, and that that is not expressed in the title.

Ream v. Siskiyou Co., 36 Cal. 620.

3. An act which provides in one section that a **tax collector** shall receive the fees allowed by law, and in another section that he shall pay a part of these fees into the treasury for the benefit of the county, does not take private property for public use. *Id.*

4. The legislature may, without violating the constitution, provide by law that a collector of taxes shall pay a part of the fees and compensation allowed by law into the county treasury, for the benefit of the general fund. *Id.*

5. A **justice of the peace** may refuse to send up the transcript of a cause tried before him, until his fees are paid by appellant; but if he sends it up without receiving his fees, the fact that they are not paid is no ground for dismissing the appeal.

Bray v. Redman, 6 Cal. 287.

6. An offer to pay the justice his costs, on appeal, so soon as the appeal papers are ready to transmit to the county court, is not a sufficient tender under the statute. The fees must be tendered unconditionally.

People v. Harris, 9 Cal. 571.

7. The justice is not bound first to make out the papers, and then rely on his fees being afterwards paid. *Id.*

8. The salaries of **teachers**, under the consolidation act, should be paid in the same manner as other claims against the treasury. *Knox v. Woods*, 8 Cal. 545.

9. The special act of the legislature, approved April 4, 1857, fixing the **compensation of the county clerk** of the county of Placer at three thousand dollars, was intended in lieu of all fees for services rendered the county.

Mitchell v. Stoner, 9 Cal. 203.

10. The **salary of an office** is incident to its title, and not to its occupation, and one elected to an office who has qualified and is ready to perform its duties is entitled to

its salary, even if it is occupied by an intruder. *Carroll v. Liebenthaler*, 37 Cal. 193.

11. A salary of an office which is fixed at a monthly rate, becomes due and payable monthly. *Id.*

12. The **occupation of an office by an intruder** does not have the effect of deferring the time of payment of the salary until the intruder is ousted. *Id.*

13. The act of February 25, 1858, concerning the office of **county clerk** of Placer county (stats. 1858, p. 29), does not limit the salary of the clerk to the amount of fees received by him; and if the fees collected for any one month do not amount to the salary to which he is entitled, he can recover the difference from the county.

Sewell v. Placer Co., 42 Cal. 650.

14. Where a statute concerning the office and fixing the salary of a county clerk provided that he should collect all official fees, and at the first of every month pay the same over to the county treasurer, "less his salary for the next preceding month;" and the fees for several months being less than the salary, it was claimed that the salary was only payable out of the collected fees: *Held*, that he was entitled to his full annual salary, and that there was no legislative intention to limit the salary to the amount of fees received. *Id.*

15. Section 4330 of the political code, as amended by the act of March 28, 1872, was intended to regulate the **salaries of district attorneys**, as contradistinguished from fees to which they were entitled under existing laws, and does not repeal prior statutes allowing fees in addition to salaries.

Pillsbury v. Brown, 45 Cal. 46.

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SALE AND DELIVERY OF PERSONAL PROPERTY.

1. On a sale of chattels, where no time of payment and no time for delivery are agreed upon, **delivery and payment are concurrent acts**, and neither party can maintain an action for non-performance, without showing a readiness and willingness to perform on his part. *Cole v. Swanston*, 1 Cal. 51.

2. Where on a sale of personal property "the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a con-

dition precedent, and until performance the right of property is not vested in the purchaser."

Putnam v. Lamphier, 36 Cal. 151.

3. If the owner of a piano deliver the same to another person, under an agreement in writing, stating its value, and that such person agrees to pay a specified sum monthly for the use of it, and that it is to be sold for a price therein mentioned, and that a specified sum is to be paid each month until the agreed price is paid, when a bill of sale will be given, the agreement does **not** constitute an **absolute sale** of the piano.

Kohler v. Hayes, 41 Cal. 455.

4. Under such agreement the title does not pass, and the party receiving the piano can not sell the same until the purchase price is paid. **Id.**

5. A sale of personal property passes to the purchaser only **such title as the vendor had**.

Robinson v. Haas, 40 Cal. 474.

6. A sale of personal property is **not completed** so as to pass the title to the property, so long as anything remains to be done to the thing sold, to identify it or to discriminate it from other things.

Caruthers v. McGarvey, 41 Cal. 15.

7. An offer to sell personal property, when no time is given, must be accepted at once, or within a reasonable time, and six months afterwards, is not a **reasonable time**, as matter of law, to accept the offer.

Roberts v. Evans, 43 Cal. 381.

8. If one party negotiates the purchase of personal property, and another furnishes him with the money to pay for it, and for his security takes the **bill of sale** from the seller in his name, and takes possession, and it is agreed that the property shall belong to the negotiator when he pays the money, the **legal title** to the property is vested in the person who furnishes the money, and to whom the bill of sale was made.

Johnson v. White, 46 Cal. 328.

9. The same would be the result if the person to whom the bill of sale is given, instead of loaning the money, obtained it by signing with the negotiator a **joint note** to a bank, or by indorsing a note given by the negotiator to the bank, provided the note is afterwards paid by him. **Id.**

10. In such case the person to whom the bill of sale is given has a good title to the property as against the **attaching creditors** of the negotiator. **Id.**

11. Roberts owned personal property, and offered to sell it to Ellsworth, but his offer was not accepted. More than six months afterwards, Ellsworth went with a servant of Evans and took the property, and delivered it to Evans, who kept and used it, and paid Ellsworth for it. Roberts afterwards wrote to Ellsworth to pay him for the prop-

erty, but not being paid sued Evans for its value: *Held*, that Roberts' right of action against Evans was not waived by this offer to accept of pay from Ellsworth, and that his purchase from Ellsworth did not release him from liability to Roberts for the value of the property. **Id.**

12. If the vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and if he accepts a part, he may return that and refuse to accept less than the whole, but having received and retained a part, he can not refuse to pay for the part received.

Polhemus v. Heiman, 45 Cal. 573.

13. Where the purchasers from a common vendor are equally innocent, or equally in fault, the first purchaser is entitled to the goods. Vance v. Boynton, 8 Cal. 554.

14. A. purchased of the plaintiffs, in the city of New York, certain merchandise, and gave his promissory note, payable in six months, for the purchase money. The goods were shipped for San Francisco, and, by the bill of lading as well as by the agreement of the parties, were deliverable to the order of the shippers; but they were insured for, and on account of A.; at the time of the purchase, he received a bill of sale, gave his note for the purchase money, and took a receipt for its payment; and the acts of the plaintiffs in New York, and of their agents in San Francisco upon the arrival of the goods there, as well as the conduct of A., indicated that all parties considered the transaction as a sale of the goods to A., subject to the right of the plaintiffs to retain possession until the payment of the note given by A.: *Held*, in an action by the plaintiffs against the master of the vessel on which the goods were shipped, to recover the market value thereof at San Francisco, on account of his having delivered them to A. without the orders of the shippers, that the transaction between the plaintiffs and A. was a sale, and transferred to the latter the property in the goods, subject to a lien thereon for the purchase money in favor of the plaintiffs, and that the master of the vessel was liable to the plaintiffs only for the value of the plaintiffs' property in the goods with interest. Perse v. Cole, 1 Cal. 333.

15. But where the sale was not made for money, and the vendor, under the power, received instead an article of fluctuating value, he is clearly chargeable with the **highest market value** of the lot sold, to be credited to the account of the mortgagor. Benham v. Rowe, 2 Cal. 387.

16. As to when the contract of sale is complete before actual delivery, so as to throw the risk of loss on the vendee, etc., see the opinion of the referee reported in this case. Tyson v. Wells, 2 Cal. 122.

17. As between the parties to a sale of

goods on store in a warehouse, the **delivery of an order on the warehouseman** for the goods by the seller to the buyer is a delivery, and passes the title to the latter so as to render him liable for the price.

Ghirardelli v. McDermott, 22 Cal. 539.

18. Where a sale of goods was made through a broker and perfected by delivery of an order for the same upon a warehouseman, which order the buyer shortly after returned to the broker to deliver to the seller, with notice that the goods would not be taken, and the broker tendered the order to the seller, who refused to receive it: *Held*, that the broker, in receiving the order from the buyer, acted as his agent, and that the reception of it by him did not effect a rescission of the contract. *Id.*

19. A delivery of a warehouse receipt, stating that the goods named therein are deliverable on the return of the receipt, is sufficient *prima facie* to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. *Horr v. Barker*, 8 Cal. 609.

20. When the defendants show that the person to whom, in his own name, the receipt was given, and who passed it to plaintiff, was their agent, or broker, acting for them, but permitted to keep it on storage in his own name, they do not rebut the *prima facie* case made out by the plaintiffs, by the possession of the receipt. *Id.*

21. Where one purchases land and receives a conveyance therefor, and at the same time buys **personal property** on the land, the question whether the vendee had **actual possession** of the personal property is an important one in determining whether there was an actual delivery of possession of the land. *Cahoon v. Marshall*, 25 Cal. 197.

22. It is no answer to action for **non-delivery of lumber**, that the plaintiff resold it soon after the purchase; it appearing that the purchaser from the plaintiff had a claim against him for non-delivery.

Gunter v. Sanchez, 1 Cal. 45.

23. **Warehousemen** who give their receipt for goods on storage are **estopped** from setting up a want of segregation of the goods receipted for from other goods, in an action against them by the holder of the receipt, for a conversion of the goods by a seizure in an action against a vendor of the plaintiff. *Goodwin v. Scannell*, 6 Cal. 541.

24. And this, although the warehousemen are the **attaching creditors**, and although the sheriff making the seizure was not liable, by reason of there being no segregation. *Id.*

25. If a contract for the **sale and assignment of certificates of stock of a corporation** is entered into in another state, but the certificates are afterwards delivered in this state, the legality of the sale and as-

signment must be determined by the laws of this state.

Dow v. Gould & Curry M. Co., 31 Cal. 241.

26. The doctrine of **continuous possession** of personal property after sale or mortgage does not apply to the case of a paper, the mere evidence of a debt.

Hall v. Redding, 13 Cal. 629.

27. To enable a vendor of goods to **rescind** the sale, he must **offer to return** the notes given for the goods; but this offer can be made at, or any time before, the trial.

Coghill v. Boring, 15 Cal. 213.

28. A contract of sale of personal property provided for the **immediate delivery** of the property sold to the vendees, for the payment, in gold coin, of one half of the purchase price down, and the balance, likewise in gold coin, in four **monthly installments**, with a provision that the vendor might retake possession of said property, "and terminate" the contract, in case of a default in payment of said monthly installments, or any of them. In accordance with the contract, the property had been delivered to the vendees, and the said half of the purchase price and the first installment thereon paid, but the vendees made default in the payment of the second and third installments, whereupon the vendor immediately retook possession of said property. At the time the said last installment fell due, the vendees tendered to the vendor the full amount remaining due on said contract, together with such other charges and demands, arising under said contract, as the vendor should have against them, and at the same time demanded the return of said property, which said tender and demand were refused, whereupon the vendees demanded the repayment, in gold coin, of the money paid to the vendor by them on said contract of sale, which demand was likewise refused by the vendor, who thereafter sold and delivered possession of the property to other parties. Thereafter the vendees sued the vendor to recover, in gold coin, the amount of their payments on said sale, with interest from the times of said payment: *Held*, first, that upon this state of facts, and under the terms of the contract, the vendor alone had the **right to rescind** said contract, and that he did not rescind it; second, that upon no hypothesis, other than that the contract had been rescinded, could the plaintiffs **recover back the said purchase money** sued for; third, that upon said state of facts, the available remedy of plaintiffs against the vendor, was to recover the value of the property less the amount of said purchase money unpaid at the time of the tender, and the necessary expenses incurred by defendants in removing and taking care of it.

Miller v. Steen, 34 Cal. 138.

29. Plaintiff held a public sale of cattle

on his farm, the terms being cash, or notes with approved sureties at sixty days. Defendant bid off two bulls for two hundred and three dollars. The bulls remained on plaintiff's farm at defendant's request, and subject to his control, plaintiff agreeing to keep them until a particular time, when defendant was to send for them, and the persons in charge of them were directed to deliver them to defendant when called for. About two weeks after the expiration of this time, defendant sent for the bulls, but meanwhile they had died. No cash was paid nor any notes given for the bulls. Plaintiff sues for the price bid: *Held*, that there was such a **delivery and acceptance** of the bulls as to complete the sale; that the circumstances were such as to authorize the **inference of change of ownership**; and that plaintiff, in taking charge of the cattle after the sale, acted simply as agent of defendant, and is entitled to recover.

Clark v. Rush, 19 Cal. 393.

30. It was not necessary that the cattle should have been actually removed from plaintiff's farm. It was sufficient that there were circumstances authorizing the **inference of a change of ownership**; and it was for the jury to draw this inference, and it was competent for them to consider any and all acts of the parties tending to prove that the defendant had acquired and assumed control of the cattle as owner. *Id.*

31. In connection with these acts, and in explanation of them, the **declarations of the parties**, showing the nature of their agreement, were admissible in evidence. *Id.*

32. Where a contract stipulated for the delivery of a vessel, but designated no particular place for such delivery: *Held*, that a **notice of a readiness to deliver** must be treated under the contract as an actual delivery. Albertson v. Hooker, 5 Cal. 176.

33. Plaintiff also asked this **instruction**: "That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them:" *Held*, that this proposition is not strictly correct; that if the trees bargained for were put out on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a **good delivery**; that there is in the testimony here, no predicate laid for the doctrine of **stoppage in transitu**, or that plaintiff claimed the right to stop the trees.

Thompson v. Paige, 16 Cal. 77.

34. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off of the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to

be baled by plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred and thirty pounds of hay baled, and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weight. Plaintiff then went to the house of defendant, and told him that the hay was baled and piled up in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked defendant whether he would take the surplus. Defendant said he would be over soon, and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff sues for nine hundred and nineteen dollars balance due on the hay. The court instructed the jury that if they believed from the evidence that it was the understanding of the parties, upon the payment of the two hundred dollars by defendant, the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: *Held*, that the instruction was right; that the question was, whether there had been a **delivery**, and any **agreement of the parties** upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with other hay belonging to plaintiff, made no difference, if defendant agreed to accept it in that condition, and to consider it as delivered—the **contract for delivery** would be **fully executed**.

Smith v. Friend, 15 Cal. 124.

34a. On the above facts, defendant asked the court to instruct the jury that "if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights, and containing different quantities, and all being in the same pile, there was no delivery without division had." The instruction was refused: *Held*, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for the defendant. *Id.*

DELIVERY TO WRONG PERSON, EFFECT OF.

35. Where **warehousemen** gave the wheat to the wrong claimant they became responsible for its value to the right one.

Hanna v. Flint, 14 Cal. 73.

36. Delivery of goods by a **carrier** to a wrong person by mistake, or by gross imposition, will not discharge his responsibility to the owner for the value of the goods.

Adams v. Blakenstein, 2 Cal. 413.

37. Authority to deliver goods, confers no authority to take them back, or to countermand the shipment. *Id.*

38. In an action upon an account, the question was whether a bill of sale of a quantity of wheat, executed by the defendant to the plaintiffs, was an absolute sale in satisfaction of the debt, or was only by way of security; and the court instructed the jury to the effect, that the bill of sale purporting to be an absolute sale, they should find it to be such, unless it appeared from a preponderance of evidence that it was given as security, and that both parties so understood it: *Hell*, that the last clause of the instruction was erroneous.

Perkins v. Eckert, 55 Cal. 400.

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SAN FRANCISCO.

1. EXTENT AND BOUNDARIES.

11. CHARTER AND ITS AMENDMENTS.

28. CONSOLIDATION ACT.

43. CORPORATE POWERS, RIGHTS, ETC.

77. LIABILITIES UNDER THE CHARTER.

89. OFFICERS—POWERS, RIGHTS, AND DUTIES OF.

89. Election.

163. Board of Supervisors.

112. Commissioners of Funded Debt.

143. Miscellaneous Decisions.

EXTENT AND BOUNDARIES.

1. In the plan of the city of San Francisco, the survey into blocks, lots, and streets, **extended into the tide waters** in front of the city, the object of which was to reach a sufficient depth of water, on the land line, for the convenience of shipping.

Eldridge v. Cowell, 4 Cal. 81.

2. The act of March 26, 1851, which requires the city of San Francisco to deposit in the office of the secretary of state a map of the water lot property granted to the city by the same act, does not make such map conclusive evidence of the extent of said property, as the boundaries are completely specified in the act, and the question of what was the water line of the city, at the date of the act, is one of fact.

Cooke v. Bonnett, 4 Cal. 397.

3. If the state land commissioners, appointed under the act of May 18, 1853 (stats. 1853, p. 219), changed the **red line**, or water front of San Francisco, as laid down by the act of March 26, 1851 (stats. 1851, p. 307), an alleged adoption and recognition by the state of the acts of the commissioners would not effect a change or create an estoppel *in pais* as against the state, unless it should be shown that the legislature and other officials, while adopting and recognizing such acts, knew that they had changed the line. *People v. Klumpke*, 41 Cal. 263.

4. The question of the location of the San Francisco **red line**, or water front, established by the act of March 26, 1851 (stats. 1851, p. 307), is a question of fact; and the acts of official surveyors and boards in running and mapping out the line, though they tend to show its position, yet, as they could not change, they do not conclusively fix it. *Id.*

5. As the act of March 26, 1851, establishing the **red line**, or water front, of San Francisco (stats. 1851, p. 307), mentioned a number of points on it with the same certainty as the **initial point**, the true position of the line between any two of such points can be ascertained by drawing a line between them, and it is unnecessary for a survey to commence at the initial point. *Id.*

6. In an action of ejectment by the state for land in San Francisco claimed to be outside of the red line, or water front: *Hell*, that the map purporting to have been made in 1864 by order of the **state harbor commissioners**, but not shown to have been approved or adopted by them, was not competent evidence in their favor to show the true location of the red line. *Id.*

7. The board of state land commissioners, appointed under the act of May 18, 1853, establishing such board (stats. 1853, p. 219), was authorized to find the red line, or water front, of San Francisco, as established by the act of March 26, 1851 (stats. 1851, p. 307), and their map is competent evidence tending to prove the position of that line. *Id.*

8. In an action of ejectment by the state for land in San Francisco between **Jackson and Pacific streets**, and claimed by it to be outside of the red line, or water front: *Hell*, that deeds of the state land commissioners, appointed under the act of May 18, 1853 (stats. 1853, p. 219), for lands to the south of Jackson street, were not admissible for the purpose of showing the position of the red line. *Id.*

9. In a suit by the state, for land in San Francisco, **outside of the red line**, or water front, claimed by defendants under deeds from the board of state land commissioners, appointed under the act of May 18, 1853 (stats. 1853, p. 219): *Hell*, that as the board was destitute of authority to sell such lots, it was

no error to exclude defendants' proffered evidence of the reports of the board to the legislature, and the controller's receipts for the purchase money paid. *Id.*

10. Deeds from the state land commissioners, appointed under the act of May 18, 1853 (stats. 1853, p. 219), so far as they include lands in San Francisco, lying outside of the red line, are void. *Id.*

CHARTER AND ITS AMENDMENTS.

11. The place called Punta Yerba Buena, on which the city of San Francisco now stands, seems **never** to have been a **pueblo** separately from the Presidio, which was founded in 1776.

Welch v. Sullivan, 8 Cal. 165.

12. The first charter of the city of San Francisco does not authorize the creation of a **sinking fund commission** in terms; nor is there any clause under which it can be exercised even by implication.

Smith v. Morse, 2 Cal. 524.

13. The power to sell does not include an authority to create a new department of city government, to divert the revenues from their legitimate source, and place them in hands neither chosen by, nor responsible to, the corporators. *Id.*

14. The charter of the city of San Francisco provides that no ordinance or resolution shall be passed except by a majority of all the members elected. The number of members elected being eight: *Held*, that an ordinance passed by a vote of four in the affirmative to three in the negative, was not passed by a majority of all the members elected, and was therefore void.

San Francisco v. Kelsey, 5 Cal. 169.

15. Under the charter of San Francisco in 1853, no ordinance could have any validity, unless it received the votes of a majority of all the members elected to the board of aldermen. The board consisted of eight members. One of the members elected that year was an alien, and ineligible, yet he was sworn in, and entered upon the discharge of his duties: *Held*, that there were eight members elected, and that it required five votes to pass an ordinance.

Satterlee v. San Francisco, 23 Cal. 314.

16. The thirty-second section of the charter of 1855 of the city of San Francisco was designed as a check upon the city government under that charter, leaving the previous **indebtedness** to stand as a matter the legislature could not interfere with.

Soule v. McKibben, 6 Cal. 142.

16a. The act of April 20, 1858, authorizing the issuance of **bonds** by the city and county of San Francisco, is valid.

Blanding v. Burr, 13 Cal. 343.

17. The provision in section 5, article III of the charter of 1851, as to not creating

liabilities beyond **fifty thousand dollars** over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts.

McCracken v. San Francisco, 16 Cal. 591.

18. The charter of the city of San Francisco vested the **legislative power** of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of all the members elected to each board. On the fifth of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of the city ordinances as ordinance No. 481. At the time the ordinance was presented to the board of assistant aldermen, there was a **vacancy in the board**, occasioned by the resignation of one of its members, so that there were but seven members in office; of these seven, four members voted for the ordinance, and three against it: *Held*, that the ordinance not having received a majority of the entire board, of the constituent members, was never passed, but was in fact rejected. *Id.*

19. The fifth section of the charter refers only to the acts or contracts of the city, and not to **liabilities** which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys; not to justify the detention of the property of her citizens which she may have unlawfully obtained, and where, as in this case, plaintiff claims that the city has got his money without consideration, by mistake, and has appropriated it to municipal purposes, she is **bound to refund**; because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice, to restore what belongs to others, which rests upon all persons, whether natural or artificial. *Id.*

20. The restriction contained in the fifth section of the charter can, in any view, only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from **torts**, or trespasses, or mistakes. *Id.*

20a. Ordinance No. 505 of the city of San Francisco, passed January 10, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands arising from the sale ordered by ordinance No. 481, the **salaries of the members and officers of the police** for the months of November and December of the previous year, does not ratify ordinance No.

481 because appropriating the proceeds of the sale. It assumes that ordinance No. 481 was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance No. 481 had become law. **Ratification**, to be effective, must be made with the full knowledge of all facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Id.*

21. The alleged ordinance No. 481 authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26, 1853. Within one hour previous to the sale the common council passed an ordinance, designated in the official book as ordinance No. 493, appropriating certain proceeds of the intended sale: *Held*, that this recognition of the existence of ordinance No. 481, and the appropriation of a portion of the proceeds of the sale, did not constitute an adoption and approval of what had been previously done, or might be subsequently done according to the terms of that ordinance, so as to give validity to the sale which took place. *Id.*

22. The only authority the common council possessed to sell city property was derived from the thirteenth section of article III of the charter, and this section provides for the sale of property in one way only, to wit, by the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. This mode of selling the property, having been pointed out by the charter, was restrictive; no other mode could be followed. *Id.*

23. The only way in which the common council could give validity to a sale, was by passing a law directing it. Ordinance No. 493 does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance No. 481. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Id.*

24. The land directed by the terms of ordinance No. 481 to be sold was set apart

and dedicated as a public dock by an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property-holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Id.*

25. Inasmuch as by article VI, section 6 of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Id.*

26. The city of San Francisco is not estopped from denying the sale made under ordinance No. 481, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance No. 493, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance No. 493, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council. They acted, in passing ordinance No. 493, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Id.*

27. The charter of the city of San Francisco of 1851 gave the city power to open streets and alleys, and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this notwithstanding section 2, article V of that charter, providing that the adjacent property shall bear two thirds of the expense of every improvement. This section simply made the property-holders liable to the city for the two thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury, to be used as the city sees fit.

Argenti v. San Francisco, 16 Cal. 255.

CONSOLIDATION ACT.

28. The corporation, the city of San Francisco, was not destroyed by the consolidation act, but continued. Its name only was changed, and the change in this respect did not require any alteration in the pleadings or any suggestion of record in an

action pending against the city at the time the act was passed.

Frank v. San Francisco, 21 Cal. 668.

29. Where an action was commenced against the city of San Francisco previous to the passage of the consolidation act, but judgment was not recovered until after the passage of the said act: *Held*, that the judgment was binding against the existing corporation, the city and county of San Francisco. *Id.*

30. The design and only effect of this section is to exempt the city and county from the liability for injuries which would otherwise attach to it, by reason of the exclusive control of the streets and public highways conferred upon it by other sections of the statute, and to transfer such responsibility to individual officers, agents and employees of the corporation.

Eustace v. Jahns, 38 Cal. 3.

31. It is competent for the legislature to provide for the expenses of public improvement, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto, and especially benefited thereby, and in these respects, the constitutionality of the consolidation act must be considered definitely established.

Chambers v. Satterlee, 40 Cal. 497.

32. Under section 90 of the consolidation act, a demand upon the treasury for the monthly salary of an officer of the city and county of San Francisco must be presented for payment properly audited, within one month after such demand shall have become due and payable; otherwise it will be forever barred.

Paxon v. Holt, 40 Cal. 466.

33. It did not require the signature of the persons composing the board of engineers to be attached to the maps and profiles prepared under the statutes 1863-4, to establish the lines and grades of streets in the city and county of San Francisco, in order that they should become valid. Their approval by the board of supervisors was sufficient for that purpose.

Chambers v. Satterlee, 40 Cal. 498.

34. The consolidation act gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds.

Doan v. Scannell, 7 Cal. 393.

35. The defendant being elected sheriff of the county of San Francisco, in September, 1855, on July 26, 1856, and after the consolidation act went into effect, one of the defendant's sureties applied to the county judge to be released from further liability;

on the sixth of August the judge declared the office vacant, by reason of the failure of defendant to file new bonds: *Held*, that the county judge had no jurisdiction, the new law then in force vesting the power of approving the bonds of such officer, in the county judge, auditor, and president of the board of supervisors.

People v. Scannell, 7 Cal. 432.

36. The provisions of section 2 of the act approved March 5, 1864 (stats. 1863-4, p. 139), are sufficient to authorize the harbor commissioners of San Francisco to institute actions *in rem*, as provided in section 317 of the practice act, and generally to pursue all remedies that a private person could under the same circumstances.

People v. Steamer America, 34 Cal. 676.

37. The provisions of section 11 of said act (stats. 1863-4, p. 144) which provide for the collection of "all tolls, dockage and wharfrage charges authorized and required to be collected, shall be due and collectible exclusively in gold and silver money of the United States," do not come within the provisions of the specific contract act; but as charges upon property to raise money for public purposes, they do come within the principles laid down in *Perry v. Washburn*, 20 Cal. 350, and are valid. *Id.*

38. It seems that the act consolidating the city and county of San Francisco is not unconstitutional. *People v. Hill*, 7 Cal. 97.

39. An account audited against the city of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment.

Knox v. Woods, 8 Cal. 545.

40. The legislature had the right to provide, in the act known as the consolidation act for the government of the city and county of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair.

Hart v. Gaven, 12 Cal. 476.

41. The object of the ninth section of the consolidation act of 1856, was not to repeal the general law of 1855, relative to filling vacancies, but to provide for cases not embraced by the general law, that is, for certain local offices, made elective by the people, peculiar to San Francisco, and for which no provision had been made.

Attorney-general v. Brown, 16 Cal. 441.

42. The provisions of the fourth section of the consolidation act, respecting the pre-existing indebtedness of the city of San Francisco, was not a mere legislative declaration of good faith towards the public creditors, but a requirement imposing upon the board of supervisors the duty of providing for the payment of that indebtedness.

Frank v. San Francisco, 21 Cal. 668.

CORPORATE POWERS, RIGHTS, ETC.

Over its Lands.

43. The act of congress of 1851 vested the title of the ungranted lands within the city limits, in the city of San Francisco, and a sheriff's sale in 1852, under a judgment against the city, entered in September, 1851, passed the title of the city in the purchaser. *Welch v. Sullivan*, 8 Cal. 165.

44. A sale of the municipal land of the city in January and February, 1852, on an execution issued under a judgment against the city, rendered September 18, 1851, conveyed a legal title to the land, upon which ejectment can be maintained. *Id.*

45. In cases involving questions of confirmation, a party is not necessarily presumed to know the law. This is a fact to be established, and even admitting the presumption to arise, it is not conclusive as against facts which go to establish ignorance of the law.

Holland v. San Francisco, 7 Cal. 361.

46. The charter of the city of San Francisco gives her the power to convey her property by law, and if an ordinance for this purpose is a law, it must be governed by the same rules of construction as other laws. *Id.*

47. *Hart v. Burnett*, 15 Cal. 530, holding, first, that San Francisco was, at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations; second, that such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart or dedicated to common use, or to special purposes, could be granted in lots, by its municipal officers, to private persons in full ownership; third, that the authority to grant such lands was vested in the ayuntamiento, and in the alcaldes, or other officers who, at the time, represented it, or who had succeeded to its "powers and obligations;" fourth, that the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority, affirmed.

Payne v. Treadwell, 16 Cal. 220.

48. Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of land for the purpose of preventing a sale under an ordinance of the city.

Weber v. San Francisco, 1 Cal. 455.

49. The fact that the board of supervisors of San Francisco, by an order, ratified by the legislature, gave the company the privilege

of laying pipes along the public streets of that city, does not operate as a restriction upon the right to condemn private lands under the act of 1858, in cases where the purposes of the company require the use of such lands. *Heyneman v. Blake*, 19 Cal. 579.

50. Where defendant, in September, 1851, on sale under judgment against the city, had purchased her title to a portion of the ground covered by said East street, between Clay and Jackson; and had subsequently purchased the state's interest in the same, these purchases being prior to any acts by the city declaring the street open as a public street: *Held*, that defendant owns the property as against the city; that her ordinances laying out this street being passed subsequently to defendant's acquisition of the city title, have no effect upon the defendant, because the proper proceedings were not taken to condemn the land to public use.

People v. Kruger, 19 Cal. 411.

51. The city of San Francisco, as successor of the pueblo of that name, had the right to take pueblo lands in the possession of others for public squares without making compensation therefor.

Sawyer v. San Francisco, 50 Cal. 370.

52. The act of 1858, ratifying and confirming ordinances 822 and 845 of the common council of the city of San Francisco, approved of the map of the western addition to said city, with streets and public squares thereon delineated, which was reported by the commissioners appointed by said council, and by said council approved. *Id.*

53. The decree of the circuit court of the United States confirming to the city of San Francisco four square leagues of pueblo lands, did not confirm to said city land which by executive proceedings had been reserved for public uses by the United States.

Nagle v. Palmer, 50 Cal. 611.

54. The act of congress of July 1, 1870, relinquishing the interest of the United States in certain lands to the city and county of San Francisco, did not impart validity to alcaldes' grants. The only persons who were beneficiaries under said act were those who were in possession of land at the date of the passage of the act, or had been deprived of the possession thereof by the military authorities of the United States. *Id.*

55. One who was not a beneficiary under the said act can not question the right of the city to convey land, under the provisions of the act, to another. *Id.*

56. A person who was in the mere naked possession of pueblo land in San Francisco, and who did not hold the same under a grant from the authorities of the pueblo, was not a beneficiary under the decree of the circuit court confirming said lands to the city. *McManus v. O'Sullivan*, 48 Cal. 7.

57. A person who was in possession of pueblo lands in San Francisco prior to 1861, but who was ousted therefrom, did not become a beneficiary under the act of congress of March 8, 1866, and ordinance No. 800 of said city, and the act of the legislature confirming it, unless he had recovered possession. *Id.*

58. A lot of land in the harbor of San Francisco, lying within the line of streets as laid down and recognized by the city on its official map, and being in the actual possession of a person who claims to be the owner, can not be taken from him and appropriated to the public use, without paying him a just compensation. *Gunter v. Geary*, 1 Cal. 462.

59. Where the city of San Francisco, so far as she had any rights in the premises, had by her own voluntary acts parted with them, any attempt on her part to resume them, by depriving the public of the easement, or denying to purchasers of lots the right of way, except on payment of wharfage, etc., was clearly illegal.

Breed v. Cunningham, 2 Cal. 361.

60. The act of March 26, 1851, operated as a grant, by which property-holders along the line of Market street, and the public are entitled to the free enjoyment of the same; and this right or privilege could not be resumed by the state, and was not resumed by the act of April 28, 1851, confirming the contract between the appellant and the sinking fund commissioners. *Id.*

61. Where lots are sold as fronting on, or bounded by, a certain space, designated in the conveyance as a street, the use of such space as a street, passes, as appurtenant to the grant, and vests in the grantee in common with the public right of way over said street. Such acts on the part of the grantor constitute a dedication of such street, and he can not so sell or dispose of it as to alter or defeat such dedication. *Id.*

Over its Water Front.

62. The act of April 5, 1850, incorporating the city of San Francisco, did not confer upon the common council of that city the power to create by ordinance a sinking fund to pay the indebtedness of the city, nor did it confer upon said common council the power to convey, by ordinance, the city front or wharves in the harbor to said board.

People v. Broadway Wharf Co., 31 Cal. 33.

63. The conveyance made by the common council of San Francisco, by ordinance of August 23, 1850, to the board of commissioners of the sinking fund, of Broadway wharf, was void for want of power, and the lease of the wharf to Francis Salmon by said board on the thirteenth of February, 1851, was also void for the same reason, as was also the conveyance of said wharf, made

by said board of commissioners on the twenty-fourth of May, 1851, to the commissioners of the funded debt, created by the act of May 1, 1851. *Id.*

64. The charters of San Francisco of 1850 and 1851, by which the power was conferred on the mayor and common council "to erect, repair, and regulate public wharves and docks, and to regulate the erection and repair of private wharves, and to fix the rates of wharfage thereat," did not vest in the city any proprietary interest in the wharves. *Id.*

65. The act of the first of May, 1851, authorizing the city of San Francisco to "construct wharves at the ends of all the streets which terminate on the bay," etc., and extend the streets six hundred feet into the bay, did not relinquish to the city of San Francisco a proprietary interest in the wharves built on the streets outside the beach and water lot line. *Id.*

66. In case of purpresture, or encroachment by the erection of a wharf in the bay of San Francisco beyond the city front, the right to recover possession is in the people, and not in the owner of the land adjoining on the city front.

Dana v. Jackson St. Wharf Co., 31 Cal. 118.

67. The owner of a lot upon the water front of San Francisco, as established by statute, below low-water mark, is not a "riparian proprietor" in the sense in which that term is used in the law of tide waters, for the water front of San Francisco is of statutory creation. *Id.*

68. In case of an increase of land by the accretion of alluvion in the bay on the water front of San Francisco, as established by statute, the owner of the lot adjacent has no right of entry thereon to the exclusion of the state, nor can he maintain ejectment against a stranger. *Id.*

69. The commissioners appointed under the act of May 18, 1853, to sell land belonging to the state on the water front of San Francisco, had no power to sell any of said land without the "red line map" of the water front, required to be made by the fifth section of the act of March 26, 1851, commonly called the beach and water lot act.

Knight v. Haight, 51 Cal. 169.

70. The deed of May 24, 1851, from the commissioners of the sinking fund to the commissioners of the funded debt of San Francisco, transferred to the latter the title to the tide land on Mission bay, vested in the city of San Francisco by the act of March 26, 1851. *Friedman v. Nelson*, 53 Cal. 589.

71. Where a deed granted "all that beach and water property lying between Folsom street on the north, ship's channel on the east, the city limits on the south, and Price street on the west, and known on the

said map as blocks numbers one (1) to thirty-two (32) inclusive;" *Held*, that a block of "beach and water property" lying within the exterior boundaries was included, notwithstanding it was numbered thirty-three (33) on the map referred to in the deed. *Id.*

72. The legal title of the city of San Francisco, in the beach and water lots granted to her for the term of ninety-nine years, by the act of March 25, 1861, vested, by virtue of the deed of the commissioners of the sinking fund, and the act of May 1, 1851, and by the acceptance by the city of the terms of that act, and its consent to the transfer, in the commissioners of the funded debt. *Le Roy v. Dunkerly*, 54 Cal. 452.

73. In this state, all beneficial estates, whether legal or equitable, are liable to be taken on execution; and, therefore, a purchase under an execution sale of the interest of the city in the beach and water lots, and the sheriff's deed made in pursuance thereof, operated as an assignment of the equitable estate remaining in the city after the legal title vested in the commissioners of the funded debt. *Id.*

Miscellaneous Provisions.

74. The common council of the city of San Francisco must exercise the functions imposed by their charter, and have no power to delegate them to others.

Smith v. Morse, 2 Cal. 524.

75. The common council of the city of San Francisco has no authority, under the charter of the city, to impose a penalty of one per cent. per day for the non-payment of an assessment.

Weber v. San Francisco, 1 Cal. 455.

76. The act of 1852 authorized the plaintiff to erect a powder magazine in the city of San Francisco, reserving certain rights to the state. The second section provides "that after notice of twenty days in the newspapers of the said city having been given by the superintendent of the magazine of the erecting thereof as provided by this act, no person shall keep in any one house or place within said limits, more than five (afterwards increased to twenty-five) pounds of gunpowder at any one time under penalty of one hundred dollars." The ninth section enacts that the common council of San Francisco shall have power to authorize by ordinance the building of other powder magazines, and to appoint superintendents. The owners of powder may store in either of the magazines created by ordinance or law, paying the fees, etc., allowed, where the same is stored. The city had the right under her charter, prior to the act of 1852, to have a powder magazine, and had exercised the right, and was in the exercise of it when the said act was passed; but had passed no ordinance on the subject after the passage of the act, but continued to exercise the right under her charter: *Held*, that

the act of 1852 did not give to the superintendent of the magazine authorized by it, the exclusive right to store all the powder in the city; that the right existing in the city at the passage of the act was not repealed by it; and that the right of the city to her magazine for the storage of powder was concurrent with that of the grantee in the act.

Harley v. Heyl, 2 Cal. 477.

LIABILITIES UNDER THE CHARTER.

77. The ayuntamiento of San Francisco, in 1850, by an order authorized its alcalde to grant to plaintiff "a quantity of land, in conformity with the survey of the town, as near as possible to the location of" certain other lots which plaintiff was to surrender to the town. The alcalde accordingly conveyed, by deed, to plaintiff, a lot which had been previously granted by the town to one Gerke: *Held*, that an action for the breach of covenants of warranty in this deed will not lie against the city.

Findla v. San Francisco, 13 Cal. 534.

78. The true meaning of the order is that the alcalde was to grant the city's land only, and neither the town nor its successor is bound for an act done beyond the limit of its authority. *Id.*

79. The prohibition against contracting debts over a certain amount, contained in the charter, applies to contracts and appropriations, but does not affect liabilities which the law may cast upon the city.

Holland v. San Francisco, 7 Cal. 361.

80. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation.

Argenti v. San Francisco, 16 Cal. 255.

81. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury, or been appropriated by her, and the property must have been used by her, or be under her control. *Id.*

82. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay for them, can not be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. *Id.*

83. That doctrine applies to cases where money or other property of a party is received under such circumstances that the general

law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Id.*

84. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of fifty thousand dollars prescribed by the charter. *Id.*

85. Purchasers at the sales of the city slip property in San Francisco, in December, 1853, under alleged ordinance No. 481, acquired no title or claim of title by their bids and the payment of their money. The city obtained the money without consideration and used it, and is legally bound to refund it, unless some subsequent matter has released her from liability.

Gorgan v. San Francisco, 18 Cal. 500.

86. The several cases which have been before this court in relation to the liability of the city of San Francisco to the parties who bid off the city slip property at the attempted sale by the city authorities in December, 1853, under an alleged ordinance, designated as ordinance 481, commented upon, and held to have decided and settled the following points: First, that the ordinance, so called, was never passed, and was, therefore a nullity; second, that the sale made in pursuance of it was, therefore, invalid, and passed no title to the bidders; third, that the bidders were entitled to recover back from the city the purchase money paid by them, and received and appropriated by the city authorities; fourth, that they were not precluded from a recovery, either, first, by reason of any want of privity between themselves and the city; or, second, by the alleged subsequent adoption by the city authorities of the ordinance directing the sale; or, third, by reason of a subsequent alleged ratification of the sale by an appropriation of the proceeds; or, fourth, by the clause in the city charter restraining the corporation from contracting liabilities beyond the sum of fifty thousand dollars; or, fifth, by the act of the legislature of 1858, authorizing the city treasurer to execute deeds to the purchasers on certain conditions.

Pimental v. San Francisco, 21 Cal. 351.

87. The C. H. and R. association made application to the board of supervisors of San Francisco for a parcel of the outside lands, under the ordinances of the city and county and statutes of the state, applicable to the disposition of such lands; caused its claim to be delineated on the "outside land map," paid the assessments and taxes thereon, and proved its right and possession to the satisfaction of the board. A portion of the land claimed was taken for a park, under the ordinances and statutes aforesaid. The plaintiffs had themselves previously

conveyed to the association: *Held*, that plaintiffs, who now claim an interest in the land awarded to the C. H. and R. A., but who made no application to the supervisors, nor notified the board of their claim, who did not have their claim delineated on the map, nor pay any assessments or taxes, can not maintain an action against the city and county of San Francisco for a part of the assessed value of the lands so taken for the park. Clark v. San Francisco, 53 Cal. 306.

88. The provisions of the statute under which the fire department of San Francisco is organized, do not create a liability on the part of the city for acts of negligence committed by the members of its fire department while engaged in duties pertaining to the department.

Howard v. San Francisco, 51 Cal. 52.

OFFICERS — POWERS, RIGHTS, DUTIES, ETC.

Election of.

89. The act to reincorporate the city of San Francisco, passed the fifteenth of April, 1851, provides that the first election for city officers should be held on the fourth Monday of April, 1851; and thereafter annually at the general election for state officers. The general election was appointed by law to be held on the first Monday in September of each year. At the first election for city officers, held on the fourth Monday of April, as above directed, the respondent was elected mayor of the city, was qualified, and was in the exercise of the functions of his office. At the general election held on the first Monday in September following, the relator received one thousand and one hundred votes for mayor (the whole number given), was qualified, and claimed the office of the respondent on the twenty-fourth of the same month. No notice of the latter election was given, or other measures pursued by the city council, under the fourth section of the second article of the charter. The respondent refused to surrender the office, and the relator filed this bill asserting his right to it, etc.: *Held*, that the election of the relator was valid, and that the means of bringing about the election and the irregularities therein should be disregarded.

People v. Brenham, 3 Cal. 477.

89a. Under the sixth section of the San Francisco consolidation act of 1856, it was intended that a superintendent of the public streets and highways of that city and county should be elected at the general election in the fall of that year; and the person then elected held his office for the full term of two years.

People v. Hossefross, 17 Cal. 137.

90. The act of April 2, 1866 (acts 1865-6, p. 719), relative to elections and officers in

San Francisco, applies only to officials holding office at the time of its passage, and was not intended to supply the rule applicable to the filling of vacancies, should any occur, after the expiration of the terms of such incumbents. *Tillson v. Ford*, 53 Cal. 701.

91. The first chapter of title 2, part 4 of the political code, which treats of "the board of supervisors," does not apply to the city and county of San Francisco. *Id.*

92. The municipal elections and terms of municipal officers in San Francisco are provided for in the consolidation act. *Id.*

93. Where a vacancy occurs in a municipal office in San Francisco by the death of the incumbent, a person elected by the board of supervisors to fill the vacancy is entitled to the office only until his successor is elected by the people. *Id.*

94. The act of May 17, 1861, to fix the fees of officers in the city and county of San Francisco, is amendatory of, and supplemental to, the act of April 19, 1856, incorporating said city and county, and is continued in force by the political code.

Adams v. San Francisco, 50 Cal. 117.

95. Under the supplementary act of April 3, 1876, relating to the construction of the new city hall in San Francisco, and directing the payment of certain outstanding warrants, out of a fund arising from the sale of bonds referred to in the act, it was the duty of the treasurer to pay the interest as well as the principal of said warrants so long as there was any money in the fund.

Jordan v. Hubert, 54 Cal. 260.

96. The statute providing for the payment of a salary to the sheriff of the city and county of San Francisco is continued in force by the political code.

Adams v. San Francisco, 50 Cal. 117.

97. The fire department of San Francisco is not a mere voluntary association, but is a branch of the municipal government of that city.

Whitney v. Fire Dept., 14 Cal. 479.

98. The police judge of the city and county of San Francisco, who is appointed to fill a vacancy, holds the office for the same term his predecessor would have held it if no vacancy had occurred. His term does not expire when his successor is elected and qualified, but continues until the first day of January following. *People v. Rix*, 33 Cal. 503.

99. The street commissioner of the city of San Francisco is empowered to use the necessary force to prevent an injury to the public streets of the city, and no action can be sustained against him, or those who act under his orders, for using such force.

Clark v. McCarthy, 1 Cal. 453.

100. The qualification of a person elected to the office of street commissioner must be made before a proper officer, and can not

be made before the mayor of the city, who has no power to administer the oath of office.

Payne v. San Francisco, 3 Cal. 122.

101. A joint resolution of the city council, approved by the mayor, recognizing a party as street commissioner, will not enable him to recover for services rendered in that capacity, upon a quantum meruit. *Id.*

102. To entitle a party to recover as street commissioner of San Francisco, he must show, not only that he had discharged his duties, but, first, that he had been lawfully elected; second, had qualified himself to hold the office, by taking the oath and filing the bond, at the time and in the manner required by law. *Id.*

Board of Supervisors.

103. Section 95 of the consolidation act, with reference to auditing claims, does not apply to judgments recovered upon the pre-existing indebtedness of the city.

Frank v. San Francisco, 21 Cal. 668.

104. The restrictive clauses of that section and of other sections of the act must be read in connection with the fourth section, and receive such a construction that the provisions of all may stand. *Id.*

105. There being no discretion as to the duty to be performed, there is none as to the use of the means required in performing it. If the means require the passage of an ordinance, the supervisors have no discretion to refuse to pass the ordinance. They have not in such case the right to vote at their option either for or against the ordinance. *Id.*

106. In imposing upon the supervisors the duty of providing for the payment of the city indebtedness, the legislature authorized them to take all the ordinary measures essential to its complete performance. The duty carries with it the means. The board can appropriate from the revenues or levy a tax, and the adjusting of the details is a mere matter of administration, which can be had under the direction of any of the officers of the corporation designated for that purpose. *Id.*

107. The board of supervisors of the city and county of San Francisco have authority, and it is their duty to provide for the payment of judgments recovered against the city of San Francisco. They have no discretion except between two courses of procedure. They must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation. *Id.*

108. Mandamus is the appropriate remedy to enforce the performance of this duty by the board of supervisors. *Id.*

109. The act of 1851, creating the board of supervisors of San Francisco county, and authorizing the board "to sue and defend

on behalf of the county," did not authorize the board to bring suits on behalf of the county in its own name; nor did it render the board liable to be sued directly for a claim against the county.

Hastings v. San Francisco, 18 Cal. 49.

110. Liability to suit has no necessary connection with ability to sue. Boards of supervisors and bodies like them, without any legislative provision, by general law, are subject, with certain exceptions, to **mandamus** to enforce the performance of the duties devolved upon them, and to the writ of **certiorari**, for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings. *Id.*

111. Where the board of supervisors of the city and county of San Francisco at a special meeting pass a resolution authorizing Burr, as president of the board, to **redeem certain city property** sold at sheriff's sale, and the resolution does not authorize the expenditure of any money on the part of the city and county, and was not published, with ayes and noes, in a newspaper before final action, according to the sixty-sixth section of the consolidation act of 1856: *Held*, that such resolution was sufficient authority to the president to make the redemption on the part of the city and county, even though the money for that purpose came from private hands. *Seale v. Doane*, 17 Cal. 476.

Commissioners of Funded Debt.

112. The act of the city of San Francisco creating the board of **sinking fund commissioners**, and the deed executed to them of all the property of the city, is void for want of power in the city, and because said deed is within the statute of frauds.

Smith v. Morse, 2 Cal. 524.

113. The **board of commissioners** of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had **no power to sell** the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners.

Heydenfeldt v. Hitchcock, 15 Cal. 514.

114. The sales of land made by the commissioners of the sinking fund of San Francisco on the twenty-fifth day of January, 1851, were void for want of power in the commissioners. *Ellis v. Eastman*, 32 Cal. 447.

115. The act of 1851, creating the board of fund commissioners of San Francisco, was a law authorizing a contract between the city and her creditors, who surrendered the old indebtedness and took a new security, bearing a different rate of interest. This transaction was in the nature of a new contract,

and the law authorizing it entered into and became part thereof, and can not be altered or amended so as to impair or destroy the rights of parties under the contract.

People v. Woods, 7 Cal. 579.

116. The act of 1851 is a law as well as a contract. And those provisions, which are mere modes of giving effect to the substantial purposes of the act may be revised and altered. The constitution forbids impairing the obligation of contracts, but does not inhibit legislation respecting them.

Thornton v. Hooper, 14 Cal. 9.

117. If, under the act, a large surplus accumulates, it may be applied to the purchase of bonds, even if no provision exist in the act for payment before the bonds are due. *Id.*

118. The act of May 1, 1851, providing for the funding of the **floating debt** of the city of San Francisco, authorized a contract between the city and her creditors, and the contract having been executed, its obligation can not be impaired by any subsequent modification or repeal of the act.

Babcock v. Middleton, 20 Cal. 643.

119. The provisions of the act, as such, are mere legislative modes to give effect to the substantial purposes of the act; may be altered, provided the alteration does not affect the security of the creditors, who have accepted the bonds of the city under the act. *Id.*

120. The object of the provision of the act requiring a public sale of the property conveyed to the commissioners of the funded debt, when a sale is made, is to secure a fair price from the purchasers. If this object can be accomplished by a sale in any other mode, the obligation of the contract is not impaired by legislation authorizing such other mode. *Id.*

121. The city of San Francisco, under the charter of 1851, had the power, by resolution of the two boards of aldermen, to reserve the lots in question from sale and keep them for school purposes, subject only to the superior title of the commissioners of the funded debt; and the fourth section of the act of 1858, validating the Van Ness ordinance, so far as it mentions property reserved and set apart for school sites, was intended to embrace such property as was reserved and set apart by resolution of the two boards.

Board of Education v. Fowler, 19 Cal. 11.

122. The commissioners of the funded debt of the city of San Francisco are the exclusive **judges of the necessity** for the sale or lease of the property of the city held by them in trust, until the trust is finally closed, and their action can not be interfered with, nor their discretion be controlled by the city, or its assignee, except on the ground

of fraud, or a gross abuse of discretion by the trustees.

Ellis v. Commissioners, 38 Cal. 629.

123. If it appear from the entire instrument that the grantors in the deed intended to execute the same in their official capacity as "commissioners of the sinking fund of the city of San Francisco," though attaching thereto their private seals and signatures only, it comes within the purview of the statute of March 25, 1858 (stats. 1858, p. 84), which was intended to validate such sales and conveyances of the commissioners.

Ellis v. Eastman, 38 Cal. 195.

124. The provisions of the consolidation act of 1856, requiring that the **sinking fund** created by the act of 1851 should be first exhausted by the redemption of certificates of stock, before the treasurer should make payment annually of the sum of fifty thousand dollars set apart by the first act for the payment of interest and for the sinking fund, are unconstitutional.

People v. Woods, 7 Cal. 579.

125. The funding act of 1851 gives considerable discretion to the commissioners in the execution of their trust, and directs that discretion to be exercised for the benefit of the city; and an arbitrary exercise of this authority, by such partial discriminations as would throw the whole burden upon particular portions of this property thus affected, even if legal, is not to be anticipated. Whether, in the exercise of this power, the public interest involved in the freeing of large masses of city property from such burdens, by some equitable apportionment of the common charge, would not be for the public interest, is a matter which addresses itself to the consideration of those interested, and which this court is not called upon to decide.

Board of Education v. Fowler, 19 Cal. 11.

126. The execution by the city of San Francisco of the **bonds** authorized by the funding act of May 1, 1851, in pursuance of and to give effect to the act, amounts to an acceptance by the corporation of the act of the legislature in all its parts; and this would be sufficient to give validity to the entire act, if, by force of the legislative will alone, the act, as a conveyance of the property of the city, would not be effectual. *Id.*

127. The purpose and effect of the act in this aspect of it, that is, as a conveyance or the authority for a conveyance of this city property, are that it is a conveyance to the commissioners of this property upon certain express trusts, to be used only for such trusts; and the title to return to the city upon the fulfillment of the trusts. If the debts were paid by the city, or the creditors released their claims, the property would become again the property of the city in full ownership. The legal title, as in other cases of trust deeds for the security of debt, was

in the grantee; the equity of redemption, and the residuum after the satisfaction of the trust debts, in the city. The city could still sell or dispose of this residuary interest, could take care of and preserve the estate—perhaps could go in possession of it, subject only to the superior right of the commissioners, so long as the debts were unpaid. *Id.*

128. *People v. Bond*, 10 Cal. 563, holding the **funding act** of 1851 to be a **contract**, and therefore that the legislature could not withdraw the property conveyed in the deed to the commissioners of the funded debt from the creditors of the city taking bonds under the act, affirmed. *Id.*

129. The act of 1858, amendatory of the act of May 1, 1851, authorizing the "funding of the floating debt of the city of San Francisco, and to provide for the payment of the same," is constitutional. The amendment that the commissioners may purchase stock at five per cent. above par does not affect injuriously the creditors under the act of 1851. *Thornton v. Hooper*, 14 Cal. 9.

130. By act of April 2, 1866, the **commissioners of the funded debt** were authorized, in certain cases, with the consent of the board of supervisors, to **make conveyances** of the trust lands; and they executed a deed to the plaintiffs, but whether with the consent of the supervisors, the record did not show: *Held*, first, that even if the deed was unauthorized by the trusts as originally defined in the act of May 1, 1851, or as modified by that of April 2, 1866, it operated to transfer to the grantees the legal estate, and the defendants, being mere intruders, could not assert the breach of trust as a defense to an action at law to recover the land; and, second, that the consent of the city was unnecessary, as the plaintiff had, under the sheriff's deed, succeeded to all the rights of the city, including the right to consent to the conveyance.

Le Roy v. Dunkerly, 54 Cal. 452.

131. A **conveyance** of the city's interest in tide lands by a majority of the commissioners of the funded debt, and held to be ineffectual by the decision in *Leonard v. Darlington*, 6 Cal. 123, for the reason that two of the five commissioners did not sign the deed, is **cured** by the act of April 14, 1857, ratifying and confirming such conveyance. *Friedman v. Nelson*, 50 Cal. 589.

132. The **commissioners of the funded debt** are not successors in interest, judgment debtors, or judgment creditors, and therefore **not redemptioners**, nor are they so in their individual capacity of citizens and taxpayers. *Thorne v. San Francisco*, 4 Cal. 127.

133. The commissioners of the funded debt of San Francisco are **not officers** within the meaning of article XI, section 7, of the constitution, and the term during which the

commissioners are authorized to act is not limited to four years.

People v. Middleton, 28 Cal. 603.

134. The commissioners of the funded debt of the city of San Francisco are not private agents; they are public officers, clothed with important trusts, for the due administration of which they have executed bonds, with security.

San Francisco v. Commissioners, 10 Cal. 585.

135. The rule which governs in this case and alone entitles the parties to intervene to restrain the proceedings, or control the action of the trustees, is that the fund is in danger of being wasted or impaired; or, that a liability will be incurred, or an injury done by threatened or probable malfeasance, for which the agents' bond or personal responsibility would afford no probable or adequate redress. Until this is shown no injunction can issue to prevent them as such commissioners from receiving the trust fund. Id.

136. The act of April 14, 1862, authorizing the commissioners of the funded debt to compromise and settle certain claims made to real estate held by them, and to convey such real estate, is not unconstitutional. Its only object is to provide a new mode for the disposition of those portions of the property which can not be advantageously disposed of at public sale, in consequence of existing doubts as to the title of the commissioners. Babcock v. Middleton, 20 Cal. 643.

137. The commissioners of the funded debt of the city of San Francisco have power, under the twelfth section of the act of May 1, 1851, authorizing them to sell the realty conveyed to them by the commissioners of the sinking fund, created by ordinance of said city, to receive the "three per cent. scrip" of the city instead of cash on the sale, it being conceded that the assets of the city were sufficient to pay all debts.

Davis v. Middleton, 14 Cal. 540.

138. The fourteenth section of article III of the act of April 15, 1851, incorporating San Francisco, taken in connection with the act of May 1, 1851, funding the floating debt of said city, did not give the commissioners of the funded debt of said city any control over or interest in the public wharves in the streets extending beyond the water front, or their revenues.

People v. Broadway W. Co., 31 Cal. 33.

139. The lease of Broadway wharf in San Francisco, made by the commissioners of the funded debt of San Francisco on the thirty-first of January, 1861, was not valid, and did not confer upon the lessees any right to the same as against the state. Id.

140. The act of May 1, 1851, to fund the floating debt of San Francisco, and creating a board of commissioners of the funded debt,

did not vest in said board the title to any wharf in San Francisco which belonged to the state. Id.

141. Without express authority, neither the mayor nor the commissioners of the funded debt of San Francisco, nor any or either of them, by virtue of their offices or otherwise, are authorized to redeem, under the act of April 29, 1851, lands of the city sold under executions against her; neither can the city attorney ratify their act of redemption by plea, after suit brought.

Thorne v. San Francisco, 4 Cal. 127.

142. The authority of the board of commissioners, under the act of May 1, 1855, relative to a sale of the state's interest in the water-line front of the city of San Francisco, as defined by the act of March 26, 1851, is limited to the property within the boundaries defined by the act; and a sale by them of lots not within those boundaries is a nullity, and can not constitute cloud of title. Hence an injunction against such sale will not lie. Kisling v. Johnson, 13 Cal. 56.

Miscellaneous Decisions.

143. The board of education of the city and county of San Francisco is a legal body, capable of suing for lots conveyed to them by the fund commissioners.

Board of Education v. Fowler, 19 Cal. 11.

144. The collector of taxes for the city and county of San Francisco is not entitled to any commissions or salary for the collection of that portion of the revenues assessed and collected for the use of said city and county. People v. San Francisco, 28 Cal. 429.

145. The clerk of the city and county of San Francisco is not in default for not countersigning the bonds required to be issued by the act of 1863, authorizing said city to subscribe to the capital stock of the Central Pacific railroad of California, until the board of supervisors direct him to countersign the same or afford him an opportunity to do so in their presence, and he refuses.

People v. San Francisco, 27 Cal. 635.

146. The act of 1864, entitled "an act concerning the salary and fees of the coroner of the city and county of San Francisco," reduces the salary of the coroner of said city and county from four thousand to two thousand dollars per annum. The fifth section provides that "this act shall not affect the salary of the present incumbent during the term for which he is elected." Held, that the fifth section did not apply to a successor of the then incumbent, appointed after his death to fill his unexpired term.

People v. Hale, 27 Cal. 148.

147. Under the act of April 26, 1858, entitled "an act to authorize the treasurer of the city and county of San Francisco to exe-

cute certain deeds and cancel certain claims," and providing that the treasurer shall receive from purchasers at the sale of the city slip property in December, 1853, any sum remaining unpaid by them respectively for the property sold under ordinance No. 481, payable in—among other items—"any genuine city controller's warrants," issued on or after May 1, 1851, the treasurer had no authority to receive any controller's warrants except such as represented a genuine indebtedness of the city. It was not sufficient that the warrants were genuine in the sense that the signatures of the officers attached to them were not forged; but they must have been issued by authority of the city and have been a valid obligation against the city.

Grogan v. San Francisco, 18 Cal. 590.

148. Where the treasurer received in payment of sums remaining unpaid upon the sales of December, 1853, controller's warrants not representing any legal or equitable indebtedness of the city, and executed a deed under the act of 1858, which was accepted by the purchaser, the treasurer acted without authority, and his deed is inoperative to pass any interest in the property; the title remains in the city, and the purchaser may recover from her the money paid upon the alleged sale in December, 1853. Id.

149. Deeds executed by the treasurer of the city and county of San Francisco in accordance with the act of April 26, 1858, above named, do not pass to the purchasers the title of the city to the slip property sold in December, 1853, under ordinance No. 481, for the reason that the city has never accepted that act; and without such acceptance the legislature could not divest the estate of the city acquired by the legislative grant under the water lot act of 1851. Id.

150. There is no difference, in the inviolability of a contract, between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are invested with subordinate legislative powers, for local purposes, they are mere instrumentalities of the state for the convenient administration of the government, and their powers are under the entire control of the legislature; they may be qualified, enlarged, restricted, or withdrawn at its discretion. But when they are empowered to take and hold private property for municipal uses, such property is invested with the security of other private rights. Id.

151. The board of supervisors of the city and county of San Francisco have no control over the treasurer, in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit, of the board, are alike immaterial.

People v. Supervisors, 12 Cal. 300.

152. A public officer, who stands in the relation of agent of the government or of the public, is not personally liable upon contracts made by him as such officer and within the scope of his legitimate duties; but the public administrator of the county of San Francisco is not a public officer within the meaning of the rule, and is personally liable upon a contract made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract.

Dwinelle v. Henriquez, 1 Cal. 387.

153. The act of March 4, 1870, requiring the city and county of San Francisco to advance out of its treasury a sufficient sum to pay for the services of the commissioners and certain others employed on the proposed extension of Montgomery and Connecticut streets (stats. 1869-70, p. 146): Held, to be clearly constitutional.

Sinton v. Ashbury, 41 Cal. 525.

154. The statute of April 25, 1863, conferring authority upon the supervisors of San Francisco "to make all regulations which may be necessary or expedient for the preservation of the public health" (stats. 1863, p. 540), was within the constitutional power of the legislature to enact; and under it the supervisors had authority to enact the ordinance (No. 730) against feeding cows on still slopes, and vending the milk of cows so fed.

Johnson v. Simonton, 43 Cal. 242.

155. Lands, the title to which is vested in the state under the act of congress donating the swamp lands to the states, are not liable to the assessment in the city and county of San Francisco, levied under the order of the board of supervisors called order 800, which assessment was made to raise a fund to pay the possessors of outside lands, dedicated to public use, the value of the lands so dedicated.

Mason v. Austin, 46 Cal. 385.

156. By the provisions of the act of the twenty-third of April, 1858, authorizing George Ensign and others, owners of the Spring Valley water works, to lay down water pipes in the public streets of the city and county of San Francisco, the Spring Valley water works are not required to supply said city and county with water for municipal purposes, free of charge, other than for the extinguishment of fires.

San Francisco v. S. V. W. W., 39 Cal. 473.

157. The third section of the act of April 23, 1858, imposes upon the Spring Valley water works the obligation to furnish, free of charge, a pro rata supply of water for municipal purposes other than the extinguishment of fires, in the event of water being introduced by some other person or persons, as provided by said section. Per Crockett, J. Id.

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SAN JOSE.

1. Under the charter of the city of San Jose, an ordinance abolishing the office of **street commissioner**, and substituting fees instead thereof, is legal and binding on the officer. *Wilson v. San Jose*, 7 Cal. 275.

2. An agreement made between the municipal authorities of San Jose on the one part, and the purchasers of the pueblo land at a judicial sale made under a decree foreclosing a mortgage executed by the municipality on those lands on the other part, **confirming unto said purchasers** all the rights and interests in such lands which they acquired by their purchase at the sheriff's sale, and releasing unto them all the right and title which the city then had, or might afterwards have therein, was void, and conferred upon said purchasers no new right.

Branham v. San Jose, 24 Cal. 585.

3. The mayor and common council of the city of San Jose have **no power** to enter into a contract by which the city becomes obliged to **pay an attorney** at a future time a sum of money, if he succeeds in placing the city in possession of certain real estate, unless there is money in the treasury at the

time to pay the same, after paying the expenses of the city government and all other demands legally due.

Wallace v. San Jose, 20 Cal. 180.

4. The mayor and common council of San Jose have no authority to bind the city by the creation of a debt to arise in future, unless there is money in the treasury at the time to pay the same, after paying the expenses of the government and all other demands legally due. *Id.*

5. In a suit against the mayor and common council of the city of San Jose on a contract creating a debt, the defendant may prove that at the time the contract was made there was **no money in the city treasury** except what had been appropriated to pay current expenses of the city government and its legal indebtedness. *Id.*

6. The mayor and common council of the city of San Jose **can sue** in the corporate name for the recovery of such real property as belongs to the city. *Id.*

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SCIRE FACIAS.

1. The writ of *scire facias* is a remedy unknown to our practice, and can not be employed for the revival or enforcement of a judgment. *Hunniston v. Smith*, 21 Cal. 129.

SEAL.

1. IMPRESSION OF, IN CIVIL PRACTICE.
6. IMPORTS CONSIDERATION.
9. MISCELLANEOUS DECISIONS.

IMPRESSION OF IN CIVIL PRACTICE.

1. An impression upon paper constitutes a good seal, and this may be made as well by pen as by a stamp; therefore, a **scroll**, with the word seal written within it, or with the initials **L. S.**, is sufficient.

Hastings v. Vaughn, 5 Cal. 315.

2. A seal is sufficient, where the impression is made upon the paper only, and not upon wax. *Connolly v. Goodwin*, 5 Cal. 220.

3. No seal was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the property sold, the date of the transfer, and the price paid, was sufficient to pass the title.

Stanley v. Green, 12 Cal. 148.

4. Where no words appear in the body of an instrument expressive of the intent to make it a **sealed instrument**, it will not be such, even though the characters [L. S.] are added to the signature.

McDonald v. Bear R. Co., 13 Cal. 220.

5. Where the **transcript** on appeal contains what purports to be a copy of a **certificate of acknowledgment**, made by a deputy county clerk, the attesting clause of which recites that the seal of court is thereto affixed, and in the margin opposite is the word "seal" embraced in brackets, it will be presumed, nothing appearing to the contrary, that the seal affixed to the original instrument is of the court of which the attesting officer was clerk.

Touchard v. Crow, 20 Cal. 150.

IMPORTS CONSIDERATION.

6. As to instruments under seal generally, the American rule seems to be that the con-

sideration clause in a deed can be explained by parol proof, at least where the consideration proven is of the same species as that mentioned in the instrument.

Bennett v. Solomon, 6 Cal. 134.

7. The law imports a consideration to a sealed instrument from its seal. At common law a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this state has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer.

McCarty v. Beach, 10 Cal. 461.

8. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor, in the same manner as a promissory note by the maker.

Comstock v. Breed, 12 Cal. 286.

MISCELLANEOUS PROVISIONS.

9. A **certified copy of a deed** from the county recorder's office, contained in the margin of the acknowledgment taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No Seal], the conclusion of the acknowledgment being, "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: *Heid*, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere **note by the recorder** of the place of the notarial seal, which he probably had no means of copying.

Jones v. Martin, 16 Cal. 165.

10. A recorder, in certifying to copies of deeds from his office, need not transcribe the **notarial seal** to the acknowledgment, the certificate of acknowledgment in this case stating that the notary did affix his seal. *Id.*

11. The deed to plaintiff of the land bought being signed by the mayor of the city and sealed with the corporate seal, the mayor being the legal custodian of the seal, and it being affixed by his authority—is sufficient to entitle the deed to be read in evidence, and a party relying upon it need not go behind the seal for the purpose of showing authority for its execution: the seal is **prima facie evidence that it was affixed by proper authority**, and the deed is **prima facie** sufficient to pass the title.

McCracken v. San Francisco, 16 Cal. 638.

12. We know of no authority which holds that a **conveyance** of interest in land must necessarily be under seal, and if it were so at

common law it does not follow that it is so required by our statute.

Ingoldsby v. Juan, 12 Cal. 577.

13. The difference between instruments sealed and unsealed is, at this day, a mere unmeaning and arbitrary distinction made by technical law, unsustained by reason. By the common law the equitable title to realty may be conveyed by instrument not under seal, if otherwise sufficient; and this equitable title, accompanied by possession, is sufficient under our system to give the right of possession. *Ortman v. Dixon*, 13 Cal. 33.

14. Under our system probably an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant. *Id.*

15. In instruments not under seal, or not required to be executed with any particular formality, it is not important in what form the obligation of the party executing as agent or principal is expressed, if from the whole instrument the true character of it can be gathered.

Haskell v. Cornish, 13 Cal. 47.

16. If, as contended in this case, a judgment by default is void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie.

Logan v. Hillegass, 16 Cal. 200.

17. The omission in the record of a deed to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record. It is sufficient if it appear from the record that the instrument copied is under seal; as, for instance, when the deed purports to be under seal and to be signed, sealed, and delivered in the presence of the notary before whom it is acknowledged.

Smith v. Dall, 13 Cal. 510.

18. The execution of an appeal bond, the delivery of it to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is *prima facie* as sufficient proof of delivery, if delivery is essential, as if the instrument were sealed.

Dore v. Covey, 13 Cal. 502.

19. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 23, 1852, is good under the statute then in force.

Stark v. Barrett, 15 Cal. 363.

20. The Mexican system knew nothing of the common law doctrine of seals. A

power of attorney executed while those laws were in force is therefore good without a seal.

Posten v. Rasette, 5 Cal. 467.

21. A release of one joint debtor is a release of the others, but it must be a technical release under seal.

Armstrong v. Hayward, 6 Cal. 183.

22. There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it; on the contrary, fraud is a legitimate defense at all times and in all proceedings, at least under our system.

Hopkins v. Beard, 6 Cal. 664.

23. It is no objection to a bill of sale for a mining claim that it is not under seal, whatever may be the effect of it in evidence.

Jackson v. Feather R. W. Co., 14 Cal. 22.

24. A bill of sale not under seal is insufficient to convey a mining claim.

McCarron v. O'Connell, 7 Cal. 152.

Clark v. McElvy, 11 *Id.* 154.

25. It is not necessary that the assignment of a judgment should be under seal.

Mitchell v. Hackett, 25 Cal. 538.

26. If there is a defect in an official bond by the failure of the principal to place a seal opposite his name, the defect will not defeat a recovery thereon as against the sureties if the defect is suggested in the complaint.

Sacramento Co. v. Bird, 31 Cal. 66.

27. The record of a mortgage not under seal does not give constructive notice of its contents, and a subsequent purchaser, unless he has actual notice of such mortgage, is not affected by it. *Racouillat v. Rene*, 32 Cal. 450.

28. Admitted, for the purposes of this decision, that a corporation may adopt the private seal of the several trustees or any one of them as its seal for the occasion.

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89-143.	POWER OF ATTORNEY,
MEXICAN GRANT, 17,	37-43.
18.	SPECIFIC PERFORM-
MEXICAN LAW, 71-	ANCE, 60.
73.	

SERVICE OF PAPERS.

1. A party relying upon a service of a notice by mail, must show a strict compliance with the provisions of the statute in making service.

People v. Alameda T. Co., 30 Cal. 182.

2. An affidavit of service of a notice of appeal by mail must state that there is a regular communication by mail between the place of residence of the person making the service and the residence of the person upon whom it is to be served. Id.

3. An affidavit of service of notice of appeal by mail, under section 521 of the practice act, must show that the person making the service resides in a different place from the person upon whom the service is made.

Moore v. Besse, April T., 1868.

4. When a legal notice is served by mail, the distance which it travels is a question of fact to be determined by proof.

Neely v. Naglee, 23 Cal. 152.

APPEAL, 198.

JUDGMENT, 203-302,

ATTACHMENT, 86, 92. | 268, 269.

SERVICE OF PROCESS.

1. The power of the legislature to provide for constructive service of process is too well settled to be attacked on constitutional grounds.

Eitel v. Foote, 39 Cal. 439.

ATTACHMENT.

JUDGMENT.

SUMMONS.

SET-OFF.

ASSIGNMENT, 45, 49.

EMINENT DOMAIN,

122.

EQUITY, 96.

MESNE PROFITS, 3.

PLEADING (COUNTER

CLAIM).

SHEEP.

1. The acts denounced by this statute (an act to restrict the herding of sheep) as unlawful, are the direct, aggressive, volitive acts of the party himself, or his agent. Its manifest object and intent is to prohibit persons owning or having the charge of sheep, from driving them to, and collecting them upon, the uninclosed lands of another.

Logan v. Gedney, 38 Cal. 579.

2. This act, neither in terms nor by im-

plication, repeals the act of April 28, 1859, "concerning lawful fences in San Bernardino" and other counties. *Id.*

SHELLEY'S CASE.

WILLS, 55, 56, 62.

SHERIFF.

1. THE OFFICE OF.
12. POWERS AND DUTIES OF.
12. *In General.*
19. *Executing and Returning Process.*
57. *Indemnity to.*
82. LIABILITIES OF.
149. EX-SHERIFF.

THE OFFICE OF.

1. A sheriff is a **ministerial or executive officer** solely, and there is no constitutional prohibition against his exercising the duties of **tax collector**, where the law consolidating the two offices was passed prior to his election. *Merrill v. Gorham*, 6 Cal. 41.

2. The sheriff is **not a judicial officer**. And, though the offices of sheriff and tax collector are distinct by the constitution, yet they may be united in the same hands.

Attorney-general v. Squires, 14 Cal. 12.

3. The offices of sheriff and tax collector, although held by the same person, are **separate and distinct offices**.

People v. Ross, 38 Cal. 76.

4. In the absence of a statute to the contrary, a person holding two **separate offices** must give two **separate official bonds**. *Id.*

5. Where a sheriff, on ascertaining that property which has been attached is **exempt from execution**, refuses to release it without an undertaking, he exceeds his authority and violates his duty.

Servanti v. Lusk, 43 Cal. 238.

6. Though the appointment of a sheriff by a county judge was void, yet the acts of such sheriff, as a **de facto officer**, are good.

People v. Roberts, 6 Cal. 214.

7. The sheriff and his **deputy** are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the sheriff impossibilities or to impose unconscionable exactions.

Whitney v. Butterfield, 13 Cal. 335.

8. A deputy sheriff who seizes property under an attachment, is not authorized, by virtue of his office, to bind the sheriff by con-

tract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown.

Krum v. King, 12 Cal. 413.

9. A deputy sheriff may, after the expiration of the term of office of his principal and in the absence of the latter from the state, execute a deed to the purchaser at a judicial sale, made by the sheriff while in office. The authority of the deputy is not impaired by the act of 1858, allowing the deed in such cases to be executed by the succeeding sheriff.

Mills v. Tukey, 22 Cal. 373.

10. Strictly speaking, there can be no vacancy in the office of sheriff, caused by the death, removal or resignation of the incumbent; for upon the happening of such an event the coroner, by operation of law, becomes sheriff. *People v. Phoenix*, 6 Cal. 92.

11. The coroner only holds the office of sheriff *ex officio*, until the appointment of a new sheriff by the board of supervisors. *Id.*

POWERS AND DUTIES OF.

In General.

12. The duties of sheriff, as such, are more or less connected with the administration of justice; they have no relation to the collection of the revenue.

People v. Edwards, 9 Cal. 286.

13. Where an attachment was issued against the property of a debtor, and the sheriff had executed the same, and was ordered to make the amount due the creditor out of the goods, chattels and property of the debtor: *Held*, that the sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person, for goods sold and delivered. *Sublette v. Melhado*, 1 Cal. 104.

14. A sheriff, under his general powers, can not take anything but legal currency in satisfaction of an execution, and where he takes a note, indorses it on the execution and then returns it satisfied, the return is not conclusive, and, perhaps, not *prima facie* evidence of satisfaction, unless it shows some authority for receiving the note.

Mitchell v. Hackett, 14 Cal. 661.

15. No order of court is required to authorize a sale by the officer.

Low v. Henry, 9 Cal. 552.

16. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against the officer; there is not sufficient cause to set aside or avoid the sale.

Smith v. Randall, 6 Cal. 47.

17. Although the officer neglects to give the notice the sale shall not be void. *Id.*

18. It is not the duty of a sheriff, at the expiration of his term of office, to turn over

to his **successor in office** personal property held by him under writ of attachment.

Sagely v. Livermore, 45 Cal. 613.

Executing and Returning Process.

19. The return on an attachment can not be amended so as to postpone the rights of creditors attaching subsequently, but before the collection.

Webster v. Haworth, 8 Cal. 21.

Newhall v. Provost, 6 Id. 85.

20. A sheriff has no right, after making a return, to amend so as to affect rights which have already vested.

Newhall v. Provost, 6 Cal. 85.

21. The general statute defines the duties of the sheriff in respect to final process. It declares "that the sheriff shall execute the writ (of *feri facias*) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess he shall return the same to the judgment debtor." These acts are to be construed **in pari materia**.

Wilson v. Broder, 10 Cal. 486.

22. A sheriff is not entitled to keeper's fees, or the expense of feeding stock under attachment unless the court from which the writ issues certifies that the charges are just and reasonable. Geil v. Stevens, 48 Cal. 590.

23. The duty imposed by the statute on sheriffs to take prisoners to the state prison, and insane persons to the insane asylum, is an official duty and none the less so because some portion of it must be performed without the limits of the county.

Adams v. San Francisco, 50 Cal. 117.

24. The sheriff of the city and county of San Francisco is required to pay to the treasurer of said city and county the sums which he receives from the state for the transportation of prisoners to the state prison and of insane persons to the insane asylum. Id.

25. A sheriff may voluntarily correct his return of a tax sale after the return has been filed, but he can not be compelled by the court to correct the return against his will. Hewell v. Lane, 53 Cal. 213.

26. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first, no special circumstances being shown.

Whitney v. Butterfield, 13 Cal. 335.

27. Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for

fraud, or because defendant is about to leave the state, or remove his property, and the like. Id.

28. In the service of process, the sheriff is responsible only for unreasonably, or not reasonably, executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. Id.

29. The mere omission of a deputy to inform the sheriff of having a process in hand is not such negligence as to charge the sheriff, in case a writ last in hand was executed first. Id.

30. A levy on personal property capable of manual delivery must be made by taking the property in custody. If it is allowed to remain in the hands of the debtor, the levy can not operate so as to defeat subsequent executions.

Dutertre v. Driard, 7 Cal. 549.

31. A levy may be good as against the defendant in the writ, and not good as to third persons. The conduct of the defendant may make the levy good, by way of waiver, or estoppel, or agreement.

Taft v. Manlove, 14 Cal. 48.

32. As to third persons, there can be no levy when the officer does not know the subject of the levy; as, where he stands at the door of a store which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession. Id.

33. Service of a copy of execution and notice of garnishment upon a third party constitute no lien on property of the debtor in his hands capable of manual delivery.

Johnson v. Gorham, 6 Cal. 195.

34. Under our statute an execution affects property only from the time of the levy. Id.

35. A levy under execution, on sufficient property to satisfy it, is a satisfaction of the judgment.

People v. Chisholm, 8 Cal. 29.

36. A deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. Krum v. King, 12 Cal. 412.

37. The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it. Low v. Adams, 6 Cal. 277.

38. Where judgment is taken jointly against two defendants, it makes no difference, so far as they are concerned, whether the sheriff first levied on joint property or not. Id.

39. Where a stranger to an execution is in possession of personal property, claiming it as his own by virtue of such a transfer to him from the execution debtor as would

prevent the latter himself from retaking possession, whether the transfer be by sale or pledge, a sheriff can not justify a seizure of the property under the writ without producing both the writ and judgment.

Knox v. Marshall, 19 Cal. 617.

40. Hence, where, in such a case, the **execution creditor** causes the property to be seized by the sheriff, and claims that the transfer from the debtor to the stranger to the writ was fraudulent and void, and made to hinder, delay, and **defraud creditors**, and on the trial, having put in evidence the execution, but not the judgment, offers evidence to show that the transfer was made for that purpose: *Held*, that the evidence was properly rejected, the judgment not being produced. *Id.*

41. The **presumptions** are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient, *prima facie*, to show a due and proper execution of the writ.

Ritter v. Scannell, 11 Cal. 248.

42. Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a **valid levy** shall be set out in the **return**; nor can such a rule be sustained. *Id.*

43. Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. *Id.*

44. Where a substitute sheriff, **elisor**, was appointed, and the pleadings did not show that there was no sheriff or coroner, or that these officers were disqualified: *Held*, that the appointment being made by a judge having competent jurisdiction, the **presumption** of the law is that he faithfully performed his duty. Turner v. Billagram, 2 Cal. 520.

45. Where an officer, by virtue of a **second attachment**, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. O'Conner v. Blake, 29 Cal. 312.

46. Where a writ of attachment was issued on the twenty-sixth of August, and a copy delivered to the occupant of the premises, or posted upon them, on the twenty-ninth of that month; and on the same day the writ was returned, with a certificate of the sheriff's proceedings, and filed in the clerk's office, but no copy of the writ, with a description of the property, was filed with the recorder until the ninth of September following: *Held*, that after the return of the writ to the clerk's office, on the twenty-ninth of August, the sheriff had no authority to take any proceedings for the **completion of the attachment** previously omitted; that the

writ was authority to him only for acts performed while it remained in his possession; and hence, that another creditor of the debtor purchasing the property from the latter, on the sixth of September, took it free from **any lien of the attachment**.

Wheaton v. Neville, 19 Cal. 41.

47. It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with **diligence**. *Id.*

48. An **execution** is sufficient **justification** to a sheriff for the seizure of the property of the debtor, whether it be in his actual possession, or in the possession of an agent or parties holding it for his benefit.

Bickerstaff v. Doub, 19 Cal. 103.

49. Where a stranger to an execution is in possession of property, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the sheriff can not justify without producing both **execution and judgment**. *Id.*

50. A **sheriff's return** is not **traversable**, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. Egery v. Buchanan, 5 Cal. 53.

51. A **mistake** in the date of the sheriff's return may be corrected at any time.

Ritter v. Scannell, 11 Cal. 238.

52. Courts should exercise great **liberality** in **allowing sheriffs** to amend their returns, so as to make them conform to the true state of the facts and to correct errors and mistakes. Gavitt v. Doub, 23 Cal. 58.

53. The **return of a deputy sheriff** on a process served is a nullity, unless made in the name of the sheriff.

Rowley v. Howard, 23 Cal. 401.

54. All returns must be made by the **deputy** in the name and by the authority of the sheriff. Joyce v. Joyce, 5 Cal. 549.

55. A **summons** was served by a deputy sheriff and returned with the following signature to the return: Elijah F. Cole, D. S. Judgment was rendered by default: *Held*, that the judgment was null and void; the return should have been in the name of the sheriff by the deputy.

Rowley v. Howard, 23 Cal. 401.

56. The **affidavit of service** required by this section must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a certified copy of the complaint accompanied the summons.

McMillan v. Reynolds, 11 Cal. 378.

Indemnity to.

57. Where an **indemnity bond** is given to a sheriff to hold him harmless, and pay

any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie.

White v. Fratt, 13 Cal. 521.

58. The bond given to release property attached only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment.

Low v. Adams, 6 Cal. 277.

59. In a bond given to release property seized on an attachment, the obligors undertook to pay on demand to plaintiffs in the action, the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiff might recover. In the bond the action is recited as for one thousand six hundred dollars. Upon delivery of the bond the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the penalty of the bond: *Held*, that recovery may be had on the bond to the extent of the penalty.

Palmer v. Vance, 13 Cal. 553.

60. Such a bond is not a statutory undertaking, but is **valid as a common law obligation**, and is a sufficient compliance with the statute.

Id.

61. The mistake in the recital as to the amount for which attachment issued, may be explained and corrected by parol.

Id.

62. Execution against the judgment debt or in such case is not a condition precedent to suit on the bond.

Id.

63. A bond given voluntarily to the sheriff on delivery of the property, is valid at common law.

Id.

64. Where the sheriff, under a writ of attachment in the suit of plaintiff against D. M. Eder and P. M. Eder, as the firm of D. M. Eder & Co., is about to levy on the property of said firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble, and expense he may be put to by reason of the non-seizure of the property, and also "to pay whatever judgment may be rendered against said defendants;" and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be partner: *Held*, that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties.

Heynemann v. Eder, 17 Cal. 433.

65. Such bond will be presumed to have been executed with reference to the provisions of the statute, and as the security required by the statute is a security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants, satisfies the condition to "pay whatever judgment may be rendered against said defendants."

Id.

66. An undertaking given to a sheriff to procure a release of goods attached is for the benefit of the plaintiff who may sue on it, and if the sheriff take a sufficient statutory undertaking he has no further responsibility.

Curia v. Packard, 29 Cal. 194.

67. If the defendant obtains an order for the release of property attached in the action, by delivering to the court or judge an undertaking, executed by sureties, conditioned to pay the plaintiff any judgment he may recover in the action, and the property is thereupon released; whenever the liability of the sureties is fixed by rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking.

Hayes v. Josephi, 26 Cal. 535.

68. The principals in a bond given to a sheriff to release goods from attachment, tender to the plaintiff in the attachment suit the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged from their obligation on the bond; and for the purpose of discharging the sureties it is not necessary that such tender be paid into court or kept good.

Curia v. Packard, 29 Cal. 194.

69. A tender of the amount claimed in the suit by the principal in an attachment bond discharges the sureties.

Id.

70. Tender by sureties on undertaking for release of attachment to plaintiff in attachment suit of the full amount of judgment recovered is equivalent to payment or release by said plaintiff.

Norwood v. Kenfield, 34 Cal. 329.

71. An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right.

Stark v. Raney, 18 Cal. 622.

72. An agreement to indemnify a party for a willful trespass about to be committed is against public policy and void.

Id.

73. If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff can not afterwards have

judgment against the sureties on the indemnifying bond, upon a notice of five days, unless he gave the sureties written notice of the action brought against him.

Dennis v. Packard, 28 Cal. 101.

74. The provision of the practice act making the judgment, in an action against a sheriff, **conclusive evidence against his indemnifier**, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier, the real party in interest, and that he has in that action an opportunity to make any defense that may exist. Dutil v. Pacheco, 21 Cal. 438.

75. Where, therefore, the **indemnifier** has been notified of the action against the sheriff, he can not maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action. Id.

76. In an action against the sheriff for not levying the execution, if the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he rendered the bond of indemnity to the sheriff required by law. Strong v. Patterson, 6 Cal. 156.

77. If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility.

Davidson v. Dallas, 8 Cal. 227.

78. A bond to indemnify a sheriff takes effect from the time of its delivery.

Buffandeau v. Brooks, 28 Cal. 641.

79. A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in violation of an order enjoining its sale, is void, because an unlawful contract. Id.

80. The fact that a bond was given to a sheriff to indemnify him against selling property in violation of an order enjoining its sale may be shown, though the bond discloses no unlawful purpose on its face. Id.

81. If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff can not maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. Lott v. Mitchell, 32 Cal. 23.

LIABILITIES OF.

82. The owner of property has his remedy and the right of recovery, against any

one, whether sheriff or not, unless it be held by legal process against himself.

Rhodes v. Patterson, 3 Cal. 469.

83. Where an order of court directed the sheriff to seize certain specific property, and this property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. Id.

84. If a sheriff take property not belonging to the defendant in the writ, whether in his possession or not, the taking is **tortious**.

Wellman v. English, 38 Cal. 583.

85. Where property has been wrongfully taken under attachment, the sheriff and the attaching creditors are **joint trespassers**.

Lewis v. Johns, 34 Cal. 629.

86. Where property attached is claimed by a third person, the sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives the bond of the indemnity, it will only inure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned. Davidson v. Dallas, 8 Cal. 227.

87. In such case, the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. Id.

88. Where a sheriff or constable seizes the property of one man under an execution against another, he is a **trespasser**, and liable on his official bond.

Van Pelt v. Littler, 14 Cal. 194.

89. A sheriff is not protected in the sale of personal property by the verdict of a jury on the trial of the right of property, under the provisions of section 218 of the code. The proceedings before a sheriff, in such a trial, are not judicial.

Perkins v. Thornburgh, 10 Cal. 189.

90. Where property is levied on by a constable or sheriff by virtue of an attachment or execution, as the property of the defendant in the suit, and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in a suit brought against him by the defendants, nor is it admissible in evidence as a defense. Sheldon v. Loomis, 28 Cal. 122.

91. The sheriff will, however, be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him.

Rhodes v. Patterson, 3 Cal. 469.

92. When the sheriff is a party to the action, the court may order the cause tried by a special jury, to be summoned by the coroner. Pacheco v. Hunsacker, 14 Cal. 120.

93. A sheriff makes out a *prima facie*

case of **justification** of the seizure of property under a writ of attachment, by the production of the writ and affidavit on which it was issued, notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure, if the property was in possession of the defendant and attached as his property.

Babe v. Coyne, 53 Cal. 261.

94. The sheriff is entitled to show such justification, irrespective of any question as to the **validity of the sale**. *Id.*

95. In trespass, against a sheriff, the court below, on plaintiff's motion, may order a special jury to try the case, instead of the regular panel. The sheriff being interested, ought not to summon a jury. And there being no coroner, an elisor may be appointed to summon a jury.

Pacheco v. Hunsacker, 14 Cal. 120.

96. An officer attaching goods under civil process is entitled to **notice of the claim of a third party** to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention.

Taylor v. Seymour, 6 Cal. 512.

97. Where the **goods of a third party** are **mixed** with the property, or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver.

Dauniel v. Gorham, 6 Cal. 43.

98. Where no such notice or demand was proved, it was error to charge the jury "that the sheriff was a trespasser, and that they were to find the value of the goods." *Id.*

99. In an action against a sheriff for **seizure and conversion** of the plaintiff's property taken under process against a third person, a demand upon the defendant prior to the bringing of the suit is not necessary to a recovery. The sheriff having misapplied his process, and whether by mistake or design will make no difference, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in the possession of the execution debtor at the date of the seizure amounts to nothing, except upon proof of fraud or commixture. The rule of the common law is correctly stated in

Ledley v. Hays, 1 Cal. 160.

100. A sheriff who levies upon and sells **property exempt from execution** is liable for the value of such property, if claimed as exempt prior to the sale.

Spencer v. Long, 39 Cal. 700.

101. A sheriff who sells property on an execution issued by a justice of the peace, after the justice has notified him that a writ of certiorari has been issued, and commanded

him to **stay all proceedings** upon the execution, is liable for the value of the property. *Id.*

102. A trespass committed by a **deputy marshal or sheriff**, in his official character, is considered, in law, as committed directly and personally by his principal.

Hirsch v. Rann, 39 Cal. 315.

103. Where a trespass is committed by a marshal or sheriff, either personally or by deputy, his official character does not relieve him from **personal responsibility**. *Id.*

104. In an action against an officer, such as sheriff or marshal, for a trespass committed through his deputy, it is not necessary to state the official character of the defendant in the complaint, or to charge the trespass as having been committed through a deputy. *Id.*

105. No **demand** is necessary before suing a sheriff for personal property tortiously taken by him.

Wellman v. English, 38 Cal. 583.

106. Where a sheriff fails to pay over money collected on execution, the action should be for a **false return**.

Egery v. Buchanan, 5 Cal. 53.

107. The **statute penalties** against sheriffs, for the non-payment of moneys collected on execution, are only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. *Id.*

108. Where the sheriff wrongfully took possession of the goods, and thereby deprived the plaintiff of them, the fact that they were taken by the coroner, under a writ against the sheriff before the latter had removed them, does not excuse his tort.

Squires v. Payne, 6 Cal. 654.

109. The **remedy by motion** against a sheriff and his sureties, to compel him to pay over the money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a *bona fide* well-grounded doubt of the authority of the party to demand it.

Wilson v. Broder, 10 Cal. 486.

110. *Held, further*, that where the **execution on such joint judgment** directed the officer "to levy of the goods and chattels, lands and tenements of the said judgment debtors," said sum, etc., the author is authorized to seize the individual as well as joint property of the judgment debtors; and hence, that where the officer seized and sold under such execution the individual property of the party not served with process, the justice of the peace issuing the writ, and the plaintiff therein, at whose request it was

issued, who took part in the proceedings and received the proceeds of the sale, are each liable to the party not served in damages for the seizure. *Inos v. Winspear*, 18 Cal. 397.

111. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law; and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt.

Sanford v. Boring, 12 Cal. 539.

112. No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the sheriff under either writ, will discharge such sheriff from liability. The statute is express that such instruction must be in writing. *Id.*

113. The evident meaning of the language of the act embraces all acts done by the sheriff in respect to the execution of process, including the care and disposition of the property levied upon. *Id.*

115. Where the taking is by an officer upon proper legal authority, a demand is necessary in order to make him liable in damages. *Taylor v. Seymour*, 6 Cal. 512.

116. Certain personal property owned by plaintiff, but which had been used by A. & G., under a contract of hire, was seized by the sheriff from the possession of the plaintiff, by virtue of an attachment against G., subsequent to which plaintiff, having made a demand for the property upon the sheriff, but not upon A. & G., commenced this action against the former for its recovery: *Held*, that the demand, if necessary at all, was properly made upon the defendant in whose possession the property was at the time.

Woodworth v. Knowlton, 22 Cal. 164.

117. If a sheriff seizes the property of A., then in A.'s possession, as the property of B., under an execution against the property of B., a demand of the return of the property by A. is not necessary before bringing suit for damages.

Moore v. Murdock, 26 Cal. 524.

118. If a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit. *Boulware v. Craddock*, 30 Cal. 190.

119. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's pos-

session, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to, the arrangement. Plaintiff had judgment in replevin: *Held*, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff, and that in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he became the agent of the plaintiff, and must be looked to as such.

Schloss v. White, 16 Cal. 65.

120. Where a sheriff received a writ of assistance, commanding him forthwith to deliver possession of certain real estate to plaintiff; and went with plaintiff to the premises for the purpose of putting him in possession, but for some reason not stated, in opposition to plaintiff's wishes and against his protestations, he declined to take any action in the matter; and then, on a subsequent day, the sheriff proceeded to execute the writ; but the parties in possession, being the parties against whom the writ run, had, in the mean time, destroyed a number of valuable fixtures, and by their willful and malicious acts had injured the premises in other respects: *Held*, that the sheriff is liable for the damage thus done; that he is presumed to have known what his duty was, and to have acted in willful violation of it; and that as his duty was to execute the writ at the earliest practicable moment, and he neglected and refused so to do, it was through his fault that the parties in possession were enabled to commit the injury; and he must respond in damages, however remote. *Chapman v. Thornburgh*, 17 Cal. 87.

121. Where a sheriff has levied on, and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sheriff, who, in defiance of it, afterwards makes the sale, he is a naked trespasser, and liable in damages, even though he be not a party to the injunction suit.

Buffendeau v. Edmondson, 17 Cal. 433.

122. The provision of law punishing the sheriff for acting in defiance of an order of court, is more for the sake of the public

than the redress of the private grievance involved in such delinquency. *Id.*

123. Where property is levied on by a constable or sheriff, by virtue of an attachment or execution, as the property of the defendant in the suit, and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in a suit brought against him by the claimant, nor is it admissible in evidence as a defense. *Sheldon v. Loomis*, 23 Cal. 122.

124. The assent of an ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the sheriff, who holds an execution against a third person, in levying it upon property in the possession of the principal in her absence.

Fitch v. Brockman, 2 Cal. 575.

125. The rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law, acting under color of process, as to private persons. *Nightingale v. Seannell*, 18 Cal. 315.

126. In such a suit, the property seized being a merchant's stock in trade, evidence of the retail value of the goods is inadmissible as a basis for damages. The object of such evidence is to estimate the profits plaintiff might have made by a sale of the goods; and this would be mere conjecture. The value of the goods was what it would cost in the market to replace them. *Id.*

127. In suit against the sheriff and the plaintiff in judgment, for a wrongful seizure of property on an execution upon such judgment, the sheriff, who acted without improper motives, can not be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff can not be given in evidence in aggravation of damages against the sheriff. *Id.*

128. If an action be improperly commenced, the party bringing it having obtained the benefit, can not avoid the responsibility he may have thus incurred, by pleading his own misfeasance.

Turner v. Billagram, 2 Cal. 520.

129. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section 232 of the code, can be commenced in the county where the redeemer resides. The provision of the statute that actions against a public officer for acts done by him in virtue of his office, etc., set forth in this section, applies only to affirmative acts of the officer, by which in the execution of process, or otherwise, he interferes with the property or right of third persons, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 9 Cal. 366.

130. In an action of trespass against a sheriff, where he is declared against personally, and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy as such committed the trespass.

Poinsett v. Taylor, 6 Cal. 78.

131. In an action against a sheriff it is not necessary to prove that the defendant directed his deputy to seize the particular property in question, in order to hold the defendant liable. *Id.*

132. In an action against a sheriff for refusing to levy an attachment on certain property as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer.

Strong v. Patterson, 6 Cal. 156.

133. As under the statute the plaintiff, after the introduction of such testimony, would be bound to show that he had tendered an indemnity bond, he may well complain that he is taken by surprise, the issue not being tendered by the pleadings. *Id.*

134. The objection to the introduction of such testimony on the ground that it is irrelevant, is sufficient. *Id.*

135. Statutory penalties against a sheriff are only recoverable when, by the return of the sheriff, he admits the collection of the money, and refuses to pay it over, and not where his failure to pay over arises from his inability to decide between conflicting claims of different execution creditors.

Johnson v. Gorham, 6 Cal. 195.

136. In an action against a sheriff for wrongfully seizing and selling property, under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict.

Phelps v. Owens, 11 Cal. 22.

137. If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law.

Markley v. Rand, 12 Cal. 275.

138. Attachment in suit of B. & Co. v. Y. & L., as firm of Y. & Co., under which defendant, as sheriff, seized plaintiff's stock in trade, claiming that L. was partner of plaintiff: *Held*, that in action by plaintiff against sheriff for damages, proof of injury to plaintiff's business as a merchant was inadmissible as a criterion of damage.

Dexter v. Paugh, 18 Cal. 372.

139. An action can not be maintained by the defendant in an execution to recover of the officer the penalty prescribed by section

222 of the practice act for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity, and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. *Askew v. Ebberts*, 22 Cal. 263.

140. In an action to enforce a penalty or forfeiture imposed by statute, the claim is to be strictly construed. *Id.*

141. Action against sheriff for seizing plaintiff's wheat, as the property of one Andeque. Evidence tending to show that the wheat was grown on the land of plaintiff, and in his possession; that A. was on the land only to raise and harvest the crop; that the grain was cut and stacked on the premises; that plaintiff was entitled to one third by the contract between him and A.; that A. sold to plaintiff and delivered possession, and then abandoned the premises, plaintiff residing thereon. A. took no further control of premises or crops, and plaintiff assumed entire dominion of both: *Held*, that plaintiff was not bound to abandon his premises, or carry the grain beyond them, to protect his title against creditors of A.; that there was no error in refusing to instruct the jury, that there was no evidence that the sale from A. to plaintiff was accompanied by an immediate delivery of the property, and followed by an actual and continued change of possession thereof.

Pacheco v. Hunsacker, 14 Cal. 120.

142. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved all of the debt upon which the attachment issued: *Held*, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit, paying C.'s debt, if it really were his property, or subject, as his, to the process, because of the fraud.

Walker v. Woods, 15 Cal. 66.

143. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still

the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Id.*

144. In case of conflict between the individual and firm creditors equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property.

Crosby v. Woods, 13 Cal. 626.

145. Where M. made a bill of sale to G. of forty-two barrels of vinegar, then in possession of G., as keeper for the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant, to recover the same: *Held*, that M. had no title to the property upon which he could recover in such an action, as the mere handing back the bill of sale to M. did not revert the title in him.

Middlesworth v. Sedgwick, 10 Cal. 392.

146. Plaintiff here can not dispute the regularity of the proceedings in such attachment unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the indebtedness of C. to F. was necessary, after showing the affidavit, undertaking, and attachment; and no irregularities, in justifying sureties and the like, could be availed of by plaintiff.

Walker v. Woods, 15 Cal. 66.

147. In an action against a sheriff for taking goods from the possession of the plaintiff, where the defendant justifies under a writ of attachment against a third person, and alleges a fraudulent sale from such third person to the plaintiff, proof of the debt on which the writ of attachment was based is necessary for no other purpose than as the foundation for proof that the sale was void as to creditors.

Mamlock v. White, 20 Cal. 598.

148. In an action by a pledgee against a sheriff for conversion of goods pledged, the sheriff who has seized them under a lawful writ in his hands will be treated as in privity with the owner, the pledgor, provided he has pursued the law in making such seizure, and will be held only for plaintiff's special interest in the goods; but in any other event he will be treated as a stranger and held for their full value.

Treadwell v. Davis, 34 Cal. 601.

EX-SHERIFF.

149. On the election of a new sheriff the former sheriff must complete the execution

of all final process which he had begun to execute before the expiration of his term of office. *People v. Boring*, 8 Cal. 406.

150. The authority of a sheriff to sell land, conferred by a writ remaining in his hands after his term of office has expired, carries with it authority to execute all the instruments required by law, to the completion of the sale, viz., a **certificate**, and in case of no redemption, a **conveyance** to the purchaser. *Id.*

151. When the ex-sheriff, who made the sale of land under a writ partially executed by him while in office, dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser, is to apply to the court for the **appointment of a commissioner or master to execute the conveyance**. *Id.*

152. Independent of statute, the court, by virtue of its original jurisdiction, has authority to appoint a suitable person to make and deliver the deed, in the enforcement of its judgment, and that its final process may be completely executed. *Id.*

153. A sheriff, whose term of office has expired, has no right to collect the **state and county tax**, as unfinished business, from the assessment list which came into his hands while in office.

Fremont v. Boling, 11 Cal. 380.

154. The ex-sheriff could only be **gar-nished as a private individual**.

Graham v. Endicott, 7 Cal. 144.

155. A sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the **deed**. Consequently, where the plaintiff's complaints in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover.

Anthony v. Wessel, 9 Cal. 103.

ASSIGNMENT, 122.

CHATTEL MORTGAGE, 16.

ESTOPPEL, 9, 32.

EXECUTION, 43, 50, 82.

FEES, 20, 21, 31-36.

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MANDAMUS, 66, 114,

115, 129, 166.

NEGLIGENCE, 10.

NEW TRIAL, 23, 27.

OFFICE, 89.

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PARTIES, 123.

PLEADING, 1335-1350.

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SHERIFF'S DEED.

EJECTMENT, 203.

ESTOPPEL, 12.

EVIDENCE, 156, 257.

EXECUTION, 195, 394-430.

QUIETING TITLE, 3.

SHERIFF'S JURY.

EXECUTION, 289.

SHERIFF'S SALE

DEED.

EQUITY, 77.

EVIDENCE, 461, 462.

EXECUTION.

PARTIES, 130.

SHERIFF.

SIGNATURE

1. In ejectment, on a patent from the United States, the original deed was produced in court, and the case tried in Yuba county, where Johnson had formerly lived for years, and where his signature could, probably, have been easily proved or disproved, had there been any suspicion as to its genuineness. *Mott v. Smith*, 16 Cal. 533.

2. Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence the court can not notice them.

Alderson v. Bell, 9 Cal. 315.

SKELETON STATEMENT.

APPEAL, 387, 814.

SLANDER

EVIDENCE, 576, 597. | LIBEL, 1, 35-48.

SLAVE

1. The marriage of a master with his female slave amounts to a relinquishment of his right to hold her as his slave and manumits her. *Pearson v. Pearson*, 51 Cal. 120.

2. If one holding a female slave of African descent in Missouri, removed with her to the

territory of Utah, and there married her, the marriage was legal, there being no local law in Utah prohibiting such marriage. Id.

SOBRANTE

DEED, 114. | TAXATION, 98.
MEXICAN GRANT.

SOLDIER.

1. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this state. But he can not vote unless he has been a citizen of the state and of the county in which he votes, for the constitutional period.

Orman v. Riley, 15 Cal. 48.

2. And a mere residence or sojourn in the county as a soldier does not make him a citizen, or prove him to be such. The rule, as fixed by the constitution, is that the fact of such sojourn or residence as a soldier, neither creates nor destroys citizenship, leaving the political status of the soldier where it was before. Id.

3. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestant. Id.

4. A copy of a copy of a muster roll of United States soldiers is not admissible in evidence to prove a man to be a soldier. Id.

5. It is the duty of the boards of supervisors of the respective counties in this state to audit and allow the bills of organized volunteer companies for rent of armory, etc., and to direct a warrant to be issued therefor, payable out of the county funds in the hands of the county treasurer; and if they refuse to issue such a warrant in a proper case, a writ of mandate will be issued, commanding them to do so.

People v. San Joaquin Co., 28 Cal. 228.

6. The sums paid by counties for expenses of volunteer companies are to be allowed and credited to such counties by the state treasurer, in his annual settlements with the county treasurers. Id.

7. The act of April 4, 1864, authorizing persons in the military service of the United States to vote elsewhere than in the county or district where they respectively reside, and have their votes counted in such county or district, is unconstitutional.

Day v. Jones, 31 Cal. 261.

8. The volunteers, to be entitled to the bounty provided to be paid by this state, by

the act of April 4, 1864 (stats. 1863-64, p. 486), must have enlisted, not only under the laws of congress requiring a quota of volunteers to be raised in this state, but also while such quota was being raised under the orders of the president.

People v. Board of Examiners, 34 Cal. 647.

CONST. LAW.

| ELECTION.

SOLE TRADER.

1. IN GENERAL 27. DECLARATION OF.

IN GENERAL

1. The sole trader act does not change the marital relation, further than the business of the wife as sole trader.

Saunders v. Webber, 39 Cal. 287.

2. A finding that there was a full compliance by a married woman with the statute of 1862 relating to sole trader (stats. 1862, p. 108), is equivalent to a finding that she was authorized to carry on the business specified in her own name and on her own account.

Porter v. Gamba, 43 Cal. 105.

3. A sole trader can not claim exemption from liability, as such, on the ground that she permitted her husband to manage and control the business. Id.

4. The provision in section 3 of the sole trader act (stats. 1862, p. 108), that "nothing contained in this act shall be deemed to authorize a married woman to carry on business in her own name when the same is managed or superintended by her husband," was intended only for the protection of the creditors of the husband, and to prevent collusion and fraud between husband and wife, but not to shield the wife from her liability as a sole trader. Id.

5. There is no objection to a general judgment against a sole trader on a claim for which she, as such, is liable. Id.

6. In an action against a *feme-sole* trader, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable.

McKune v. McGarvey, 6 Cal. 497.

7. The effect of our statute is to make a *feme-sole* of a married woman who is a sole trader, as to the particular business in which she is engaged. Id.

8. In an action brought by a married woman concerning property belonging to her as a sole trader, the husband need not be joined. Guttman v. Scannell, 7 Cal. 455.

9. By the provisions of the sole trader act the legislature designed to afford to every

married woman an opportunity of providing against the improvidence or misfortunes of her husband, by engaging in any legitimate calling, by **protecting her earnings** against her husband and his creditors, and enabling her by her own energy and industry to support herself and children. Id.

10. So far from forbidding, the law, by the plainest implication, intends that the **capital invested by the wife** as a sole trader, to the extent of five thousand dollars, may be furnished by the husband. Id.

11. If the husband at the time was **embarrassed**, the transfer to his wife, as to his creditors, would be fraudulent and void. Id.

12. The act does not confine sole traders to any particular trade or occupation, nor prohibit the husband from being employed by or acting for his wife in the business. Id.

13. The fact that the **business was unsuited to the sex** of the wife, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it. Id.

14. The right of the wife to acquire property by purchase during the marriage, can only exist as an exception to the general rule as laid down by the act defining the rights of husband and wife, and this exception exists in the case of a sole trader by statute. Alverson v. Jones, 10 Cal. 12.

15. If a husband arranges with his wife that she engage in a business as a sole trader for the mere purpose of **shielding their joint earnings** against the existing and subsequent creditors of the husband, and with the understanding between them that the property used in or acquired by the business shall belong to both, and the husband have power to dispose of it, this is a fraud upon the creditors, and the property is liable for the husband's debts. Hurlburt v. Jones, 25 Cal. 225.

16. If a husband **embarrassed** with debt makes a settlement upon or conveys to his wife, as sole trader, property for the purpose of delaying or defrauding his creditors the conveyance is void. Id.

17. The fact that a married woman is a **sole trader and contracts a debt**, raises the **presumption** that the debt is contracted on account of her business as a sole trader. Melcher v. Kuhland, 22 Cal. 522.

18. A married woman who became a sole trader under the act of 1852, for the purpose of keeping a public-house and farming, could lawfully **execute** and deliver in her own name a valid **promissory note** for the purchase money of land conveyed to her for use in said business, and could also execute in her own name a valid **mortgage** on the same to secure the purchase money. Camden v. Mullen, 29 Cal. 564.

19. The question whether property pur-

chased by a sole trader, was bought for use in her business as sole trader, is one of fact. Id.

20. The affidavit of publication of the declaration of a sole trader, which states that the publication was made "once a week for three weeks, viz., from April 26 to May 30, 1861," is sufficient to show that the publication was made for three successive weeks. Abrams v. Howard, 23 Cal. 388.

21. It is not essential that a declaration as sole trader under the act of 1852 be published. Reading v. Mullen, 31 Cal. 104.

22. The party seeking judgment on a note and mortgage executed by a married woman as sole trader under the act of 1852, has cast on him the burden of proving that the defendant was a sole trader when she made the note and mortgage. Id.

23. A copy of a recorded declaration as sole trader under the act of 1852, certified by the recorder, does not prove either the existence or contents of the original. Id.

24. If an order which is required to be made by the court, is entitled and filed in the court and bears the seal of the court, it will not be considered as an order of the judge at chambers, because the words "it appearing to me," are used in it, and the *testatum* clause says "in witness whereof, I have hereunto set my hand." Oaks v. Rodgers, 48 Cal. 197.

25. If the statute requires an oath to be administered by the court or judge, and it is administered by the clerk in open court, under the direction of the court, and tested by the clerk, it is administered by the court in the sense of the statute. Id.

26. A certified copy of the order declaring a married woman a sole trader, is admissible in evidence, even if, in the order, the judge uses the first person, as though it was made by him instead of the court, and the oath attached thereto appears upon its face to have been administered by the clerk. Id.

DECLARATION OF.

27. A declaration of a married woman, under the sole trader act, must state: First, that she intends to carry on some certain business, specifically describing it; second, that she intends to carry on such business in her own name; and, third, on her own account. These three facts are essential, and a declaration which omits either is fatally defective, and will not entitle the declarant to the privileges of a sole trader. Adams v. Knowlton, 22 Cal. 283.

28. A declaration in the following form: "State of California, county of Nevada; H. Adams, resident of Nevada City, and wife of P. Adams, hereby declares that she intends to carry on the business of restaurant and hotel keeping, accommodating boarders and

lodgers, in the city of Nevada, and from this date will be individually responsible, in her own name, for all debts contracted by her on account of her said business; that the amount of money invested in said business does not exceed or equal five thousand dollars. (Signed) H. Adams," and sworn to and acknowledged, is insufficient, and will not sustain a claim of the declarant to hold, as a sole trader, property subsequently conveyed to her for the purpose of the business mentioned, as against an execution creditor of her husband. Id.

29. The declaration of a married woman as sole trader, which states that the business she intends to carry on will be the business of buying and selling goods, wares and merchandise, describes the business to be carried on with sufficient particularity.

Abrams v. Howard, 23 Cal. 388.

30. The act of 1852 relating to sole traders does not require that the declaration provided for therein should have an acknowledgment of any kind certified by the officer before whom it is taken. It is sufficient if the officer before whom it is made certify to the truth of the paper.

Reading v. Mullen, 31 Cal. 104.

PARTIES, 86, 175-177. | PLEADING, 1351.

SOLVENT DEBT.

TAXATION, 127.

SOVEREIGNTY.

CONSTITUTIONAL LAW, 177.

SPANISH GRANT.

MEXICAN GRANT.

SPECIAL CASE.

JURISDICTION, 203.

SPECIAL PROCEEDINGS.

1. Under section 76, code of civil procedure, courts are always open to hear special proceedings of a civil nature.

Stewart v. Mahoney M. Co., 54 Cal. 149.

SPECIFICATION.

APPEAL, 353, 360-371, 373-380, 839, 840.	NEW TRIAL, 154-160, 302, 316-384.
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SPECIFIC CONTRACT.

1. CONSTRUCTION OF ACT.
14. GOLD COIN CONTRACTS.
23. CONTRACTS IN GOLD OR ITS EQUIVALENT.
28. LEGAL TENDER.
44. PERFORMANCE OR ENFORCEMENT OF CONTRACTS.
59. GOLD COIN JUDGMENTS.

CONSTRUCTION OF ACT.

1. The act of April 27, 1863, commonly called the "specific contract act," is not in conflict with the constitution of this state, nor is it opposed to the principles of essential justice. Galland v. Lewis, 26 Cal. 46.

2. The act of 1863, commonly called the "specific contract act," applies to contracts made before as well as after its passage. Otis v. Haseltine, 27 Cal. 80.

3. The specific contract act was not intended to legalize contracts which without it were illegal, but to provide a remedy for enforcing certain contracts if held to be legal.

Lane v. Gluckauf, 28 Cal. 288.

5. If one making a special deposit of gold coin afterwards contracts with the bailee to pay him interest on the same, the special deposit is turned into an open account. Howard v. Roeben, 33 Cal. 399.

6. Where the makers of a note and mortgage, subsequently to their execution (being otherwise capable of contracting) entered into the following promise in writing, in consideration that the creditor would forbear to sue: "We promise to pay our indebtedness to Benjamin Belloc in United States gold coin;" it is sufficient to bring the note and mortgage within the operation of the specific contract act.

Belloc v. Davis, 38 Cal. 243.

7. If one of the makers was a married woman such subsequent promise could not be enforced against her personally, nor against her estate, unless the instrument in writing containing the subsequent promise had been acknowledged and certified as required by law. Id.

8. If the beneficiaries of the trust seek to recover by action the value of the property in dispute at the time of suit brought, and not to obtain the amount for which it has been sold, the relief sought is not within the provisions of the specific contract act, and a

judgment payable therefor in gold coin will be reversed, unless the plaintiff consents to a modification thereof.

Price v. Reeves, 33 Cal. 457.

9. The act of April 27, 1863, commonly called the "specific contract act," does not authorize the rendition of a judgment to be paid and collected in a specific kind of money, **except** in an action on a contract or obligation in writing made payable in a "specific kind of money or currency," or in an action for the recovery of money received in a fiduciary capacity or to the use of another.

Reed v. Eldredge, 27 Cal. 236.

10. In an action upon a judgment rendered prior to the passage of the act of April 27, 1863, commonly called the "specific contract act," the court has no power to annex to the judgment rendered an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment. Id.

11. The act of the legislature of this state, passed April 17, 1863, commonly called the "specific contract law," providing for the enforcement in terms of contracts made payable in a specified kind of money or currency, **is not in derogation of**, nor does it conflict with the laws of congress making United States notes lawful money and a legal tender in payment of debts; and under said act a judgment may be rendered and enforced, payable in the kind of money specified in the contract or obligation on which it is rendered.

Carpentier v. Atherton, 25 Cal. 564.

12. It only adds one to the cases found in the common law in which it is competent for courts to enforce the execution of contracts specifically. Id.

13. The two hundredth section of the practice act, as amended in 1863, making provision for the entry of judgments in certain cases, payable in a specific kind of money, confers a special authority on courts not known to the common law, or courts of equity, and must be strictly construed.

Hathaway v. Brady, 26 Cal. 581.

GOLD COIN CONTRACTS, ENFORCEMENT OF.

14. One member of a partnership may bind the firm, by a contract in writing, signed by the firm name, to pay a debt of the firm in a specific kind of money.

Meyer v. Kohn, 29 Cal. 278.

15. An account stated, with a memorandum at the bottom, "payable in gold coin (United States), according to contract," and signed by the defendant, is admissible as written evidence of a contract on the part of the defendant to pay in gold coin.

Carey v. P. & C. P. Co., 33 Cal. 694.

17. In an action for money had and re-

ceived, where an account is introduced in evidence by the defendant, showing a charge by the defendant against the purchasers of plaintiff's claim of "cash" paid to the plaintiff, and the only cash mentioned in the testimony is gold coin, the jury may find a verdict for plaintiff in gold coin.

Wendt v. Ross, 33 Cal. 650.

18. A gold coin contract entered into before the passage of the specific contract act, will be enforced by the courts in accordance with the provisions of said act, in actions commenced after the passage of said act, and a tender made in United States treasury notes on such contracts, before the passage of said act, will not satisfy the same.

Galland v. Lewis, 26 Cal. 46.

19. A debt for goods purchased by a firm, with a verbal understanding that it is to be paid in gold coin, may be enforced in gold coin, if, after the debt has accrued and suit has been commenced on it, one of the firm makes a contract in writing, in the firm name, dated before the sale, to pay in gold, provided the complaint avers a contract to pay in gold made before the goods were sold.

Meyer v. Kohn, 29 Cal. 278.

20. If, to a note secured by a mortgage duly recorded, payable in money generally, a supplement is afterwards added agreeing to pay in gold coin, which supplement is not recorded, the mortgage can be enforced by a sale for gold coin as against subsequent incumbrancers, whose lien attached after the addition to the note.

Poett v. Stearns, 31 Cal. 78.

21. A tax due for an assessment for improving a street in Oakland, may be assessed upon a gold basis and collected in gold coin.

Beaudry v. Valdez, 32 Cal. 269.

22. If one having a deed, absolute on its face, but intended as a mortgage, goes into possession, and receives gold coin for rent, and sells the property, and receives gold coin therefor, the money is received in a fiduciary capacity, and may be recovered in gold coin.

Gay v. Hamilton, 33 Cal. 686.

CONTRACT IN GOLD COIN OR ITS EQUIVALENT.

23. A contract agreeing to pay a specific sum in gold coin, or, upon failure thereof, to pay such further sum as may be equal to the difference in value between gold coin and legal-tender notes, belongs to the class of contracts provided for in the so-called specific contract act, and may be enforced according to its meaning.

Lane v. Gluckauf, 28 Cal. 288.

24. The meaning of such contract is that the maker will pay in gold coin, or, if he does not do so, in legal-tender notes at their gold value. Id.

25. A judgment may be rendered on such contract payable in gold coin alone. *Id.*

26. A contract to pay money in gold coin of the United States, or the equivalent of such gold coin if paid in legal currency, is a contract to pay the given number of dollars in any kind of lawful money of the United States, and can not be enforced in any specific kind of money. *Reese v. Stearns*, 29 Cal. 273.

27. The specific contract act does not authorize the entry of an alternative judgment upon such contract payable in gold coin or its equivalent in legal-tender notes. *Id.*

LEGAL TENDER.

28. United States notes, issued under the act of congress of February 25, 1862, are not receivable for state and county taxes.

Perry v. Washburn, 20 Cal. 318.

29. The constitution of the United States confers upon congress the power to issue treasury notes or bills of credit, not in express terms, but as a power necessarily implied, whenever congress in its wisdom shall determine that it is necessary to issue them in order to carry into effect a power expressly granted.

Lick v. Faulkner, 25 Cal. 404.

30. The act of congress of February 25, 1862, authorizing treasury notes to be issued, and making them lawful money and a legal tender in payment of debts, was an exercise of sovereign authority within the scope of the powers granted in the constitution, "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasion," and "to raise and support an army," and "to provide and maintain a navy." *Id.*

31. The making of treasury notes lawful money, and a legal tender in payment of debts, is one of the means which congress may constitutionally adopt to enable the general government "to raise and support an army, to provide and maintain a navy," and "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasion." *Id.*

32. The act of congress, passed February 25, 1862, making the notes issued under the act lawful money, and a legal tender for the payment of private debts, is constitutional.

Curiae v. Abadie, 25 Cal. 502.

33. The notes issued under said act are a legal tender in payment of a debt, the consideration of which was gold or silver coin of the United States, unless there is a written contract to pay in gold or silver coin. *Id.*

34. The act of congress, passed February 25, 1862, making the notes issued thereunder a legal tender in payment of private debts, is constitutional.

Kierski v. Mathews, 25 Cal. 591.

35. Treasury notes issued under the act of

congress of February 25, 1862, are lawful money, and a legal tender in payment of all debts, public and private, **except certain public debts** mentioned in the act.

People v. Mayhew, 26 Cal. 655.

36. United States notes issued under and by authority of the act of congress of February 25, 1862, entitled "an act to authorize the issue of United States notes," etc., and the act of March 3, 1863, entitled "an act to provide ways and means for the support of the government," are lawful money and a legal tender in payment of all private debts contracted before the passage of said acts, unless by the terms of the contract creating the debt the debtor promised to pay in gold or silver coin.

Higgins v. B. B. & A. Co., 27 Cal. 153.

37. The acts of congress making United States notes lawful and a legal tender in payment of debts are not laws operating retrospectively, but *in presenti* and prospectively. *Id.*

38. In an action to recover the value of services rendered, when no price has been agreed upon by the parties, if the jury adopt treasury notes, made by act of congress a legal tender in payment of debts, as the standard of value, the verdict will not be set aside on that ground.

Spencer v. Prindle, 28 Cal. 276.

39. In contemplation of law, a dollar in United States treasury notes made a legal tender in payment of debts, is equal to and therefore the equivalent of, a dollar in gold coin.

Reese v. Stearns, 29 Cal. 273.

40. As a matter of law there is no possible difference in value between gold coin and legal-tender notes, nor can evidence be received to prove a difference.

Poett v. Stearns, 31 Cal. 78.

41. A railroad company is not justified in refusing to convey a passenger already admitted into its cars, and the journey is commenced, who, upon demand of his fare, tenders only legal-tender notes in payment.

Tarbell v. C. P. R. Co., 34 Cal. 616.

42. In such case the contract is already made and in process of performance, and the kind of money to be paid is no longer an open question. Whether payment in coin might be demanded before the passenger is admitted into the cars and the journey is commenced, not decided. *Id.*

43. Railroad fares are not taxes, and do not fall within the rule in *Perry v. Washburn*, 20 Cal. 318. *Id.*

PERFORMANCE OR ENFORCEMENT OF CONTRACTS.

44. A contract made to pay money generally may be discharged by a tender and payment of either of the three kinds of money

made a legal tender by the laws of the United States; but a contract made to pay in one of the three kinds of money can not be discharged by a tender of either of the two other kinds.

Carpentier v. Atherton, 25 Cal. 564.

45. A contract for the payment of a sum of money in United States coin, entered into before the passage of the act of April 27, 1863, commonly called the specific contract act, can only be performed by a payment of the kind of money specified.

Galland v. Lewis, 26 Cal. 46.

46. The obligation of a judgment creditor or redemptioner to pay a certain amount of money in order to exercise the statutory right of redemption from a sale of land made by a sheriff, is a debt within the meaning of the act of congress making treasury notes lawful money and a legal tender in payment of debts. *People v. Mayhew*, 26 Cal. 655.

47. Land sold at sheriff's sale under a judgment payable generally in money, without specifying a particular kind of money, may be redeemed with treasury notes made a legal tender by act of congress. *Id.*

48. In an action to recover possession of personal property, the plaintiff may recover its value in United States legal-tender notes. *Tarpey v. Shepherd*, 30 Cal. 180.

49. One unlawfully converting property does not sustain any injury if the jury, in an action to recover possession of the same, finds its value in United States legal-tender notes. *Id.*

50. Where the kind of money received by the defendant is not in issue, and he has received the same in a fiduciary capacity, or to the use of another, it is proper for the court, upon a verdict for the amount of money, to order judgment in the kind of money received by him.

Pinkerton v. Woodward, 33 Cal. 557.

51. Where it is found by the court in an action brought to redeem, "that it was tacitly understood by and between the plaintiff and wife and the defendant, that the conveyance made by plaintiff to defendant was intended to secure the repayment to said defendant of the sums paid and advanced by him, with interest thereon, and not as an absolute conveyance of the premises, and that upon such payment in gold coin of the United States said defendant would reconvey said premises to the plaintiff, or the plaintiff's wife," the judgment must require the plaintiff to pay the redemption money in gold coin, not under the provisions of the specific contract act, but upon the principle that "he who seeks equity must do equity." *Cowing v. Rogers*, 34 Cal. 648.

52. Where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs

and interest in the kind of money mentioned in the contract.

Carpentier v. Atherton, 25 Cal. 564.

53. Where a note is made payable "in gold and silver coin," it is error to render judgment for gold coin alone.

Burnett v. Stearns, 33 Cal. 468.

54. Where suit is brought on a general indebtedness, without a written contract to pay, or on a written contract to pay money generally, without designating the kind of money, the court can not render a judgment payable in a specific kind of money.

Curiae v. Abadie, 25 Cal. 502.

55. In an action against the sureties upon a bond given by the general guardian of an infant minor, but not made payable in any specific kind of money, a judgment should not be rendered payable in gold coin.

Fox v. Minor, 32 Cal. 111.

Mendocino Co. v. Morris, *Id.* 149.

56. In an action against the principal and his sureties, on an official bond, if the bond contains no promise to pay in coin, judgment can only be rendered in money generally. This rule applies to the principal as well as sureties.

Mendocino Co. v. Morris, 32 Cal. 145.

57. In an action for the value of services rendered, when no price has been agreed upon by the parties, if the jury adopt treasury notes made by the act of congress a legal tender in payment of debts, as the standard of value, the verdict will not be set aside on that ground.

Spencer v. Prindle, 28 Cal. 276.

58. The two hundredth section of the practice act, as amended in 1863, making provision for the entry of judgments in certain cases payable in a specific kind of money, confers a special authority on courts not known to the common law or courts of equity, and must be strictly construed. *Hathaway v. Brady*, 26 Cal. 586.

GOLD COIN JUDGMENTS.

59. A party is not entitled to a judgment in gold coin, unless it is averred in the complaint that there was a contract in writing, or that it was understood and agreed by the parties that payment should be made in that kind of coin.

Goldsmith v. Sawyer, 46 Cal. 209.

60. A judgment for work and labor performed may be made payable in gold coin, if there is a promise to pay in gold coin.

Bradbury v. Cronise, 46 Cal. 287.

61. In ejectment, if the court finds the value of the use and occupation of the premises in both gold and currency, a general judgment may be rendered for the currency value. *Carpentier v. Small*, 35 Cal. 346.

62. Where suit is brought on a general indebtedness without a written contract to

pay, or on a written contract to pay money generally, without designating the kind of money, the court can not render a judgment payable in a specific kind of money.

Curiac v. Abadie, 25 Cal. 502.

63. If there is **no allegation** in the complaint that there was an agreement to pay in gold coin, the court can not render a judgment payable in gold coin, even if the verdict of the jury is for gold coin. The verdict can not go beyond the issues.

Watson v. S. F. & H. B. R. Co., 50 Cal. 528.

64. If the complaint does **not pray for a gold coin** judgment, and the summons does not say that judgment will be taken for gold coin, the clerk should not, on default, render a gold coin judgment.

Lamping v. Hyatt, 27 Cal. 99.

65. In an action upon a note payable in gold coin, if the defendant suffers a default, the clerk may enter a judgment against him payable in gold coin.

Harding v. Cowing, 28 Cal. 212.

66. If a note is made payable in the alternative, either in gold or legal-tender notes, a judgment rendered on it may also be in the alternative.

Lane v. Gluckauf, 28 Cal. 288.

67. If the note sued on is payable in money generally, and the complaint contains a copy of the same, the clerk can not, after default, enter judgment payable in gold coin, although the complaint prays for such judgment.

Wallace v. Eldredge, 27 Cal. 495.

68. If the complaint in action on a judgment aver that the judgment sued on was rendered payable in gold coin, and defendant makes default, the clerk should enter judgment payable in the same kind of money. *Id.*

69. If a promissory note has the words "in gold coin" after the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of the United States, if not paid in gold coin.

Lamping v. Hyatt, 27 Cal. 99.

73. In an action for the value of services rendered, when no price has been agreed upon by the parties, if the jury adopt treasury notes, made by act of congress a legal tender in payment of debts, as the standard of value, the verdict will not be set aside on that ground.

Spencer v. Prindle, 28 Cal. 276.

74. A judgment payable in gold coin can not be recovered upon an open account or account stated, unless there is a promise in writing to pay the balance in such coin.

Howard v. Roeben, 33 Cal. 399.

75. In an action upon a note and mortgage, by the terms of which the payments, promised and secured, are to be made in United States gold coin, or in default of that then in legal-tender notes at their market value in gold coin in the San Francisco market: *Held*, that a judgment for gold coin was properly rendered. Such a note is authorized by and enforceable under the specific contract act. *Lane v. Gluckauf*, 28 Cal. 288.

Burnett v. Stearns, 33 Cal. 468.

76. In an action against the sureties upon a bond given by the general guardian of an infant minor, but not made payable in any specific kind of money, a judgment should not be rendered payable in gold coin.

Fox v. Minor, 32 Cal. 111.

77. In an action against the principal and his sureties on an official bond, if the bond contains no promise to pay in coin, judgment can only be rendered payable in money generally. This rule applies to the principal as well as sureties.

Mendocino v. Morris, 32 Cal. 145.

78. Under the specific contract act, a promise in writing to pay in United States gold and silver coin is enforceable by judgment for the payment of gold and silver coin, and a judgment for gold coin only is erroneous. *Burnett v. Stearns*, 33 Cal. 468.

80. It is error for the court to adjudge the costs in an action of forcible entry and detainer to be paid in gold coin.

Moore v. Del Valle, 28 Cal. 170.

81. If the complaint aver a contract in writing by defendant to pay for goods sold in gold coin, made before the sale, and such contract is made after suit commenced, but dated before the sale, judgment should be rendered payable in gold coin.

Meyer v. Kohn, 29 Cal. 278.

82. Where, in an action for money had and received, it appeared that the defendant received the sums demanded in gold coin or gold dust, all of which he entered in his account book as "cash," a verdict for plaintiff for said sum "in gold coin" will not be set aside as contrary to the evidence.

Wendt v. Ross, 33 Cal. 650.

83. A guest who had deposited with an innkeeper his money, consisting of gold coin, is entitled under the specific contract act to recover judgment therefor payable in gold coin only.

Pinkerton v. Woodward, 33 Cal. 557.

84. For public revenue, wharfage, etc., in San Francisco, judgment may be rendered in gold coin.

People v. Steamer America, 34 Cal. 676.

85. Where the annual value of premises is found both in gold and in currency,

the judgment may be general for the amount of the currency valuation.

Carpentier v. Small, 35 Cal. 346.

86. If the complaint alleges that the contract sued on called for payment in gold coin, and the answer admits it, the plaintiff, if he recovers, is entitled to a judgment payable in gold coin, and the verdict of the jury need not specify the kind of currency or money to be recovered.

Winans v. Hassey, 48 Cal. 635.

87. If, in a proceeding to condemn land for a railroad, the court finds generally the value of the land taken, and the damages to the remainder of the tract, and it does not appear that the values were estimated on a gold coin basis, a judgment in gold coin can not be rendered.

N. P. R. Co. v. Reynolds, 50 Cal. 90.

88. The point not decided, whether in a proceeding to condemn land for a railroad, damages may be proved and allowed in gold coin. *Id.*

89. If, on the suit of the purchaser, a contract for the sale of real estate is rescinded for fraudulent representations, he can not recover judgment in gold coin for the value of improvements placed on the premises by him, if the court finds the value in money without designating the kind of money.

McDonald v. M. V. H. A., 51 Cal. 210.

90. Judgment in gold coin can not be rendered upon a verbal contract to pay money unless there was an agreement to pay in gold coin.

Williston v. Perkins, 51 Cal. 554.

91. In an action for goods sold and services performed, and money loaned, a judgment for the plaintiff in gold coin must not be rendered if there is nothing in the record to show an agreement to pay in gold coin.

Noonan v. Hood, 49 Cal. 293.

92. Judgment in gold coin rendered in an action for tort is irregular, and will be modified on appeal.

Livingston v. Morgan, 53 Cal. 23.

93. In an action of slander, if the jury assess the damages for the plaintiff in gold coin, the court may disregard so much of the verdict as relates to coin, and enter a judgment which does not specify any particular kind of money.

Chamberlin v. Vance, 51 Cal. 75.

94. In an action to recover damages for an injury to the person, a verdict for the plaintiff payable in gold coin is not warranted, and if such verdict is rendered, the court should disregard the gold coin part as surplus.

Patochi v. C. P. R. Co., 52 Cal. 90.

95. It is not error to make an assessment in a swamp land district payable in gold coin.

People v. Hagar, 52 Cal. 171.

SPECIFIC PERFORMANCE.

1. IN GENERAL.
21. CONTRACT TO CONVEY LAND.
89. TIME AS ESSENCE OF CONTRACT.
99. CONTRACT TO SELL PERSONAL PROPERTY.
104. CONTRACT BETWEEN ATTORNEY AND CLIENT FOR SERVICES.
110. CONTRACT TO TRANSFER STOCK.
115. PAROL CONTRACTS.

IN GENERAL.

1. To entitle a party to a specific performance he must have performed, on his part, every essential of the agreement.

Goodale v. West, 5 Cal. 339.

2. A party seeking to enforce specific performance of a contract must show that he has acted in good faith.

Conrad v. Lindley, 2 Cal. 173.

3. The law supposes that every suitor will state his case as strongly as the facts warrant; and hence the rule that a pleading is taken most strongly against the party making it.

Green v. Covillaud, 10 Cal. 317.

4. The case of *Brown v. Covillaud*, 6 Cal. 568, which is a case very similar to this, in its main features, disposes of the whole matter of this bill, as it originally stood; and this court feels no inclination to disturb that decision.

Id.

5. A party seeking the legal enforcement of the stipulation of a concurrent obligation of the other party must first show a compliance with his own.

Id.

6. A court of equity is always chary of its power to decree a specific performance, and will withhold the exercise of its jurisdiction in this respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity.

Morrison v. Rossignol, 5 Cal. 64.

7. Courts of equity will enforce the stipulations of a deed of separation whenever it affects rights to property or income, and sometimes, where the jurisdiction has attached on account of questions relating to property, it will even lend its aid collaterally to enforce its stipulation for a separation.

Joyce v. Joyce, 5 Cal. 161.

8. A bill *quia timet*, and to enforce the specific execution of an agreement, lies only where there is no adequate remedy at law. But where the damages, resulting from the breach of such agreement, are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances.

White v. Fratt, 13 Cal. 521.

9. A contract should be enforced in every case where the subject is susceptible of substantial enjoyment; provided always, that

the circumstances surrounding and connected with the contract bring it within the equitable rules which entitle it to the relief sought, and where the remedy at law is uncertain or insufficient.

Johnson v. Rickett, 5 Cal. 218.

10. The fact that the vendor of land is absent from the state at the time the vendee becomes, by the terms of the sale, entitled to a deed, does not prevent him from giving a deed voluntarily, nor the courts of this state from compelling him to do so, in person, or by a commissioner appointed by the court to act for him.

Rourke v. McLaughlin, 38 Cal. 196.

11. Specific performance will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court. Id.

12. The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but upon the question whether the breach admits of adequate compensation in damages.

Senter v. Davis, 38 Cal. 450.

13. If damages at law will be adequate compensation for the breach, specific performance will not be decreed. If non-performance will embarrass the plaintiff in his business plans, or involve him in a loss which a jury can not estimate with any degree of certainty, specific performance should be decreed. Id.

14. Whether equity will enforce the specific performance of a contract depends, not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law.

Duif v. Fisher, 15 Cal. 375.

15. Equity will not enforce specifically a contract for personal services, especially where they are confidential in their nature and involve in their performance the exercise of discretionary authority, but will leave the party to his remedy at law.

Cooper v. Pena, 21 Cal. 403.

16. Equity will not enforce the specific performance of a contract where the party asking its enforcement can not, from the nature of the contract, be compelled to perform it specifically on his part. Id.

17. In order that a specific performance of a contract may be compelled, the remedy as well as the obligation must be mutual, and, as a general rule, the question of mutuality is to be determined by the contract itself, and is not affected by circumstances arising after the contract is made and the rights of the parties fixed. Id.

18. In cases in which a want of mutuality at the time the contract has been entered

into has been held not to be sufficient reason for refusing to enforce it, as in contracts with infants, those between lessor and lessee, trustee and cestui que trust, voluntary settlements, and the like, are exceptionable cases in which peculiar considerations have been allowed to override the principle of mutuality, and they do not contravene the general rule as above stated. Id.

19. The specific performance of a contract is not a matter of course, but rests in the sound discretion of the court upon a view of all the circumstances, and before the court will act it must be satisfied that the contract is reasonable and equal in its operation. Id.

20. In an action for specific performance, the plaintiff, after a decree in his favor which does not designate the time for performance, may demand its enforcement at any time until the statute of limitations becomes available to his adversary.

Redington v. Chase, 34 Cal. 666.

OF CONTRACT TO CONVEY LAND.

21. A., the owner of a lot of land in San Francisco, requested B. to sell the same, and delivered to him the title deed in order to enable him to effect a sale. B. agreed verbally with the plaintiff to sell the land to him, but A. refused to comply with the verbal agreement which B., his agent, had made with plaintiff: Held, in an action by the plaintiff against A. to compel the execution of a deed or the payment of damages, that the agreement was void and could not be enforced, and that defendant A. was not liable in damages.

Harris v. Brown, 1 Cal. 98.

22. Courts of equity have not the power to make contracts for parties, nor alter those which have been deliberately made.

Grey v. Tubbs, 43 Cal. 359.

23. A letter signed by the owner of land, and addressed to A., stating that he has agreed with B. to sell B. the land, and giving the general terms of the agreement, with a general description of the land and its price, is a sufficient memorandum of a contract for the sale of the land within the statute of frauds, and may be enforced by B. in equity.

Moss v. Atkinson, 44 Cal. 3.

24. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been part performance of a verbal contract by the vendee.

Hoen v. Simmons, 1 Cal. 119.

25. A party who seeks a specific performance of a verbal contract for the conveyance of real estate should show that he has fully complied with the substance of the contract on his part. Id.

26. Where A. contracted verbally to convey to B. a certain lot of land for five

thousand dollars, of which sum one thousand dollars was to be paid down, and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the four thousand dollars had elapsed long before the commencement of the suit: *Held*, the plaintiff not having paid or tendered the four thousand dollars, with interest, that a specific performance ought not to be decreed. *Id.*

27. Where the terms of a verbal contract are reduced to writing, but the written paper is **neither signed nor delivered**, the contract will be deemed inchoate and incomplete, and neither party will be bound by it. *Id.*

28. A covenant entered into by all the tenants in common who, as such, own a block of land in which they intend to lay out a street through the middle of the block, but which is so drawn as to **locate the street at a place not in the middle of the block**, can not be enforced according to the intention of the covenantors, without first reforming it so as to make it express the real intention of the parties. *De Witt v. Duncan*, 46 Cal. 342.

29. The case of *Hoen v. Simmons*, deciding that a verbal contract of itself alone was insufficient under Mexican law to transfer the title to real estate, affirmed; but where a verbal contract of sale *in presenti* and the **title deeds are delivered** by the vendor to the vendee, and permission given to the vendee to enter and take possession of the land, and the vendee did accordingly take possession of and make valuable improvements on the premises: *Held*, that a specific performance of the verbal contract should be decreed.

Tohler v. Folsom, 1 Cal. 207.

30. Where there has been such **part performance** of a verbal contract of sale by the plaintiff as to put him into a situation which would operate as a fraud upon him, unless the verbal agreement should be enforced, a specific performance of the contract will be decreed. *Id.*

31. On a bill for specific performance, **defendant allged fraud** in the contract sued upon, **but admitted payment** of the consideration money under protest, affirming the fraud: *Held*, that the receipt of payment was no waiver of the defense, and that defendant was not estopped from showing the fraud, and that it was error in the court not so to instruct the jury when requested.

Russell v. Amador, 3 Cal. 400.

32. A party entering upon land, under an agreement to purchase, and afterwards **abandoning the purchase**, disclaiming the title of the vendor, forfeits the benefit of the agreement, and can not, on subsequently tendering the purchase money, claim a specific performance.

Conrad v. Lindley, 2 Cal. 173.

33. An **unwritten contract for the sale** of land is void, by the express declaration of the statute of frauds, and a court of equity has no power to enforce a specific performance of it. *Abell v. Calderwood*, 4 Cal. 91.

34. K. entered into a parol contract with L. to convey to L. a tract of land, upon the payment of a stipulated price therefor. L. **paid the price as stipulated, and was let into possession**. Thereafter, K. brought ejectment to recover the possession of said land, to which action L. pleaded said contract and its said part performance, and prayed judgment for its complete performance on the part of K.: *Held*, that a judgment for L. as prayed was properly rendered.

King v. Meyer, 35 Cal. 646.

35. An **executory contract for the sale of real estate** is valid and binding, and can be enforced by the vendee, if **signed by the vendor alone**.

Vassault v. Edwards, 43 Cal. 458.

36. In a suit for specific performance, the contract must be **so free from ambiguity** as to leave no reasonable doubt of the intentions of the parties.

Agard v. Valencia, 39 Cal. 292.

37. It must be shown that the contract is **fair and just**, and that it would not be inequitable to enforce it. *Id.*

38. In a suit for a specific performance of an agreement to convey lands, the agreement must be one which in all its features appeals to the **judicial discretion** as being fit to be enforced *in specie*, as having been obtained without any intermixture of unfairness.

Bruck v. Tucker, 42 Cal. 347.

39. Tenants in common of land are not bound by the acts of a co-tenant in accepting a balance of the purchase money and promising a deed, after the right thereto had become forfeited.

Pearis v. Covillaud, 6 Cal. 617.

40. The lapse of over **four years** from the maturity of the note, before action commenced for a specific performance, bars the action by limitation, and goes far to make out an abandonment of the purchase by the plaintiff. *Id.*

41. Where the plaintiff gave his note, payable four months after date, in consideration of which the defendants executed a contract for a deed of land, upon payment of the note: *Held*, that after a **tender of the deed, and demand and refusal to pay** the note after its maturity, the plaintiff had forfeited his right to insist on a performance of the contract. *Id.*

42. Where a party seeks to enforce a contract to convey land to him, if there are circumstances showing **culpable negligence** on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raise a presumption of an abandonment of the contract, or if the

property has greatly enhanced in value, and he has apparently laid by for the purpose of taking advantage of this circumstance, he will not be entitled to a decision in his favor.

Brown v. Covillaud, 6 Cal. 566.

43. In applications of this kind, the party is not entitled to relief as a matter of course, but subjects himself to the equitable consideration of the chancellor, and must show a case free from doubt or suspicion. *Id.*

44. Where the plaintiffs gave their note to the defendants, payable in one year and only bearing interest at ten per cent. per annum, at a time when the current rate of interest was ten per cent. per month, in consideration of which he received a covenant from the payees to convey them certain land, on the payment of the note at maturity, the low rate of interest raises the presumption that the parties intended that the note should be paid at maturity. *Id.*

45. Where it appeared that the defendants were desirous to raise money to make certain improvements, for which reason they were anxious to dispose of some of their land, and that the plaintiffs never offered to pay their note so given, until three years after its maturity, during which time the property of one of the defendants had been sold under execution, and the other defendants had been obliged to raise money at a high rate of interest, to meet their obligations respecting this and other property, and had paid all the taxes on the land; while the plaintiffs refused to have the property assessed to them or to pay taxes thereon; that they had ever since the making of the contract been in receipt of the rents and profits of the land, which had greatly enhanced in value since the maturity of their note; and further, that since the maturity of their note, they, with others, had made a written request to the defendants to be allowed to purchase the land occupied by them and the others; all these facts go to show conclusively that the plaintiffs never intended to consummate the purchase unless they found it to their interest to do so. *Id.*

46. This conclusion is strengthened when the complaint sets up as a reason for the non-payment of the note that the defendants hitherto had been unable to make a "good and sufficient deed," as they had covenanted to do, for the reason that the title to the land in the defendants had only recently been confirmed by the United States land commission. *Id.*

47. And further, though it might be a defense to an action brought by the vendor to enforce such a contract, that he had no title, the rule can not be invoked in an action brought by the vendee, who has broken his contract, against a vendor who only agreed to convey the interest he had in the land. *Id.*

48. Courts of equity in this state possess

the power to enforce the specific performance of verbal contracts for the sale of land in cases of **part performance** of such contracts. *Arguello v. Edinger*, 10 Cal. 150.

49. A court of equity will not enforce a specific performance of the agreement to convey lands when the plaintiff shows **no compliance** or offer of compliance on his part with the agreement, nor any excuse therefor, for the period of **twenty-one or twenty-two months** from the time he bound himself to perform.

Brown v. Covillaud, 6 Cal. 571.

Pearis v. Covillaud, *Id.* 617.

Green v. Covillaud, 10 *Id.* 317.

50. If, in a case where both the vendor and vendee act through agents in the sale and purchase of real estate, a written memorandum of sale is made by the agent of the vendor, and delivered to the broker of the vendee, and the circumstances show that the broker of the vendee was authorized by him to make the purchase, and that the vendee accepted of the written memorandum to his broker as a delivery to him, and knew what its contents were, the contract will be enforced against the vendee.

Rutenberg v. Main, 47 Cal. 213.

51. The authority of a mere broker, employed to sell real estate, is limited to the power of finding a purchaser satisfactory to the principal; but if the language of the principal, used in making the employment, clearly shows that he intended to give the agent a power more extensive than that of a mere broker, and to authorize him to make a written memorandum of sale, the court will so find, and will enforce the written contract made by him. *Id.*

52. If the statute authorizes the probate court to compel an administrator to execute a conveyance of real estate, in a case where the intestate had contracted in writing to convey it, the petition asking for a decree compelling the administrator to convey **must state** that the contract was in writing, in order to give the probate court jurisdiction.

Cory v. Hyde, 49 Cal. 469.

53. The words "and in all cases where such decedent, if living, might be compelled to make such conveyance," inserted in such section by way of amendment to section 205 of the old probate act, do not extend the jurisdiction of the probate court to cases where there was no contract in writing. *Id.*

54. Section 1597 of the code of civil procedure does not empower the probate court to direct an administrator to perform specifically a contract for the conveyance of land made by his intestate, unless the contract of the intestate was in writing. *Id.*

55. The question of the extent of equitable jurisdiction which may be conferred on the probate court, as collateral to the main ob-

jects for which that court is created, not decided. *Id.*

56. In ejectment brought by a **pre-emptor**, based on the patent issued to him, the defendant can not set up, nor will a court of equity enforce an **executory contract** to convey the land entered into by plaintiff before making proof and payment as a pre-emptor. *Huston v. Walker*, 47 Cal. 484.

57. An action to compel the specific performance of an agreement to convey real estate may be brought within two years after the time the cause of action accrues, and the time is not shortened by the facts that the person bound to convey dies, and executors of his will are appointed more than one year before the action is commenced.

Lowell v. Kier, 50 Cal. 646.

58. Possession of land under an unrecorded agreement with the owner to purchase the same, is notice sufficient to put others on inquiry, and if they buy of the owner, the contract of purchase may be enforced, as against them, in equity.

Moss v. Atkinson, 44 Cal. 3.

59. When a married woman has prior to her marriage entered into a contract which is binding upon her, a specific performance may be decreed notwithstanding her subsequent marriage.

Love v. Watkins, 40 Cal. 547.

60. An executory contract for the sale of the wife's separate property, executed by the husband and wife, in the mode prescribed by the statute defining the rights of husband and wife, is valid and binding on the wife, and may be enforced by a decree of specific performance. *Id.*

61. Equity will decree specific performance of a covenant in a lease, which provides that the lessee shall have the privilege of purchasing the premises for a fixed sum of money, on or before the expiration of the term. *Hall v. Center*, 40 Cal. 63.

62. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for his execution.

Goodale v. West, 5 Cal. 339.

63. Lands held by no other tenure than possession may be legitimate subjects of control; and sometimes, in equity, chattel interests or personal property are made the subject of specific performance.

Johnson v. Rickett, 5 Cal. 219.

64. The defendants were not bound to tender a deed and demand the purchase money, in order to avoid the contract. In this state there is no rule on the subject, but in England it is the duty of the vendee to tender a deed.

Brown v. Covillaud, 6 Cal. 566.

65. Where, in pursuance of an agreement to convey land, the grantee presents a dif-

ferent deed to the grantor for execution than that called for in the contract, the grantor must make his objections to the deed when presented, or within a reasonable time, or when possession of the premises is demanded. He can not be permitted to avail himself of it, for the first time, as a defense, when sued for a breach of the covenant. *Morgan v. Stearns*, 40 Cal. 434.

66. It is the duty of the grantor to prepare, execute, and deliver the deed; the grantee need do no more than tender the purchase money. *Id.*

67. If the vendor in such a case is unable to perform the entire agreement, and can convey only an undivided half of the land, he may be compelled to convey that interest.

Marshall v. Caldwell, 41 Cal. 611.

68. To constitute a valid tender, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party, on the performance by him of the requisite condition. *Englander v. Rogers*, 41 Cal. 420.

69. To entitle the vendee in the case stated to a decree compelling the vendor to convey his undivided half of the land: *Id.*, that it was necessary for him to tender as the purchase money only one half of the contract price. *Marshall v. Caldwell*, 41 Cal. 611.

70. In proceeding to specifically enforce the contract, it is not incumbent on the defendant to restore, or offer to restore, the possession to the plaintiff; nor is the plaintiff entitled to any portion of the rents and profits accruing since the contract was made. *Id.*

71. In an action for the specific performance of a trust by the execution of a deed, a demand therefor before suit is only material as affecting costs. Without such demand the action may be maintained, but the plaintiff will not be entitled to costs.

Jones v. Petaluma, 36 Cal. 230.

72. In action for specific performance of contracts of sale, it is to the interest of the parties, at least the losing party, to have a written finding of the facts filed.

Morrison v. Lods, 39 Cal. 381.

73. Nothing can be regarded as a part performance, to take a verbal contract for the sale of land out of the operation of the statute, which does not place the party in a situation which is a fraud upon him, unless the contract be executed.

Arguello v. Edinger, 10 Cal. 150.

74. It would be a fraud, which no court of equity could tolerate, to hold that the vendor of land, on a contract to convey, receiving a portion of the purchase money and seeing the vendee expend large sums improving the property without objection,

and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny all obligation on his part to comply with his engagements.

Farley v. Vaughn, 11 Cal. 227.

75. In such a case, where there has been a compliance with a reasonable understanding of the contract, and no injury done by the want of an exact compliance, a specific performance will be decreed. *Id.*

76. The following verbal agreement for the sale and purchase of land was made between W., claiming the land under a Mexican grant, and M., who was in possession. W. was to choose one referee and M. another, the two to choose a third, they to appraise the value of the land, which M. was to pay W. upon the confirmation of the grant by the United States land commissioners. The grant was confirmed in 1855, and no offer was made by M. until 1861, when W. brought ejectment for the land, to comply with the terms of the agreement: *Held*, that under the agreement it was the duty of M., within a reasonable time after the confirmation of the grant by the United States land commissioners, to notify W. that he was ready to execute the agreement and to appoint the referees, and that his failure to do this for five or six years was fatal to his claim for specific performance; *held, further*, that it was not the duty of W. to notify M. of the confirmation; that the board of United States land commissioners being a public tribunal, whose proceedings were open and notorious, and affecting whole communities, and M. being personally interested in the decision upon this grant, the fact of confirmation was not peculiarly within the knowledge of W., and that hence the case is not within the rule requiring notice from the party having peculiar information; *held, further*, that the fact that payment for the land was to be made according to the value at the time of the appraisal, and that, therefore, the delay in executing the agreement was not injurious to W., is insufficient to take the case out of the rule refusing specific performance where there has been no unreasonable delay.

Weber v. Marshall, 19 Cal. 447.

77. The party insisting on specific performance must show himself "eager, prompt, ready, and desirous to perform the contract on his part." He must show that he has "used due diligence; or, if not, that his negligence arose from some just cause, or has been acquiesced in. It is not necessary for the party resisting performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the other party." *Id.*

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78. Nor does possession by the party seeking performance make the rule different. *Id.*

78a. Where a party who has executed a deed to lands to secure the performance of his agreement, **not in writing, as to pay a certain sum of money in gold coin**, and who seeks the aid of a court of equity to have the deed declared a mortgage, and to be permitted to redeem and have a reconveyance of the land, ought to be held to be a full compliance with the terms of the agreement, as a condition precedent to the conveyance, and this by no construction of the specific contract act, but by the application of the maxim, "he who seeks equity must do equity." *Cowing v. Rogers*, 34 Cal. 648.

79. If A. enters into a contract with B. for the conveyance of a tract of land, whereby B. acquires a right to a conveyance of the entire tract, and B. afterwards assigns to two or more persons, giving to each a separate conveyance of his equitable title to distinct and separate parcels of the land, the assignees of B. may maintain a joint action against A. for a specific performance of the contract. *Owen v. Frink*, 24 Cal. 171.

80. A contract for the conveyance of land, by the terms of which the purchaser may pay the purchase money either in labor or money, at his option, may be enforced in equity if the purchaser elects to pay in money, and makes a tender of the amount due. *Id.*

81. In an action to compel the specific performance of a verbal contract to convey land, a decree enforcing specific performance will not be reversed because the court fails to find that the party seeking performance was **ready and desirous to perform** on his part, provided the findings show such facts as, taken in connection with an offer to pay the price of the land into court, evince a readiness and willingness to perform. *Id.*

82. An administrator will not be compelled to perform specifically a contract of the intestate to convey land, unless it is found as a fact that the intestate had contracted to convey the particular land described in the complaint. An agreement of the intestate to convey a parcel of his land, when he owned several parcels, without describing any particular tract, will not be enforced. *Ferris v. Irving*, 28 Cal. 645.

83. If, in a contract for the sale of land, the vendee agrees to make certain **payments at stipulated times**, and the vendor agrees to execute a conveyance of the land when the payments are all made, the vendee can not maintain an action in equity for a specific performance if he has failed without any cause to make the first payment, and the last installment is not due.

Troy v. Clarke, 30 Cal. 419.

84. A court will not attempt to enforce the specific performance of a contract in

writing relating to lands, where the terms of the instrument are so vague and indefinite that it is impossible to ascertain what the contract really is.

Minturn v. Baylis, 33 Cal. 120.

85. In an action, brought in the usual form, to quiet title, the court will not decree a specific performance of an agreement of the defendant to convey to the plaintiff's executor.

Killey v. Wilson, 33 Cal. 691.

86. In an action for specific performance of a contract to convey an undivided interest of a specified quantity of land in a larger tract, all persons subject to the plaintiff's equity, and holding adversely to him, must be made parties to the proceeding.

Agard v. Valencia, 30 Cal. 292.

87. Where there is but one contract and one cause of action under it, there can be but one action, in which the rights of all the parties can be adjusted. Id.

83. In an action by a vendor of land for a specific performance of the contract, and the enforcement of his lien: *Held*, that the decision of the cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto such as the parties contemplated at the time they entered into their contract; and *held, further*, the question turning upon the validity of the patent discussed in the opinion and under which the plaintiff deraigned title, that the patent was valid.

Fletcher v. Mower, 55 Cal. 119.

TIME, AS ESSENCE OF CONTRACT.

89. In construing contracts, it is impossible to prescribe any general and uniform rule by which the question whether the time within which an act is to be performed is of the essence of the agreement, but each case must be decided upon its own circumstances.

Steele v. Branch, 40 Cal. 4.

90. The general rule of equity is that time is not of the essence of the contract. Id.

91. Where a vendor covenanted in his deed of conveyance to procure a reconveyance to himself, of such portions of the land described in the deed as he may have conveyed to others, or to convey other lands of equal value, etc.: *Held*, that the vendor must procure such conveyance within a reasonable time; and eight years is not a reasonable time for that purpose.

Vance v. Peña, 41 Cal. 686.

92. Such covenant is broken upon a failure to procure such conveyance within a reasonable time, or to convey to the vendee other lands of equal value; and the statute of limitations will commence running from such breach. Id.

93. If, in a contract for the sale and conveyance of land, it is provided that the pur-

chaser shall pay certain sums at specified times, and that, if he fails to do so, the seller shall be released from all his obligations in law or equity to convey the premises, and the purchaser shall perfect his right to a conveyance, and the purchaser makes default in his payments without excuse, a court of equity will not enforce the contract against the seller. Grey v. Tubbs, 43 Cal. 359.

94. In such contract the parties have made time essential in performing the conditions of the contract, and courts of equity will not inquire into their motive for doing so. Id.

95. In such contract had no time been fixed, the vendee would have been entitled to a reasonable time in which to exercise his election; but the time having been fixed, it is of the essence of the contract, and the court has no power to extend it.

Vassault v. Edwards, 43 Cal. 458.

96. If such contract is extended, in order that the vendor may perfect his title, and the vendee, as soon as the title is perfected, accepts the same and tenders the money, he accepts the vendor's proposal within a reasonable time, and it then ripens into a complete contract of sale. Id.

97. When a deed contained a provision that the grantee within one year from its date should reconvey to the grantor a specified quantity of the land conveyed, to be selected by the grantor, the right to select the land to be reconveyed, and to a reconveyance, is not lost to the grantor by his failure to exercise the right within one year.

Hearst v. Pujol, 44 Cal. 230.

98. Though time is not of the essence of a contract for the sale of real estate, unless made so by the express agreement of the parties, yet in every case it will devolve upon the party seeking relief in a court of equity to account for his delay.

Brown v. Covillaud, 6 Cal. 566.

OF CONTRACTS TO SELL PERSONAL PROPERTY.

99. As a general rule, courts of equity do not enforce the specific performance of contracts for the sale of personal property. When such contracts are enforced by courts of equity, it is not upon the ground of the insolvency of the defendant, but because the character of the property is so peculiar in itself, or its connection with the complainant's business is such that no adequate damages could be given at law.

McLaughlin v. Piatti, 27 Cal. 451.

100. A bill in equity will not lie to enforce the specific performance of a contract for the sale of cattle not possessing any especial value, except as merchandise. Id.

101. The general rule is that specific performance of contracts for the sale of personal property will not be decreed; yet if

the thing bargained for is of **unusual distinction or curiosity**, or is so related to the business of the plaintiff that non-performance will embarrass or impede him in his business, threatening a loss of profits which a jury can not correctly estimate, or the like, specific performance will be granted.

Senter v. Davis, 38 Cal. 450.

102. A party seeking specific performance of contracts for the sale of personal property **must state, in his complaint, the peculiar facts** upon which he relies as taking his case out of the general rule that specific performance will not be decreed in relation to such contracts. *Id.*

103. D., being the owner of the right or privilege to deliver a newspaper to subscribers within a certain district, sold to S., at a price agreed upon, to be thereafter paid, and when paid, D. was to give a bill of sale. S. took possession, and paid part of the purchase money, when D. turned him out. S. then sued for specific performance; but no further facts being stated showing why damages would not be full compensation, specific performance was denied. *Id.*

CONTRACT BETWEEN ATTORNEY AND CLIENT FOR SERVICES.

104. A court of equity will not, for the want of mutuality, refuse to enforce the specific performance of a contract **between an attorney and client**, by which the attorney undertakes to give his professional services in resisting a motion for a new trial made in the district court of the United States, in a case where a Mexican grant of land has been confirmed to the client, and to procure the dismissal of an appeal if one is taken, and the client agrees to convey to the attorney a portion of the land if he succeeds in his undertaking.

Ballard v. Carr, 48 Cal. 74.

105. If a contract is entered into between an attorney and client, by which the attorney agrees to give his professional services in the matter of a confirmation of a Mexican grant of land in the United States courts; and, if the confirmation becomes final, the client agrees to convey to the attorney a portion of the land, and the attorney, after performing some service, is absent when the case is called in court, and the client employs another attorney to assist in the matter, the client waives a full performance of the contract on the part of his attorney, if he still continues to recognize him as his attorney, and avails himself of his service. *Id.*

106. If a party appeals to a court of equity for the specific performance of a contract, **he must himself do equity**, and submit to such terms as a court of equity will impose. *Id.*

107. If an attorney asks the specific performance of a contract to convey to him

land for his professional services, and the **client has employed other counsel to assist** in the absence of the attorney, equity will allow the client compensation for the services of the counsel, and the amount of the compensation is the value of the services rendered. *Id.*

108. Although, when an attorney contracts to perform legal services for a client in consideration of receiving a portion of the property about which the litigation is to be carried on, he can not maintain an action for a specific performance **while the contract remains unperformed on his part**; yet, if he can show a substantial performance on his part he is as fully entitled to maintain such action as if he would be if the agreement on his part had been for the payment of money.

Howard v. Throckmorton, 48 Cal. 482.

109. If a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services to be rendered, the facts, that the **property afterward enhances in value**, and that such enhancement is, in a material degree, the result of the labor and money of the client, are no valid objection to a decree for a specific performance of the contract. *Id.*

OF CONTRACT TO TRANSFER STOCK.

110. C., G. & B. enter into an agreement to form a corporation for commercial purposes. By this agreement and the corporate act subsequently filed, each corporator is entitled to an equal proportion of the stock; G. and B. contribute to the capital in money, and C., having no money, proposes and is allowed to give his note in lieu of money, pledging his stock to G. and B. as security, they agreeing to raise him the money on the stock. It is agreed that the stock due him shall be issued on a given event; the event happens. The note is not made nor the stock issued to him, but the company, controlled by the other two corporators, go on with their business, recognizing C. as a corporator. No demand is made for his note or stock. The corporation makes profit enough to pay the debts, and the share coming to C. pays his contribution to the capital. No stock having been issued to C., he now claims and sues to enforce the specific performance of the agreement: *Held*, that if G. and B., who were to raise the amount to be contributed by C., having by the agreement the right to demand his note and stock, do not demand them, or issue the stock to him, and without this form of security advance the money which was to be raised, they are to be considered as waiving this formal right, and can not plead the want of a mere literal compliance as a forfeiture of the interest of C. in the common enterprise; that in equity, the substance of the whole transaction was fulfilled; the object of the security answered;

and the original right of C. to his stock was not lost by mere failure on his part to give a particular form of security, upon which G. and B., who were beneficially interested in demanding it, did not insist; and that C.'s stock, whether actually issued in the form of a certificate or not, is bound by the agreement, and he is entitled to it.

Chater v. Sugar R. Co., 19 Cal. 219.

111. The general rule, that a court of equity would not enforce a specific performance of an agreement for the transfer of stock, applied particularly to **public stocks**, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law.

Treasurer v. Com. M. Co., 23 Cal. 390.

112. Where **stock is of a peculiar and uncertain value**, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance.

Id.

113. In this state, courts of equity will decree a specific performance of contracts for the transfer of **mining stocks**, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating by competent evidence what would be a proper measure of damages.

Id.

114. Where the action is for the recovery of certain shares of **mining stock**, and if those can not be had, then their value, and during all the time the defendants had an equivalent amount of said stock, one share thereof being equal in value to any other share: *Hell*, that plaintiff was not entitled to the delivery of the particular shares of stock demanded.

Hardenbergh v. Bacon, 33 Cal. 356.

OF VERBAL CONTRACT.

115. Where there has been such a part performance of a verbal contract of sale by the plaintiff, as to put him into a situation, which would operate as a fraud upon him, unless the verbal agreement should be enforced, a specific performance of the contract will be decreed. *Tohler v. Folsom*, 1 Cal. 207.

116. If the **lessee and lessor** enter into a parol agreement with regard to a new lease of the premises the lessee is occupying, and the amount of rent to be paid by the lessee, and improvements made by him and to be made on the premises, and afterwards the lessee executes a lease in writing relating to the same subject-matter, containing terms varying from the parol agreement, a court of equity will not rescind the written lease and enforce the parol contract, nor, unless upon some equitable ground, as mistake, or fraud, will it reform the written lease to make it correspond with the parol contract.

Ewald v. Lyons, 29 Cal. 550.

117. A court of equity will not enforce a parol contract, if, after the same is made, the **parties voluntarily enter into a written contract**, differing in terms from the parol agreement, nor will it substitute the parol contract for the written one.

Id.

118. If a surveyor and another enter into a parol contract, by which the **surveyor** is to search for and survey **swamp lands**, and the other is to pay the first installment of twenty per cent. purchase money, and procure a certificate of purchase, and then deed one half to the surveyor, the services performed by the surveyor are not such part performance of the contract as to bring the case within the tenth section of the statute of frauds, and enable the court to decree a specific performance.

Edwards v. Estell, 48 Cal. 194.

119. If the owner of land makes a **verbal agreement** with another to **lease** him the same for one year, with the privilege of two years more, at an annual rent of six hundred dollars, and a lease is to be executed containing the usual covenants, and the lessee takes possession and pays the rent for the first year, the agreement is sufficiently certain to support a decree against the lessor for a specific performance.

Clark v. Clark, 49 Cal. 586.

120. A court of equity will, in a proper case, enforce the specific performance of a parol contract to execute a written lease of land.

McGarger v. Rood, 47 Cal. 138.

121. In an action to enforce a parol agreement to execute a **lease** of land, where plaintiff has entered into possession and farmed the land under the parol agreement, evidence on behalf of defendant that plaintiff has not properly farmed the land is not admissible, because it does not tend to prove that there had not been such part performance as takes the contract out of the statute of frauds.

Id.

122. Specific performance of parol contract—Purchaser in Good Faith—Conflict of Evidence—Findings.

Jones v. Bryan, 55 Cal. 478.

123. A parol gift of land, followed by possession and improvement of the land by the donee, is so far executed as to entitle the donee to a specific performance; but *h-ll*, in an action of ejectment, by the grantee of the donor, the defense must be specially pleaded.

Manly v. Howlett, 55 Cal. 94.

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STAMP.

1. A forged instrument, though unstamped, may be used as evidence against the person charged with committing the forgery.

People v. Frank, 28 Cal. 507.

2. In order to defeat a recovery on an unstamped note, it must appear that the stamp has been fraudulently omitted.

Hallock v. Jaudin, 34 Cal. 167.

3. An internal revenue stamp on a note, as prescribed by the federal internal revenue laws, is **no part of the note**. Id.

4. On papers sent up on appeal from justices' courts, no stamp is required under the act of congress requiring "writs or other process on appeal from justices' courts, or other courts of inferior jurisdiction, to a court of record" to be stamped with a fifty-cent stamp. People v. Weston, 28 Cal. 639.

5. The stamps which, by the provisions of the act, are required to be purchased from the state, are to be regarded in no other light than as a **tax on the contract for passage**, to be paid by the passenger. This is a regulation of commerce, within the meaning of section 8, article I of the federal constitution, and the act is unconstitutional and void. Id.

PLEADING, 1490, 1491. | PROBATE, 60, 61.

STARE DECISIS.

1. In reference to mere matters of practice, involving no principle, it is safe to adhere to a rule long established.

Piercy v. Sabin, 10 Cal. 30.

2. The conservative doctrine of *stare decisis* was never designed to protect innovations upon settled principles of law.

Aud v. Magruder, 10 Cal. 282.

3. In the doctrine of *stare decisis* some of the authorities use the terms "a series of decisions," "an uninterrupted series," "a

long-established rule," and the like expressions; but we apprehend that the language was designed to imply not solely the age of the rule, but its permanent, settled, stable character. Hart v. Burnett, 15 Cal. 607.

4. There is no principle which compels the observance of the doctrine of *stare decisis*, when a rule well settled and universally acquiesced in has been violated.

Cohas v. Raisin, 3 Cal. 443.

5. In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*.

Scale v. Mitchell, 5 Cal. 401.

6. Though, on questions of practice, previous decisions are entitled to very great weight, still a **single decision**, made without notice of a statute, and, in fact, setting aside the statute, can not be invoked as authority on the principle of *stare decisis*.

Duff v. Fisher, 15 Cal. 375.

7. Where a decision of this court was made several years ago, affirming the validity of a deed conveying a large amount of real estate, under which decision important rights may have been acquired, the court will not re-examine the grounds of the decision, but on the principle of *stare decisis* will allow it to stand.

Heihn v. Courtis, 31 Cal. 398.

8. Where important rights of property had grown up under a decision of the supreme court, and many years have elapsed since the same was rendered, and its correctness has been tacitly admitted in other cases, the question will not be reopened.

Vassault v. Austin, 36 Cal. 691.

9. When a rule by which the title to real property is to be determined has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should, itself, be constant and invariable.

Smith v. McDonald, 42 Cal. 484.

10. The doctrine of Call v. Hastings, 3 Cal. 179, and Stafford v. Lick, 7 Id. 474, that a deed executed before the passage of the act concerning conveyances must, in order to prevail against a subsequent deed taken in good faith, and for a valuable consideration, be first recorded, affirmed on the principle of *stare decisis*.

Clark v. Troy, 20 Cal. 219.

11. Lathrop v. Mills, 19 Cal. 513, deciding that the statute of March 26, 1856, limiting the time for commencing actions by a patentee was, in this respect, unconstitutional, affirmed on the principle of *stare decisis*.

Pioche v. Paul, 22 Cal. 105.

12. A rule once established and firmly adhered to, may work apparent hardship in a

few cases, but in the end will prove more beneficial than if constantly deviated from.

Giblin v. Jordan, 6 Cal. 418.

13. The judge who, from petty vanity, and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years has settled the rights of property, should be regarded as the common enemy of mankind and unworthy of the high trust which had been confided to him.

Welch v. Sullivan, 8 Cal. 188.

14. The highest regard for the doctrine of *stare decisis* does not require its observance when a plain rule of law has been violated.

McFarland v. Pico, 8 Cal. 631.

15. When the question upon which the judgment of this court depends is such as may be re-examined on writ of error by the supreme court of the United States, we will follow the rule of law with respect to such question laid down by the supreme court of the United States.

Belcher v. Chambers, 53 Cal. 635.

CONSTITUTIONAL LAW, 70.

STATE

1. STATE SOVEREIGNTY.
29. STATE PRISON.
49. STATE CAPITAL.
53. STATE LIBRARY.
55. MISCELLANEOUS.

STATE SOVEREIGNTY.

1. Sovereignty is a term used to express the supreme political authority of an independent state or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty, as the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain.

Moore v. Smaw, 17 Cal. 199.

Fremont v. Flower, Id.

2. In this country, this authority is vested in the people, and is exercised through the joint action of the federal and state governments. To the federal government is delegated the exercise of certain rights or powers of sovereignty; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective states, or vested by them in their local governments. Id.

3. To say that a state of the union is sovereign, only means that she possesses supreme political authority, except as to those matters over which such authority is delegated to the federal government, or prohib-

ed to the states; in other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the constitution of the United States. Id.

4. Sovereignty is a unit that can not in its very nature be divided. It must reside with only one party, and the highest ultimate right to determine the limits and powers of each must belong to that government with which is found the supreme law of the entire nation.

Warner v. Str. Uncle Sam, 9 Cal. 720.

5. When congress admitted California as a state, the constituent members of the state, in their aggregate capacity, became vested with the sovereign powers of government "according to the principles of the constitution," and had the right to prescribe the qualifications of electors.

People v. De la Guerra, 40 Cal. 311.

6. Neither the state in its own person, nor as represented in its local subordinate governments, can be summoned to answer before its courts except by its own consent, nor can its property, in actions *in rem*, be so summoned. All suits and judgments brought and recovered in the state courts against itself or its subordinate governments, without such consent given, are void.

People v. Doe, G., 36 Cal. 220.

See People v. Talmage, 6 Cal. 258.

7. The power to enforce a limitation upon the power of a state can not be construed to authorize congress to enlarge the limitation if necessary to render it effectual.

People v. Brady, 40 Cal. 198.

8. Congress has not the power to nullify a law of the state, either directly or by preventing its execution. Id.

9. The government of the United States, in the face of the notorious occupation of the public lands in this state by her citizens, that upon the lands they have mined for gold, constructed canals, built saw-mills, cultivated farms, and practiced every mode of industry, has asserted no right of ownership to any of the mineral lands in this state.

Conger v. Weaver, 6 Cal. 548.

10. The mines of gold and silver in the public lands are as much the property of the state, by virtue of the sovereignty, as are similar mines in the hands of a private proprietor. Hicks v. Bell, 3 Cal. 227.

11. The state, therefore, has the sole right to authorize them to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. Id.

12. The United States, as owner of land within the limits of the state, only occupies the position of any private proprietor,

with the exception of exemption from state taxation. *Id.*

Overruled in *Fremont v. Flower*, 17 Cal. 218; *Doran v. C. P. R. R. Co.*, 24 *Id.* 257.

13. The state has an absolute right to control, regulate and improve the **navigable waters** within its jurisdiction, as an attribute of sovereignty.

Gunter v. Geary, 1 Cal. 462.

14. The absolute right of a state to control, regulate, and improve the **navigable waters** within its jurisdiction is an attribute of sovereignty which can not be disputed, and this right may be delegated to individuals either in a natural or corporate capacity. *Id.*

15. The state holds complete sovereignty over her **navigable bays and rivers**; and although her ownership is by the law of nations and the common and civil law, attributed to her for the purpose of preserving the public easement or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship.

Eidridge v. Cowell, 4 Cal. 81.

16. The federal government has not only the right of **eminent domain**, but the fee and the prime and uncontrolled right of disposition of the territory, all of which are attributes of sovereignty.

People v. Folsom, 5 Cal. 373.

17. Sovereignty can never be in abeyance, and until there was some local government organized, either by the people of the territory or some other competent authority, the **United States**, upon the doctrine of necessity, succeeded to and represented the **government of Mexico**, so far as the same could be exercised within the purview of the constitution. *Id.*

18. The sovereign power may, in disposing of lands, **annex such conditions to a grant** as it sees fit; and in such case a restriction against alienation, inserted in a grant and authorized by law, will not be held void on the ground that it is against the policy of the law.

Suñol v. Hepburn, 1 Cal. 274.

19. The ownership of the **precious metals** found in public or private lands is not one of the rights of sovereignty which the **United States held in trust** for the future state. Such ownership stands in no different relation to the sovereignty of a state than that of any other property which is the subject of barter or sale.

Moore v. Smaw, 17 Cal. 200.

Fremont v. Flower, *Id.*

20. By the common law the right to the mines of **precious metals** was not an incident of sovereignty, but a personal prop-

erty of the king, which could be alienated at his pleasure. *Id.*

21. On the formation of this state, the **title to water property** passed to this state.

Chapin v. Bourne, 8 Cal. 296.

22. The right of the state to **lands under water**, where the tide ebbs and flows, is founded upon her sovereign control over the easement or right of navigation; where, therefore, the easement is destroyed, the right of the state ceases, except to prosecute for pre-
 23. The city can not set up a right in the state to defeat a claim against her. If her right, title, and interest in the property has been sold by the sheriff, and the state has any right, the latter can assert it when she chooses to have it ascertained.

Guy v. Hermance, 5 Cal. 74.

23. The city can not set up a right in the state to defeat a claim against her. If her right, title, and interest in the property has been sold by the sheriff, and the state has any right, the latter can assert it when she chooses to have it ascertained.

Smith v. Morse, 2 Cal. 524.

24. The state has the most perfect right to **determine what shall constitute evidences of title**, as between her own citizens, to all lands within her boundaries, and congress has no power to interfere therein.

Nims v. Palmer, 6 Cal. 8.

25. **Money** is not the species of property which the sovereign authority can authorize to be taken in the exercise of its right of **eminent domain**.

Burnett v. Sacramento, 12 Cal. 83.

26. Each state is supreme within its own sphere, as an independent sovereignty.

People v. Coleman, 4 Cal. 46.

27. By well-settled rules of construction the right of the state to **regulate commerce** is concurrent with that of congress, with the understanding always that all state regulations inconsistent with those of the federal government on this subject give way. *Id.*

28. The right and jurisdiction to **determine finally all controversies** between her citizens, and all conflicting claims to property within her limits, is an essential element of sovereignty, which was possessed by each state before the adoption of the constitution, and this right was not surrendered by that compact.

Ferris v. Coover, 11 Cal. 175.

STATE PRISON.

29. The objection to the contract with Estill, under the act of the twenty-first of March, 1856, that it contained stipulations for the release of claims held by Estill against the state, thereby increasing the amount of the monthly payments, can not be raised at this late day, three years having elapsed since the execution of the contract, and it having been in part performed on both sides, and thus acquiesced in and affirmed. *State v. McCauley*, 15 Cal. 430.

30. The fact that the contract with Estill was signed by the commissioners with their individual names, and not with the name of

the state, does not make it defectively executed. The contract purports in its body to be between the state, acting by the commissioners under the act of March 21, 1856, of the one part, and Estill of the other, and is signed by the commissioners with the affix of "Board of state prison commissioners." This makes it the contract of the state and not of the commissioners. Id.

31. Upon this point, the rule applicable to contracts of a private character differs from the rule governing contracts made by agents of the government. Such public agents are presumed to contract, not personally, but officially, within the sphere of their duties. Id.

32. The act of March, 1856, having authorized the commissioners to execute a lease, without prescribing any specific form, or containing any restrictions as to assigning, and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment to McCauley. The security of his bond was not impaired thereby. Id.

33. If some of the covenants of the lease do not bind the assignee, the state can not have relief on that ground. She can claim no greater exemption than an individual from the consequences of an unwise contract. Id.

34. The state can not rescind the contract made with Estill for breaches of the covenants of the lease by him and his assignee, so long as she herself is in default. Id.

35. One party can not violate a contract himself, and then seek to rescind it on the ground that the other party has followed his example. Id.

36. Nor, when the contract has been in part performed, and the parties can not be restored to their original position, can the right of rescission exist. Id.

37. In this case, the state being in default in making the monthly payments under the contract as they became due, and for months previous to this suit refusing to pay at all; not offering to make restitution of the property received of the lessee, or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due; and it not being possible to restore Estill and McCauley to their original position, they having been in possession of the prison for nearly three years, and having performed valuable services, can not claim in equity a rescission of the contract. Id.

38. It is too late for the state to complain that the contract did not exact of the lessee

security against breaches thereof, other than the bond of two hundred thousand dollars required by the act of March 21, 1856, or did not reserve to the state the right to re-enter and resume possession of the premises, and control of the prisoners, whenever she deemed proper. Id.

39. Conceding that the board of state prison directors have power to enter into contracts for the employment of convict labor, that power must be limited by the requirements of the act creating the board and prescribing its powers and duties.

Porter v. Haight, 45 Cal. 631.

40. The board of state prison directors have no power under said act to enter into any contract for the employment of convict labor that would deprive it in any degree of the full and exclusive control of the prisoners and prison labor, or of the prison grounds, buildings, and property. Id.

41. If the board of state prison directors enter into a contract for the employment of convict labor, which is not void under the above rule, they have the right to terminate it whenever in their judgment the proper exercise of the powers conferred upon them may require it. Id.

42. Whether the exigency of a particular case requires the board of prison directors to annul a contract they have made for the employment of convict labor is a question which addresses itself to their judgment, and their determination in the matter is in the nature of a judicial and not of a ministerial act, and for which, if they act without fraud or malice, they do not incur personal liability. Id.

43. A contract entered into by the agents of the state, upon a subject within the constitutional control of the legislature, may be affirmed by the state by legislation, indirectly referring to the contract, or proceeding upon its assumed validity. Direct legislative action, in terms designating and affirming the contract, is not necessary.

McCauley v. Brooks, 16 Cal. 11.

44. In the act of April 7, 1856, appropriating moneys to defray the expenses of the prison up to March 28, passed after a copy of the contract with Estill had been transmitted to the senate, the legislature recognized the existence, and, in effect, the validity of the contract, in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison, until he surrendered such contract and released the state from all liability for such supplies "furnished after the leasing of said prison by the board of commissioners, under an act passed at this session of the legislature." Id.

45. The contract is not from month to month, but for the entire term of five years,

the payments by the state to be made in monthly installments. The consideration advanced by the lessee for these payments is not merely the services rendered each month. It consists of buildings erected and other improvements made. These were not intended for any particular month, but for the entire term. The expenses of them can not be apportioned out and considered as belonging to one or more months rather than others. These expenses probably absorbed the receipts of many months, and for reimbursement the lessee undoubtedly looked to the general profits from the entire contract. Again, large claims against the state were relinquished by the lessee as part of the consideration of the payments by the state, not of one or of several months, but of the entire term. To the general profits of the whole term the lessee looked, as furnishing the equivalent for the relinquishment. Again, the lessee, or the other parties representing him, were entitled to the labor of convicts; and the profits of that labor, in the manufacture of brick or other articles of commerce, during the period the parties were excluded from the prison, may have exceeded the entire expenses of keeping the prison. Id.

46. If the state desire to resume the possession of the state prison, and the control of the convicts, she can do so only in one way, by compensation, as is required in all cases where private property is taken for public use. The leasehold interest is as much property for which compensation is to be made before it can be subjected to the uses of the state, as are lands held in fee. If the state has cause of complaint from the mismanagement of the prison, or any disregard of the stipulations of the contract, she must seek her redress, as individuals in like cases are required to do, by proceeding upon the bond executed as security for the performance of the contract. Id.

47. *State of California v. McCauley*, 15 Cal. 429, deciding the act of March 26, 1856, appointing a board of state prison commissioners, to be constitutional, and the contract entered into by said board, in behalf of the state, with Estill, and the assignment thereof to McCauley, to be valid and binding upon the state, affirmed. Id.

48. Any wrongs to the state, from mismanagement of the prison, or from disregard of the stipulations of the contract, must be redressed by proceeding upon the bond executed as security for the performance of the contract. Id.

49. The contract only gives the right to have the warrants paid out of the moneys in the treasury not otherwise appropriated. When the warrants are presented to the treasurer, it will be his duty to apply to them the unappropriated moneys in the treasury, and to continue to apply such

moneys as they are from time to time received, until the warrants are fully paid. Id.

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STATE CAPITAL.

49. City of Sacramento declared to be the capital of the state.

Vermule v. Bigler, 5 Cal. 23.

50. The act of February 4, 1851, removing the seat of government to Vallejo, declared to be constitutional. Id.

51. This act operates as an absolute removal, and can not be defeated by the breach of subsequent conditions. Id.

52. After the first removal, a majority of the legislature might at any time remove the capital. Id.

STATE LIBRARY.

53. The board of trustees of the state library are authorized to draw from the state treasury, at any time, all the moneys therein belonging to the library fund.

State Library v. Kenfield, 55 Cal. 488.

54. Bills for books purchased for the state library are not claims within the meaning of section 660 of the political code, and need not be presented to the board of examiners. Id.

MISCELLANEOUS.

55. The act of May 1, 1854, which creates the office of state printer, and requires the controller to draw his warrant on the treasury for such sums as may be due the state printer, is not a specific appropriation.

Redding v. Bell, 4 Cal. 333.

56. A man dealing with state securities is not bound to search the books and records of state officers before buying claims against the state.

State v. Wells, 15 Cal. 336.

57. The controller may decline to audit the accounts of the state printer, even after they have been approved by the board of examiners, if he is of opinion that the work has not been correctly computed, or that it contains items which are not a legal charge against the state.

Springer v. Green, 46 Cal. 73.

58. Warrants drawn by the controller of state, delivered to the payees thereof and by them indorsed in blank, were presented by the holders to the state treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the state, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive state bonds payable to bearer, under the

funding act of 1857, and part with them. The state sues for the bonds or their value: *Held*, that the action does not lie; that defendants, having received the bonds *bona fide* and without fraud, for warrants apparently good against the state, are not liable in this form of action. *State v. Wells*, 15 Cal. 336.

59. The mere reception of the bonds, though issued by mistake, does not render defendants liable. *Id.*

60. Bonds so issued are negotiable, and bind the state, in the hands of an innocent assignee. *Id.*

61. The acceptance by a collector of taxes, of a warrant, is not a liquidation of the debt, but the receipt of it by the state treasurer, from the collector, would be a liquidation, for which the treasurer would be responsible.

Seofield v. White, 7 Cal. 400.

62. The county government is a part of the state government, which is sovereign. The state government, neither in its general nor local capacity, can be sued by her creditors or made amenable to judicial process except by her own consent. Her creditors must rely solely upon her good faith as to the time, mode, and manner of payment.

Sharp v. Contra Costa Co., 34 Cal. 284.

63. In the absence of any statute to that effect the state can not be sued, and a judgment against her is erroneous.

People v. Talmage, 6 Cal. 258.

64. Neither the governor, nor the attorney-general, has any power to bind the state by a contract to procure the advice of counsel as to the rights of the state in certain property. *Id.*

65. Services performed for the state under such a contract might be the subject of relief at the hands of the legislature, but are not a legal cause of action. *Id.*

66. The state, in the contemplation of our theory of constitutional government, can have no interest in asking anything but that which is right; nor can she allow her agents to do so. She is as much interested in protecting the individual citizen as in protecting the mass; so that to address judicial process to the agents of the state does not implead the state herself.

Nougues v. Douglass, 7 Cal. 74.

67. In a case where a citizen claims to be injured by an alleged failure of a state officer to do his duty, the state is not a formal party to the record nor responsible for costs in any event. Nor if the officer had failed to do his duty, can the state be injured by the decision of the court. Neither can she be injured if the officer does his duty, and is sustained by the court. *Id.*

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32. LOCAL LAWS.
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GENERAL LAWS.

1. The clause in the act requiring the action of the **board of examiners** to be submitted to a vote of the people in a contingency does not make the act any the less a law. The act took effect as a law immediately, and was not dependent on the action of any other body.

Blanding v. Burr, 13 Cal. 343.

2. Section 14 of the general corporation law of April 22, 1850, making the **directors of a corporation** jointly and severally liable for the excess of the debts of the corporation, over and above the amount of capital stock actually paid in, being a statute creating a forfeiture, or imposing a penalty, is to be strictly construed.

Irvine v. McKeon, 23 Cal. 472.

3. Where a **criminal statute** is changed between the time of the commission of the offense and conviction, but contains a saving clause to the effect that it shall not apply to the trial of offenses committed prior to the amended act, the punishment of the prisoner must be regulated by the old law.

People v. Gill, 7 Cal. 356.

4. The best rule of interpretation of the statute (see facts) is to follow the established policy of the government from its origin, which is to make elective all officers of the state, counties, and cities, at the shortest period which the convenience of the public will permit. *People v. Brenham*, 3 Cal. 477.

5. The statute, so far as it affects the election of 1858, only applies to such offices as were to become vacant in January, 1859, and this is evident as well by the terms of the act as the unreasonableness of supposing that the legislature meant to authorize an

election several years in advance of the time when the office was to be filled.

People v. Weller, 11 Cal. 77.

6. The **practice act** of April 29, 1851, is **prospective** in its operation, and to give it a retrospect beyond the time of its passage would be in violation of all settled rules of construction.

Thorne v. San Francisco, 4 Cal. 127.

7. Where an act **amending the laws of practice** is passed, to take effect at some future time, judicial proceedings, intermediate between the passage and the time of taking effect, are governed by the old law.

Reddington v. Waldon, 22 Cal. 185.

8. Statutes for acquiring the jurisdiction of the person by **publication of summons** must be strictly construed.

Forbes v. Hyde, 31 Cal. 342.

9. Statutes fixing the time for the filing of papers are merely directory.

Wood v. Fobes, 5 Cal. 62.

10. The fourteenth section of the practice act was intended to apply to **suits in equity**, and not to actions at law.

Andrews v. Mok. Hill Co., 7 Cal. 330.

11. The act of 1861, amending section 422 of the practice act so as to permit **parties to testify on their own behalf**, was approved May, 1861, but by a general did not go into effect until sixty days after its passage. In an action tried on the thirteenth day of July, 1861, the defendants were admitted as witnesses on their own behalf, in accordance with the provisions of the amendment, to which plaintiffs excepted: *He'd*, that this was error, for which a judgment in favor of defendants must be reversed.

Reddington v. Waldon, 22 Cal. 185.

12. The eighth section of the act concerning courts of justice, which provides that when a "judgment or order is reversed or modified, this court may make complete **restitution** of all property and rights lost by the erroneous judgment or order," does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of defendant, and the like.

Farmer v. Rogers, 10 Cal. 335.

13. A law relating to the subject-matter of an order made by the lower court previous to its passage, will not affect the decision of the supreme court on an appeal from the order. The decision in the appellate court must be whether the order was correct or erroneous at the time it was made.

State v. McGlynn, 20 Cal. 233.

14. The act of March 23, 1864, allowing an appeal from a judgment in cases of parti-

tion, "which determines the right of the several parties and directs **partition** to be made," is not retroactive so as to apply to such judgments which had already been entered. *Gates v. Salmon*, 28 Cal. 320.

15. The word "**representative**" used in the three hundred and ninety-third section of the practice act, as amended in 1863, applies to the executor or administrator of the estate of the deceased person, and also to the person or party who has succeeded to the right of the deceased, whether by purchase or descent, or operation of law. *Davis v. Davis*, 26 Cal. 23.

16. The statute which provides a way in which the father of an **illegitimate child** may make the child his heir, being in derogation of the common law, must be strictly construed. *Pina v. Peck*, 31 Cal. 359.

17. The act of May, 1853, does not violate that clause of the federal constitution which guarantees to the citizens of each state the same privileges and immunities which they are entitled to in their own state. *People v. Coleman*, 4 Cal. 46.

18. The revenue law of 1854 authorized the **payment of a portion of the taxes** in controller's warrants. The acts of 1855 and 1856 provide for the funding of the state debt, and the collection of the revenue in cash, and forbids the treasurer to liquidate any of the debt, except as therein provided: *Hebl*, that the act of 1854, allowing payment in warrants, was thereby repealed. *Scotfield v. White*, 7 Cal. 400.

19. Though the legislature can make such disposition of accruing revenue as it deems proper, a construction of a statute which would impair the rights of third parties will always be unwillingly adopted, in the absence of express words to that effect. *People v. Williams*, 8 Cal. 97.

20. The **exception by name of certain counties** of the state from the operation of certain provisions of the general road law of 1861, limits the exception, by implication, to the counties specified. *Perry v. Ames*, 26 Cal. 372.

21. The act of 1856 assumes to divest the rights of the parties in property, vested in them by laws existing at the time they acquired the property, and, further, it denies the owner the right to the rents and profits of land, accruing prior to the date of a patent, although the patent is but a declaratory affirmation of a pre-existing, valid, and acknowledged fact. *Billings v. Hall*, 7 Cal. 1.

22. A motion against a sheriff and his sureties, under the provisions of the ninth section of the "**act concerning sheriffs**," passed April 29, 1851, is a summary proceeding, in derogation of the rules of the common law, and is penal in its character; and for

these reasons the act must be strictly construed. *Wilson v. Broder*, 10 Cal. 486.

23. An act of the legislature **legalizing assessments** for taxes for the fiscal year ending on the first day of March is not void because the constitution provides that the fiscal year shall commence on the first day of July, but the word "**fiscal**" in the act may be treated as surplusage. *People v. Todd*, 23 Cal. 181.

24. The **statute of enrollments** (27 Henry VIII, ch. 16) has never been in force in this state. *Chandler v. Chandler*, 52 Cal. 267.

25. Whether the **statute of uses** (27 Henry VIII, ch. 16) has never been in force in this state. *Quere?* *Id.*

26. If it is claimed that a statute is not correctly published, or if the fact of its passage is denied, the **question** is to be tried and determined by the court as one of **law**, and can not be put in issue and tried as one of fact. *Sherman v. Story*, 30 Cal. 253.

27. An act of the legislature, properly **enrolled, authenticated, and deposited with the secretary of state, is a record** which conclusive evidence of the passage of the act, and that the act passed as enrolled. *Id.*

28. Neither the **journals** of the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor **parol evidence**, can be received in order to show that an act of the legislature, properly enrolled, authenticated, and deposited with the secretary of state, either **did not become a law** in accordance with the prescribed forms, or did not become a law as enrolled. *Id.*

29. The validity of a public act of the legislature is in no respect impaired by the knowledge or ignorance at the time of the action of the legislature in passing it, on the part of the parties who may be affected by its operation. *Oakland v. Carpentier*, 21 Cal. 642.

30. Where a statute is in **affirmance of the common law** it is to be construed as was the rule by that law. *Baker v. Baker*, 13 Cal. 87.

31. An act which purports on its face to be, and is in fact, a **special act**, can not be converted into a general act, by a declaration of the legislature in another act, that it shall be considered a general act. *San Francisco v. S. V. W. W.*, 48 Cal. 493.

LOCAL LAWS.

32. The authority by act of the legislature to erect a **court-house and jail** would necessarily embrace the power to purchase the land on which to erect them. *De Witt v. San Francisco*, 2 Cal. 289.

33. If the term **public improvements**

in the amended charter could be construed to extend to commercial speculations, then it would be in violation of said section of the constitution, as it would be granting powers to a corporation by a special act for other than municipal purposes.

Low v. Marysville, 5 Cal. 214.

34. The act authorizing the **county recorder** of Yuba county to be paid out of the county treasury for certain specified services contains no words which raise the presumption that he was to be allowed a preference over other creditors.

People v. Williams, 8 Cal. 97.

35. The act of March, 1851, commonly called the **San Francisco water-lot act**, should be construed favorably to the city, and includes all land within the boundaries fixed by the survey referred to in the act.

Hyman v. Read, 13 Cal. 444.

36. By an act passed in 1855, **constables in El Dorado county** were allowed the same fees as sheriffs for like services in criminal cases. In 1859 an act was passed allowing the sheriff of that county fifty cents per mile for travel in making an arrest. In 1860, by a special act making no reference to constables, the sheriff in that county was made a salaried officer, and allowed no fees, section 15 providing that all former acts "conflicting with the provisions of this act are hereby repealed so far as they relate to the said several officers herein named." In 1862 an act amendatory of the act of 1860 was passed, the second section of which provided, as an amendment to section 8 of the original act, that two deputies should be allowed the sheriff, and that "the said deputies or other officers performing such service should receive twenty cents per mile in criminal cases for each mile actually traveled in going only; and section 5 of which declared that "so much of any acts or parts of acts as are inconsistent with the provisions of this act are hereby repealed;" *Held*, that the last act applied to constables, and repealed all the provisions of former acts in reference to their mileage in criminal cases, and that they are entitled therefore to only twenty cents per mile for travel in such cases.

Simonton v. El Dorado, 22 Cal. 554.

37. The provisions of a statute which provide for **taking the lands** of private persons for road purposes must be strictly followed, and the act must be strictly construed.

Curran v. Shattuck, 24 Cal. 427.

38. Where, in one section of a statute, it is provided that the respective boards of supervisors of Solano and Lake counties shall meet, etc., "and upon the receipt of the report of the viewers," etc., "to declare the road as located by the viewers thereof, a **public highway**," and in the succeeding section of the act it is provided that "when the report of the viewers shall have been received

and approved, the said boards of supervisors shall declare the road open," etc.: *Held*, that the exercise of judgment, if not discretion, is required to approve the report.

People v. Lake, 33 Cal. 487.

39. The act of May 1, 1851, authorizing "the **funding of the floating debt** of the city of San Francisco," is substantially a trust deed whereby she agrees, on a valuable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations, in the mode and according to the terms of her agreement.

People v. Bond, 10 Cal. 563.

40. The act being of this character, it was not competent for the legislature to substantially change its terms, without the sanction of the creditors. *Id.*

41. If an act both authorizes and empowers and makes it the duty of a board of supervisors to contract for a map, it will not be construed as **mandatory**.

Bowers v. Sonoma, 32 Cal. 66.

42. The thirty-ninth section of the act concerning courts of justice provides that "the clerk of the **superior court** shall be elected at the next municipal election of the city of San Francisco, and thereafter every two years, by the legal electors of the city of San Francisco, and shall hold his office for the term of two years from and after his election." At the time of the passage of this act, the municipal and general state elections were held on the same day in September. The fourth section of the amended charter of San Francisco provides that the municipal election shall be held on the fourth Monday in May in each year, and at an election held at this time, the relator was elected: *Held*, that by the thirtieth section of the amended charter the legislature intended that the clerk of the superior court should be elected at the municipal election on the fourth Monday in May, and the relator was therefore properly elected.

People v. Haskell, 5 Cal. 357.

PRIVATE ACTS.

43. An act of the legislature confirming sales of land before then made by a board of fund commissioners, which sales conveyed no title for want of power in the board, is a private statute of which the courts will not take notice as evidence of title, unless offered in evidence.

Ellis v. Eastman, 32 Cal. 447.

RULES OF CONSTRUCTION.

In General.

44. When **two laws are passed on the same day** in relation to the same subject-matter, they are to be read together as if part of the same act.

People v. Jackson, 33 Cal. 427.

45. It is a well-settled rule of construction that **statutes upon the same subject-matter must be construed together, and that a general provision must be controlled by one that is special.**

People v. Wells, 11 Cal. 329.

46. Two statutes upon the same subject-matter, passed at different times, which are *in pari materia*, **must be read and construed as one act.**

McMinn v. Bliss, 31 Cal. 122.

Merrill v. Gorham, 6 Id. 41.

People v. Broadway W. Co., 31 Id. 33.

47. Where **two sections** of a law relate to the same matter, both are to be read together, in order to ascertain the intent of the legislature.

Taylor v. Palmer, 31 Cal. 240.

48. Where a law is capable of two constructions, that one **must be adopted** which will preserve the sense as well of the several parts, as of the whole act.

San Francisco v. Kelsey, 5 Cal. 169.

49. Where a **statute is ambiguous**, such a construction will be given to it as not to deprive a party of a substantial right.

People v. Hodgdon, 55 Cal. 72.

50. An act authorizing a person to **sell the real estate of an infant** will not be construed as freeing such person from the supervision of the probate court under the general laws, unless its language clearly and explicitly requires such construction.

Paty v. Smith, 50 Cal. 153.

51. An act attempting to **validate a void assessment** on a lot in a city for a street improvement, if it has that effect, does not, by relation, make the assessment valid as of the date when it was levied, but only validates it at the date of the passage of the act.

Reis v. Graff, 51 Cal. 86.

52. Sections 3233 and 3234 of the political code, which relate to labor and materials on public buildings, seem to refer exclusively to the buildings of the state.

Babcock v. Goodrich, 47 Cal. 488.

53. The laws passed at the session of **1871-72** must prevail over the codes which were adopted at the same session. Id.

54. Language in a statute **conferring franchises** on a corporation, which is not free from doubt, is to be construed to the benefit of the public rather than to that of the corporation.

S. V. W. W. v. S. F., 52 Cal. 111.

55. The passage of a certain preamble and **resolution by the board of supervisors** held not to be the exercise of the judicial function; it was an attempt to make law, not to render a judgment under the existing law. *S. V. W. W. v. Bryant*, 52 Cal. 132.

56. An act authorizing and empowering a board of supervisors of a city to keep its

streets clean by employing men and carts for that purpose, and by using the labor of persons sentenced or committed to the house of correction, does not compel the board to adopt the system which it provides for.

Weed v. Maynard, 52 Cal. 459.

57. If such act does not repeal a former act empowering said board to keep the streets clean in such mode and manner as it may deem best, the board, after its passage, may still exercise its discretion as to the mode and manner of cleaning. Id.

58. If, upon the face of an act, the legislative intent is ambiguous, a judicial reference may be had to the title of the act to assist in determining its meaning. Id.

59. The act of March 4, 1870, is **not mandatory**, but permissive; and in solving the question, the whole and not detached portions of it must be considered.

Harris v. San Francisco, 52 Cal. 553.

60. The words "authorized and empowered to appropriate, allow, and order paid out of the general fund," etc., do not show an intention that the act should be mandatory. Id.

61. Until the claim had been allowed and ordered paid by the board of supervisors, neither the auditor nor treasurer had authority to act. Id.

62. Under the fourth section of the act of April 1, 1876 (cited in the opinion), "to provide for a supply of water for the university and for the asylum for the deaf, dumb, and blind," the power to approve or disapprove of the appraisal, made under the act, is vested in the governor, and his discretion in the matter can not be controlled by mandamus.

Berryman v. Perkins, 55 Cal. 488.

63. The act of March 27, 1874 (stats. 1873-4, p. 711), authorizing and requiring the board of supervisors of the plaintiff to sell at public auction all of **Channel street and Mission creek**, except so much thereof as might be required for a street and sewer, and providing that the deed of the mayor to the purchaser of any lot, should vest the title in such purchaser, did not operate as a grant to the plaintiff.

San Francisco v. Ellis, 54 Cal. 72.

64. On May 1, 1851, the legislature passed two acts, one to regulate proceedings in criminal cases, the other to regulate fees in office, both fixing the fees of the clerk in criminal cases, and essentially different: *Head*, that the latter act must govern, as the subject of fees was the sole object of that act, and the fixing of fees in the former act being a mere incident, the main purpose of the act being to regulate criminal proceedings.

Dobbins v. Yuba Co., 5 Cal. 414.

65. If a part of an act which is not subject to constitutional objections can be sep-

arated from the remainder, such part may be enforced, regardless of the remaining sections. *Kood v. McCargar*, 49 Cal. 117.

66. The forty-fifth section of the revenue act of 1861, relating to the effect of a deed of land sold for taxes, has not been repealed. *Mayo v. Haynie*, 50 Cal. 70.

67. Statutes of the several states, regulating remedies by means of judicial proceedings, are to be understood as intended to apply only to proceedings in the courts of the particular state where adopted, unless it clearly appears they were intended to have a wider scope. *Majors v. Cowell*, 51 Cal. 478.

68. A state statute regulating remedies and proceedings in courts, will not be construed as furnishing remedies to suitors in federal courts, unless it clearly appears from the statute that it was intended to have that effect. *Id.*

69. If a claim against a county is barred by the statute of limitations, and the legislature passes an act requiring the board of supervisors to act upon and reject or allow it, notwithstanding the bar of the statute, the act does not have the effect of legalizing the claim, if it is illegal. *Domingos v. Sacramento Co.*, 51 Cal. 608.

70. Although a statute may be conditional, so that its taking effect may depend upon a subsequent event which may be named in it, yet this event must be one which shall produce such a change of circumstances that the law-makers, in their own judgment, can declare it wise and expedient that the law shall take effect when the event shall occur. *Lx Parte Wall*, 48 Cal. 270.

71. When the legislature passes a law, it must pass entirely upon the question of its expediency; and it can not say that a law shall be deemed expedient, provided that the people afterwards, by a popular vote, declare it to be expedient. *Id.*

72. A statute to take effect upon a subsequent event must, when it comes from the hands of the legislature, be a law *in presenti* to take effect *in futuro*. On the question of the expediency of the law, the legislature must exercise its own judgment, definitely and finally. *Id.*

73. The rule that penal statutes must be strictly construed has been abolished in this state by the penal code. *People v. Soto*, 49 Cal. 67.

74. Section 2390 of the political code, which authorizes either of disagreeing parties as to damages for drifted lumber to select "two disinterested citizens of the county, who may hear proofs and determine" the damages, does not impose any duty on either party, because it does not propose an intelligible mode of selecting appraisers. *Flanders v. Locke*, 53 Cal. 21.

75. The right to resort, at the trial of an

action for the conversion of personal property, to an arbitrary presumption of detriment was not, previous to the trial at which the presumption would have arisen, a "right acquired" within the meaning of section 286 of the amendments to the civil code, which took effect July 1, 1874.

Tully v. Tranor, 53 Cal. 274.

76. The commencement of an action before the "amendments" took effect was not a "proceeding taken" within the meaning of the section aforesaid. *Id.*

77. The volume of statutes continued in force, published by the code commissioners, has not received the legislative sanction, and is not, therefore, authority. *Needham v. Thresher*, 49 Cal. 392.

78. To determine the true interpretation of the terms of a doubtful or ambiguous section, it is proper to read it in connection with others in the same act dealing with the same general subject. *People v. White*, 34 Cal. 183.

79. The intent or proper construction of an act of the legislature which took effect upon the contingency of receiving a majority of the votes of the electors of a municipal corporation, is not to be determined by the views entertained of its provisions by the electors when they adopted it. *French v. Teschemaker*, 24 Cal. 518.

80. Courts will uphold where it is possible a contemporaneous interpretation of a statute under which interpretation rights of property have for many years been acquired. *Will of Warfield*, 22 Cal. 51.

81. Statutes should be construed according to what appears to be the intention of the legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the latter statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. *Sacramento v. Bird*, 15 Cal. 294.

82. The motives of a member of the legislature in moving, or of the body of which he is a member, in passing a legislative act, is not a proper subject of judicial inquiry. *Harpending v. Haight*, 39 Cal. 189.

83. In construing a statute, it is an invariable rule to start out with the assumption that some effect is to be given, if possible, to every provision of the law to be construed. *People v. Waterman*, 31 Cal. 412.

Souter v. Sea Witch, 1 Id. 162.

San Francisco v. Kelsey, 5 Id. 169.

Smith v. Randall, 6 Id. 47.

Seabury v. Arthur, 28 Id. 142.

Appeal of N. B. & M. R. Co., 32 Id. 499.

Burr v. Dana, 22 Id. 11.

Gates v. Salmon, 35 Id. 576.

Cheever v. Hayes, 3 Id. 471.

People v. Southwell, 46 Id. 139.

84. It is a universal rule of construction that courts **must find** the intent of the legislature **in the statute itself**. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts can not arbitrarily subtract from or add thereto.

Tynan v. Walker, 35 Cal. 634.

85. In the construction of statutes for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed, as to the **general tenor and scope** of the entire legislative scheme embodied in the statute.

Palache v. Pacific Ins. Co., 42 Cal. 418.

86. If it appears from the language of an amendatory act, and of the act which is amended, that by the words "**board of underwriters**," used in the former, the legislature meant "board of fire underwriters," the court will construe it as intended.

In re Bulger, 45 Cal. 553.

In re Merrill, Id.

87. In construing a statute, **all parts of the act must be considered**, in order to ascertain from the whole what was the real intent of the legislature.

People v. San Francisco, 36 Cal. 595.

88. Although it may appear from the first section of an act that it was not intended to be **mandatory**, yet if the other provisions of the act are wholly inconsistent with this hypothesis, the act will be held to be mandatory.

Id.

89. The rule of the common law, that penal statutes should receive a **strict construction** in favor of him upon whom a penalty was to be inflicted, has been **abrogated by the code**, which has constituted itself, in this respect, its own interpreter.

Ex parte Gutierrez, 45 Cal. 429.

People v. Soto, 49 Id. 67.

90. Statutes should be so construed as to **avoid absurd results**, not within the evil to be remedied, and evidently not within the contemplation of the legislature.

People v. Turner, 39 Cal. 370.

91. In construing a statute, the sections must be taken together, and that interpretation should be placed upon the language, which will give the particular section utility and effect, make it compatible with common sense, and the plainest principles of justice.

Burnham v. Hays, 3 Cal. 115.

92. The consideration of the **justice or policy** of a statute, and its effect upon the general welfare of the state, is addressed to the discretion of the legislature, and, having been decided by the legislature, is not a proper subject of judicial inquiry.

Billings v. Hall, 7 Cal. 1.

93. It is the duty of the courts, to ex-

cute all laws according to their true intent and meaning; that **intent**, when collected from the whole and **every part** of the statute taken together, must prevail, even over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to possible injustice, contradiction and absurdity.

Ex parte Ellis, 11 Cal. 222.

94. The meaning of an act is to be ascertained, not from the **debates** which took place on its passage, but from the language of the act.

McGarrahan v. Maxwell, 28 Cal. 75.

95. The reason and intention of the law-giver will **control the strict letter** of the law in interpreting the same, when to adhere to the strict letter would lead to palpable injustice, contradiction or absurdity.

Knowles v. Yeates, 31 Cal. 82.

96. Statutes in derogation of the **common law** should be construed strictly, especially when they open a door to fraud.

Hotaling v. Cronise, 2 Cal. 60.

People v. Buster, 11 Id. 215.

But see Ex parte Gutierrez, 45 Cal. 429; Turner v. Tuolumne W. Co., 25 Id. 397.

97. Opinions expressed by individual legislators upon the object and effect of particular provisions of an act under discussion, are entitled to little weight in the construction of the act. The intention of the legislature must be sought in the language of the act, and the object expressed or apparent on its face.

Leese v. Clark, 20 Cal. 387.

98. The primary rule in the construction of laws is to **so read them as to give force and effect to the intent of the legislature**, and when the object of a law is to subserve some purpose in which the public are interested, courts will hold a provision to be mandatory or directory, as will best subserve that purpose.

Calaveras Co. v. Brockway, 30 Cal. 325.

99. If a section in an amendatory or supplementary act refers to a **section of the act** amended or supplemented by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section.

People v. King, 28 Cal. 265.

100. When a statute assumes to specify the effects of a certain provision, courts will presume that all the effects intended by the law-maker are stated.

Perkins v. Thornburgh, 10 Cal. 189.

101. In construing a particular section of a statute, it should be **considered together with the other sections**, and its language so interpreted as to give to it utility and effect, and to make it compatible

with common sense and the dictates of justice. *Cullerton v. Mead*, 22 Cal. 95.

102. The general rule is that a proviso which is clearly repugnant to the body of an act is void. But, in construing statutes, it is the duty of the court to reconcile, if practicable, apparently conflicting provisions, so as to carry into effect the intention of the legislature as it appears from the whole act, and from contemporaneous legislation. *Pond v. Maddox*, 38 Cal. 572.

103. If it clearly appears, from all the sources of interpretation, that a provision of a statute was inserted through inadvertence, it will be disregarded. *Id.*

104. The act to prohibit lotteries, etc., passed April 24, 1861, and the act to aid the mercantile library association of San Francisco, passed February 19, 1870, are not repugnant in the sense of the rule which would construe the last act as a repeal of the first. *Ex parte Smith*, 40 Cal. 419.

105. Where an act of the legislature recognizes the existence of a general law upon any subject, and attempts to create an exception, the exception is not repugnant to the general law, or if it be, it is only to the extent of the exception. *Id.*

106. Legislative acts compelling municipal bodies to make improvements of a local character, may not only be passed, but will receive as liberal a construction as other acts. *People v. San Francisco*, 36 Cal. 595.

107. Legislative enactments, or municipal ordinances, "to prohibit noisy amusements, and to prevent immorality," are not repugnant to the constitution of the United States, nor to the constitution of the state. *Ex parte Smith*, 38 Cal. 702.

108. The seventeenth subdivision of section 433, article VI of the political code, repeals the provision of section 6 of the act of 1869-70, in respect to the duty of the controller to draw warrants in payment of salaries of the tide land commissioners. *Stratton v. Green*, 45 Cal. 149.

109. If a statute providing for the organization of a new county contains no provisions in relation to official bonds, they must be given in conformity to the general law upon that subject. *People v. Ross*, 38 Cal. 76.

110. The act of the legislature of this state (stats. 1867-8, p. 708), allowing those who have put improvements on lands of the United States, to remove the same within six months after the lands shall have become the private property of any person, in so far as it relates to improvements which are a part of the realty, is void, because in conflict with the act admitting this state into the union. *Collins v. Bartlett*, 44 Cal. 371.

111. There is a typographical error in the statutes of 1851, page 443, section 31. As

printed, said section repeals the act of April 22, 1850, concerning railroad corporations. The enrolled act only repeals the third chapter of said act of April 22, 1850.

Brewster v. Hartley, 37 Cal. 15.

112. The second section of the act of 1868, "for the encouragement of silk culture," shows that the act of 1866, on the same subject, was not repealed for all purposes; but so much of it was left in force as was for the benefit of those who had, at the time of the passage of the act of 1868, already planted mulberry trees under the encouragement of the act of 1866.

Atty. Genl. v. Board of Judges, 38 Cal. 291.

113. By the act of 1866, it was the intention of the legislature to give for each farm or assemblage of mulberry trees of the age of two years—amounting to five thousand or more—a premium of two hundred and fifty dollars. *Id.*

114. Under that act, the state board of judges had no jurisdiction to allow a premium for a half of a plantation; or to subdivide a plantation, and denominate each subdivision a plantation, and award a premium therefor. *Id.*

115. An act which provides that it shall be the duty of the board of supervisors, within a certain time, to proceed and let a contract for a local improvement, and prescribes what the improvement shall be, leaving nothing to the discretion of the board, is mandatory on the board. *People v. Supervisors*, 36 Cal. 595.

116. The act of 1868, providing for the election of supervisors in Sacramento county, repealed so much of the act of 1863 as authorized an election to be held for three of the districts in 1869, and the ballots cast at that election for supervisors for those three districts were void. *Christy v. Supervisors*, 39 Cal. 3.

117. A statute declaring that a board of supervisors shall not be sued in any action whatever, but that it may be proceeded against by mandamus, does not change the essential nature or office of the writ itself. *Tilden v. Sacramento Co.*, 41 Cal. 68.

Title of an Act.

118. It is well settled that the title of an act is no part of the law itself, although it may be referred to in case of doubt to ascertain the intention of the legislature. *Cohen v. Barrett*, 5 Cal. 195.

119. The title of an act can not be used to restrain or control any positive provision of the act, but where the meaning of the body of the act is doubtful, the title may be resorted to as a means of ascertaining the intention of the legislature. *Flynn v. Abbott*, 16 Cal. 338.

120. The title of an act in cases of doubt may be referred to as tending to elucidate the intent of the legislature, but it is never permitted to control the body of the act.

People v. San Francisco, 36 Cal. 505.

121. While the title of an act will not control the language of the statute in the body, it may be referred to as tending to explain the intention of the act when the language is doubtful.

Barnes v. Jones, 51 Cal. 303.

122. The head-notes to the chapters and titles in the practice act are entitled to more consideration in explaining the intention of the different sections, where the language is doubtful, than the title of the entire act. Id.

123. While the title can not be resorted to to control the body of a statute, yet in doubtful cases it may be referred to as an aid in construing doubtful clauses; and as the act in question is entitled "an act to confer additional powers," etc., it may be inferred that additional powers only were intended to be given, and that it was not the intention of the legislature to compel the board of supervisors to allow a claim without examination.

Harris v. San Francisco, 52 Cal. 533.

124. When the language of an act is plain, the title can not be resorted to for the purpose of restraining that language.

In re Boston M. & M. Co., 51 Cal. 624.

125. In construing statutes, resort is sometimes had to the title, as tending to throw some light upon the intention of the legislature, in very doubtful cases; but, in any case, it is entitled to but little weight, and is never allowed to enlarge or control the language in the body of the act.

Hagar v. Yolo Co., 47 Cal. 222.

Approval of Statutes.

126. The constitution provides that if any bill presented to the governor (having passed both houses of the legislature) shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return.

Price v. Whitman, 8 Cal. 412.

127. In approving a statute, the executive acts as a component part of the law-making power, and his power of approval ceases on the adjournment of the legislature.

Fowler v. Peirce, 2 Cal. 165.

Time in Statute Directory.

128. Where time is prescribed to a public body in the exercise of a function in which the public is concerned, the time designated is merely directory, unless there are negative words restraining the exercise of the power to that time. Tuohy v. Chase, 30 Cal. 524.

129. Where an act of the legislature con-

tains no provisions limiting its operation upon any contingency, and it is impossible to take the initial step in its execution within the time prescribed in the statute: *Id.*, that the provision in respect to the time of taking said step is directory merely. Where a statute specifies the time at or within which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the act contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right.

People v. Lake Co., 33 Cal. 487.

130. Provisions in a statute in regard to the time within which an act is required to be done, are generally to be construed as directory, but such a construction is improper where a consequence is attached to a failure to comply with the statute.

Shaw v. Randall, 15 Cal. 384.

Amendments.

131. A general statute, controlled in some of its provisions by a subsequent special statute, is revived by the amendment of the latter, intended to give effect to the former; and though the first statute gave jurisdiction to a court which could not constitutionally exercise it, the act becomes effectual by an amendment, passed still later, transferring the jurisdiction to the proper body.

People v. Phoenix, 6 Cal. 92.

132. Under the constitution of this state, the amendment of a statute operates as an absolute repeal of the old statute or section so amended, even if the amendment takes nothing away from the old law, but merely adds a proviso in certain cases.

Billings v. Harvey, 6 Cal. 381.

Particular Words and Phrases.

133. Where the statutes use words and phrases of a well-known and definite meaning in the law, they are to be expounded in the same sense in the statute.

Harris v. Reynolds, 13 Cal. 514.

134. In construing laws, words not technical will be presumed to have been used in the sense in which they are understood by those for whom the laws are made.

Sprague v. Norway, 31 Cal. 173.

135. The words of a statute must be interpreted according to their common acceptation.

Quigley v. Gorham, 5 Cal. 418.

136. In construing statutes, the rule is that general words are controlled by specific exceptions.

Lucas v. Payne, 7 Cal. 92.

137. It is a rule of construction of statutes that some effect, if possible must be given to every word, and certainly to every distinct provision of the act.

Langenour v. French, 34 Cal. 92.

138. When two acts are in *pari materia*.

or one is an amendment of the other, it will be presumed that a **word used** in a certain sense in the first act was used **in the same senso** in the subsequent one.

Robbins v. O. R. R. Co., 32 Cal. 472.

130. In construing statutes words are to be taken in their usual and **popular sense**, unless they have a well understood **technical meaning**; and if practicable, effect should be given to all the words and provisions of the statute.

Appeal of Houghton, 42 Cal. 35.

140. The words "**final and conclusive**," in the act of 1870, apply to the county court only, and do not prohibit an appeal to the supreme court. Id.

141. The courts will not permit an **erroneous punctuation** of a statute in printing it, to have the effect of giving it an absurd construction.

Randolph v. Bayne, 44 Cal. 366.

142. The words "**payments and offsets**" are substantially equivalent in meaning to the words "credits and offsets," as employed in the fifth section of the act.

Preston v. Sonora Lodge, 39 Cal. 116.

143. A word **repeatedly used** in a statute will bear the **same meaning** throughout the statute unless it is apparent that another meaning is intended.

Pitte v. Shipley, 46 Cal. 154.

Hoag v. Howard, 55 Id. 564.

144. In a proceeding for a writ of mandamus to compel the defendants to sell or fix the price of certain lots fronting on a new street opened through the **market plaza** of the city of **San Jose**, under the act of March 4, 1878 (stats. 1877-8, p. 163): *Held*, that the statute did not enjoin upon the defendants a duty to sell the lots in question, but simply conferred upon them the power to sell or not to sell, as they should deem best for the interests of the city.

Coopers v. San Jose, 55 Cal. 599.

145. The meaning of the terms "Allowed" and "Provided" construed.

Schmitt v. Dunn, 55 Cal. 651.

Retrospective Statutes.

146. A statute should be construed so as to take effect upon future, and not upon past transactions; but with the exception of cases within prohibitory clauses, in state constitutions, or in the constitution of the United States, it is competent for a state legislature to give to a statute a retroactive effect.

Von Schmidt v. Huntington, 1 Cal. 55.

147. No statute should be so construed as to give it a retrospective effect to divest the rights of individuals vested previous to its passage, or previous to the time the act took effect, unless such intention be expressed in terms. Thorne v. San Francisco, 4 Cal. 127.

148. Statutes should not be so construed

as to give them a retroactive operation, unless it is clearly apparent that such was the intention. Gates v. Salmon, 28 Cal. 320.

149. Where a statute is declared to take effect from and after its passage, it takes effect at the very moment of its approval by the governor; and for the purpose of determining the right to an office, it is competent to inquire at what particular point of time in the day an act was approved by the governor. People v. Clark, 1 Cal. 406.

Remedial Statutes.

150. Where both the right and the remedy are given by statute, that remedy alone can be pursued. People v. Craycroft, 2 Cal. 243.

151. Where a **new right** is created by statute, the party complaining of its violation is confined to his **statutory remedy**, so far as the courts of common law are concerned. If, however, the right existed at common law, the remedy provided by statute is merely cumulative.

Ward v. Severance, 7 Cal. 126.

152. Where a statute provides a **remedy not known to the common law**, and by which no personal notice to the person proceeded against is required, the statute should receive a strict construction and not be extended to cases which do not clearly fall within its language.

Souter v. Sea Witch, 1 Cal. 162.

153. Remedial statutes should be beneficially construed.

Kent v. Laffan, 2 Cal. 595.

154. Remedial statutes must be **construed liberally**, and where the meaning is doubtful, it must be so construed as to extend the remedy.

White v. Tug Mary Ann, 6 Cal. 462.

Cullerton v. Mead, 22 Id. 95.

156. An act of a remedial character should receive, having due regard to the language in which it is expressed, a liberal construction, which will bring within its scope every case which comes clearly within its spirit and policy. Wallace v. Mooly, 26 Cal. 387.

157. The right to regulate the mode of redressing injuries belongs to the legislature, but when, under the semblance of a change of the remedy, a substantial **existing right** is defeated, **impaired**, or abridged, the act is null and void. Billings v. Hall, 7 Cal. 1.

REPEAL OF STATUTES.

In General.

158. Where the **charter of an old hospital** was repealed, and a charter granted to a new one, the officers of the former were directed to deliver to the trustees of the latter "all property, real and personal, held by them in trust for the old institution." And the same act makes it the duty of the

new institution, "to pay out of any funds which may come into its hands, all of the debts which may be owing by the old one." The new corporation is bound to pay all such debts, without regard to the sufficiency of the fund derived from the corporation.

Johnson v. Hospital, 2 Cal. 319.

159. Where a general repealing statute is passed, and on the next day a supplementary act is passed, excepting certain counties from the operation of the repeal, to a certain extent: *Held*, that the case was a special one, and there being no doubt of the true intention of the legislature, the **supplemental act must be regarded as a part of the repealing act**, and must be given the same effect as if passed on the same day. So held in the construction of the act of April 29, 1857, repealing the then existing law concerning ex-sheriffs, as tax collectors, and requiring them to turn over the assessment rolls to their successors, taken in connection with the act of April 30, excepting certain counties from the operation of the repealing law of the day previous. *Manlove v. White*, 8 Cal. 376.

160. Where a statute **repeals or super-sedes certain sections** of a previous statute, a mere declaration in a still subsequent statute that the repealing statute shall not repeal these sections, is not a law reviving them or enacting them. There can be no law without a legislative intent that it become a law; and such intent must be manifested by language declaring the legislative will.

State v. Conkling, 19 Cal. 501.

161. Where a statute contains a clause repealing **all laws** and parts of laws in **conflict** with its provisions, a previous act upon the same subject-matter, the material provisions of which are repugnant to and irreconcilable with those of the new act, is repealed by it, unless the terms of the subsequent act show an intention to keep the previous one in force.

People v. Grippen, 20 Cal. 677.

162. An act containing a clause repealing **all acts** and parts of acts **inconsistent** with its provisions, but not repealing by name a previous act on the same subject-matter, leaves in force all such portions of the previous act as are not in conflict with its provisions.

People v. Durick, 20 Cal. 94.

163. A repeal of a statute under which alone a right of action exists, operates as an **extinguishment of actions pending** when the repeal takes effect, unless there is a subsequent law which enables the court to try and determine them.

McMinn v. Bliss, 31 Cal. 122.

164. The repeal of an act repealing a former act **does not revive the former act**, or give it any force or effect. To revive such former act it must be re-enacted.

People v. Hunt, 41 Cal. 435.

165. When a general act applicable to all the counties of the state is repealed **as to a particular county**, and a still later act amends a section of said general act so partially repealed, such **amendment does not apply** to or affect the said particular county as to which the said original act had been before repealed.

People v. Tyler, 36 Cal. 522.

165a. The **repeal of a statute** effectually annuls all proceedings had under the act repealed, unless the **obligation of a contract** would thereby be impaired, or a vested right destroyed: *Held*, accordingly, that all the proceedings under the Rogers act, above referred to, were annulled by the repeal of the act, and that therefore it would be neither necessary nor proper for the court to proceed further with the case.

Lamb v. Schoottler, 54 Cal. 319.

By Implication.

166. The law **does not favor** repeals by implication, and where there is an apparent conflict between two acts, the court should reconcile them if possible, but if this can not be done, then the last act must govern.

Scotfield v. White, 7 Cal. 400.

People v. S. F. & S. J. R. Co., 28 Id. 254.

167. A statute may be repealed by implication; and where a **subsequent act** is **repugnant to a prior one**, the last operates, without any repealing clause, as a repeal of the first; and where two acts, passed at different times, are not in terms repugnant, yet if it is clearly evident that the last was intended as a revision or substitute of the first it will repeal the first to the extent in which its provisions are revised or substituted.

Pierpont v. Crouch, 10 Cal. 315.

168. And as there is **no necessary repugnancy** between the specific provisions of the sixth article of the act of 1854, taxing consigned goods, and the general language of the act of 1857, taxing all property within the state, with certain exceptions, and as the legislature has not in direct terms repealed said sixth article, the two acts must be construed together and effect given, if possible, to both.

Crosby v. Patch, 18 Cal. 438.

169. Where a subsequent statute repeals in direct terms certain sections of a former statute, upon the same general subject, it is equivalent to a declaration that the remaining sections shall be in force, there being no necessary repugnancy between such remaining sections and the subsequent statute. *Id.*

170. Cases cited upon the rules applicable to the repeal of statutes by implication. *Id.*

171. A statute may be repealed by express words, or by necessary implication. The latter takes place whenever, by subsequent legislation, it becomes apparent that

the legislature did not intend the former act to remain in force.

Christy v. Sacramento, 39 Cal. 3.

172. An act of the legislature is repealed by a subsequent act, when it appears from the last act that it was intended to take the place of or repeal the former, and when the two acts are so inconsistent that effect can not be given to both.

Ex parte Smith, 40 Cal. 419.

Estate of Wixom, 35 Id. 320.

People v. Burt, 43 Id. 560.

173. If there are **two acts** for the assessment and collection of a **tax**, and by one, a notice of the election to vote, it must be posted ten days, and published two weeks, and the tax is not to exceed one dollar and fifty cents on the hundred dollars, and by the other the notice is to be posted twenty days, and published three weeks, and the rate of taxation is not to exceed seventy cents on the hundred dollars, the two acts are repugnant, and the latter repeals the former.

People v. Burt, 43 Cal. 560.

174. If a **section** of an act is **amended** and published at length in a subsequent act, and the **original section** is again **amended** and published at length in a still later act, which repeals the first amendatory act, the last act is only an amendment of the original section, although it does not refer to the first amendatory act except in the repealing clause. Kimball v. Supervisors, 46 Cal. 19.

175. An act authorizing the board of supervisors of a county to levy and collect, for county school purposes, a **rate of taxation** which will produce an amount not exceeding a given sum, and which rate may be as high as fifty cents on the one hundred dollars, is in conflict with, and repealed by, a **subsequent act** passed for the whole state, in which it is provided that the board of supervisors of each county shall annually levy a school tax not exceeding thirty-five cents on each one hundred dollars of the property in the county. People v. Sargent, 44 Cal. 430.

176. Section 3891 of the political code, which declares that the provisions of the code with respect to revenue must be construed as if passed on the last day of the session of 1871-2, has the effect to repeal all acts passed at the session of 1871-2, concerning revenue, except acts amendatory of or carrying into effect the codes.

Mitchell v. Crosby, 46 Cal. 97.

177. The repeal of an act effects a repeal of an act amendatory of the act repealed.

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STATUTE OF FRAUDS.

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PERSONAL PROPERTY.

Validity of Sale—Effect as to Creditors.

1. In order to constitute a valid sale of personal property against creditors, there must be, according to the statute of this state, an **immediate delivery** thereof, accompanied by an actual and continued change of possession.

Samuels v. Gorham, 5 Cal. 226.

2. A sale of personal property, to be valid against creditors, must be accompanied by **actual and continued change of possession.**

Whitney v. Stark, 8 Cal. 514.

3. The statute of frauds only requires an **actual and continued change** of possession as a protection against creditors and subsequent purchasers of the vendor.

Paige v. O'Neal, 12 Cal. 483.

Samuels v. Gorham, 5 Id. 226.

Montgomery v. Hunt, 5 Id. 366.

Chenery v. Palmer, 6 Id. 119.

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4. A sale of personal property without delivery is not absolutely void, but only so as to creditors and subsequent purchasers. *Visher v. Webster*, 13 Cal. 58.

5. A sale of property, however fraudulent as to creditors, is good as between the parties to the sale.

Montgomery v. Hunt, 5 Cal. 366.

6. Every sale of property and personal chattels is good between the parties, and can not be attacked for fraud except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned unsatisfied, in whole or in part, with the single statutory exception of an attaching creditor, and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued, under the statute, before he can attack the sale.

Thornburgh v. Hand, 7 Cal. 554.

7. A sale of property by a debtor, even if void as against creditors, is good as between himself and his vendee, and all the world except his creditors. And such sale can not be attacked by a creditor merely from the fact that he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment authorizing a seizure of the property. *Bickerstaff v. Doub*, 19 Cal. 109.

8. Where W. agreed to sell a team and wagon to T., he to have the use thereof to draw wood to be delivered to W., and by him to be credited at the market price on the price of the team and wagon (the property to belong to W. until so paid for) and the performance of the contract was entered upon by T.: *Held*, that the contract is valid; that until a neglect or refusal by T. to complete the performance, W. could not have reclaimed the property, nor could the sheriff, under an execution against him, until then seize it. *Id.*

9. *Held*, further, that the sheriff could not question the transfer unless it were made to hinder, delay, or defraud creditors, and then he must produce both judgment and execution. *Id.*

10. The transfer of said property by said sale from C. to S., even if fraudulent, was good against all the world except creditors; and even a creditor at large could not attack it. *Sexey v. Adkinson*, 34 Cal. 346.

11. Where the plaintiff bought eight hundred sacks of flour, on storage in a warehouse, which stood therein as a separate pile, and the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterwards attached as the property of the vend-

or: *Held*, that the delivery was sufficient, and the sale valid.

Cartwright v. Phoenix, 7 Cal. 281.

12. If A. sells his property to B. in consideration of so much money to be paid by B. to C., though the money is to be paid by or out of a sale of the goods, the contract is not void. There is no difference in such case between paying to A. and paying to A.'s order or creditor.

Wellington v. Sedgwick, 12 Cal. 469.

13. Where a vendee of personal property buys it *bona fide*, takes possession openly, and holds it in exclusive possession for a year or more, and afterwards puts the property into the possession of the vendor, as attorney in fact of the vendee, this qualified possession of the vendor does not, as a matter of law, show the sale to be fraudulent and void as against the creditors of the vendor. *Stevens v. Irwin*, 15 Cal. 503.

14. All the statute requires is that delivery must be made; the vendee must take actual possession; the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. The possession must be continuous, not taken to be surrendered back again, not formal, but substantial. But it need not necessarily continue, indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement of the status of the property, and the claim to it by the vendee. *Id.*

15. The principle decided in *Stevens v. Irwin*, 15 Cal. 506, that, to make a sale of personal property good against creditors of the vendor, the vendee must take actual possession; that the possession must be open and unequivocal, having the usual indications of ownership by the vendee so as to notify the world of his claims, and that this possession must be continuous, etc., affirmed. *Engles v. Marshall*, 19 Cal. 320.

16. The court below did not err, in instructing the jury that the facts showed no valid sale for want of such change of possession of the property as the statute of frauds requires. *Id.*

17. In order that a verbal contract for the purchase of goods or chattels at a price exceeding two hundred dollars may be saved from the operation of the statute of frauds by a delivery, there must be a transfer of possession evidenced by acts, and not by words merely. *Malone v. Plato*, 22 Cal. 103.

18. Where, after an alleged verbal agreement for the sale of a pair of horses, they remained in the seller's livery stable, where they had been previously kept: *Held*, that proof of a direction by the purchaser to the seller to keep the horses in the stable for him, or of any other language of that import, was insufficient to show such a delivery

as is required by the thirteenth section of the statute of frauds. *Id.*

19. Where the vendor of goods is not at the time in possession, the transfer is an "assignment" within the meaning of that term in the fifteenth section of the statute of frauds, and an actual and continued change of possession is required equally as in case of a sale by one in possession.

Weil v. Paul, 22 Cal. 492.

20. No delivery by the vendor of personal property is necessary as against parties who are neither creditors nor subsequent purchasers of such vendors.

Paige v. O'Neal, 12 Cal. 483.

21. The sale of personal property unaccompanied by immediate delivery and continued change of possession, as required by section 3440 of the civil code, is void as to creditors, notwithstanding the fact that the vendee obtains possession before the levy is made by the creditor.

Watson v. Rogers, 53 Cal. 401.

22. G., the owner of cattle and horses, rented land of L., and kept the cattle and horses on the land, in Sutter county, and P. worked for him. G. owed L. on a note given April 29, 1872. June 7, 1872, G. and P. went to Sacramento and delivered L. some hogs on the debt. The next day G. sold to P., and to R., his brother-in-law, his cattle and horses for one thousand eight hundred dollars, and all three of the parties started with the cattle and horses for Big valley, Siskiyou county, G. riding on a horse, and his family following behind in a wagon hauled by one of the horses sold by G. When about thirty miles from the place of starting, the cattle and horses were attached at the suit of L.: *Held*, that there was no such change of possession as is required by the statute, and that the sale was plainly fraudulent.

Regli v. McClure, 47 Cal. 612.

23. D. owned several teams, with which he was engaged in hauling bark for G. Drivers were employed, and D. did not personally superintend the work. The teams were fed and kept nights at a barn on G.'s land, and the drivers slept there. G. met D. at a town several miles from the barn, and bought the teams, and, returning toward the barn, met the teams on the road, and told the drivers of the purchase, and requested them to continue work for him, to which they agreed. He went to the barn the same night, and renewed the arrangement with the drivers, who, the next day, continued hauling bark, and were met by an officer, who attached the teams at the suit of a creditor: *Held*, that there was not an actual delivery and continued change of possession as required by the statute of frauds.

Gray v. Corey, 48 Cal. 208.

24. If a sale of property is made, which is fraudulent as to the creditors of the vendor,

and the vendee then sells to a third person, in whose hands the goods are attached by a creditor of the first vendor, and the creditor, in an action against the sheriff, attacks the sale as a fraud on creditors, this admits the validity of the sales as between the vendors and vendees, and the creditor must show that the second vendee was a party to the fraud. The burden of proving the fraud is on him; and the questions whether the second vendee had notice of the fraud of the first sale, or was an innocent purchaser, or whether the second vendee paid a valuable consideration, have no application to the case. Such questions apply only to a case where property is purchased by such fraudulent representations as will vitiate the sale between the vendor and vendee.

Thornton v. Hook, 35 Cal. 223.

25. The statute of frauds does not annul a sale in favor of creditors, solely upon the ground that it was not founded on a valuable consideration. *Id.*

26. A creditor who attacks a sale on the ground of fraud as to him, admits the validity of the sale between the parties thereto, but seeks the benefit of the statute of frauds as to himself, and must show fraud. *Id.*

27. In the fall of 1856, L. rented of W. a portion of his brick-yard, for the purpose of making bricks. L. subsequently made a kiln of bricks, and left them in W.'s charge and possession for him to sell for L.'s benefit. In January, 1857, L. made and delivered a bill of sale of the bricks to R., and informed W. of the same, but there was no change of possession under the bill of sale. S., the defendant, as constable, seized the bricks under a process against L., and sold them as the property of L.: *Held*, that L.'s sale to R. was a fraud as against the creditors of L., and that defendant was justifiable in taking the bricks and selling the same.

Richards v. Schroder, 10 Cal. 431.

28. A constable having attached certain personal property, an action for its recovery was brought against the officer by one claiming the property as a purchaser from the defendant in the attachment proceedings. The district judge charged the jury that if the property was delivered to plaintiff, and was under his control from the date of the alleged purchase to the levy of the attachment, a period of six days, the sale was valid as against the attaching creditor: *Held*, in view of the facts in evidence, that the question should have been submitted to the jury.

Hesthal v. Myles, 53 Cal. 623.

Delivery and Change of Possession.

29. What constitutes delivery, depends on the character of the article and the circumstances of the case.

Chaffin v. Doud, 14 Cal. 384.

30. But we do not decide, that any removal from the land was necessary to vest a perfect title as against the creditors of B. *Id.*

31. Where no question is raised as to the validity of the contract, or the effect of the statute of frauds, and where the question is as to the kind of delivery which effects a change of property, although the goods can not be immediately delivered, the delay may be implied as one of the stipulations.

Stevens v. Stewart, 3 Cal. 140.

32. A delivery of an order for goods is only considered as a delivery of the goods themselves, where they are susceptible of an immediate delivery. *Id.*

33. But, where delivery of the goods is necessary to make the contract, a symbolical delivery can only be effectual, where it can be followed by an actual delivery. *Id.*

34. Words alone, unaccompanied by acts, will not constitute a delivery.

Gardet v. Belknap, 1 Cal. 399.

35. By an immediate change of possession is not meant a delivery instantor, but the character of the property sold, its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirement of the statute, and this will often be a question of fact for the jury. *Samuels v. Gorham*, 5 Cal. 226.

36. Upon part delivery of goods, and an inability on the part of the vendor to deliver the whole quantity sold, he is, nevertheless, entitled to recover the stipulated price of the quantity actually delivered, deducting therefrom the damages sustained by the purchaser on account of the non-delivery of the whole. *Coie v. Swanston*, 1 Cal. 51.

37. The vendor, if employed by the vendee as his clerk, can not remain in the apparently sole possession of the goods after the sale; but if it be apparent to all the world that he has ceased to be the owner, and that another has become such, and that he is only a subordinate or clerk, the rule requiring an actual and continued change of possession is satisfied.

Godchaux v. Mulford, 26 Cal. 316.

38. After a sale of goods and chattels in good faith, and an actual and notorious change of possession, the employment of the vendor by the vendee as a mere clerk or salesman is not a fraud which vitiates the sale because the change of possession is not continued. *Id.*

39. Thus, where in an action in a district court of this state, an issue was raised as to whether a sale of personal property made in Oregon was fraudulent, and no proof was made of the laws of Oregon: *Held*, that the validity of the sale must be determined by

the common law and statutes in force in this state on the subject.

Hickman v. Alpaugh, 21 Cal. 225.

40. If a merchant, having a stock of goods in his store, and engaged in a retail trade, with clerks in his employ, makes a sale in good faith of his entire stock in trade to a creditor in payment of the indebtedness, and for a fair price, and the creditor immediately goes into the store, takes entire control of the business, and proceeds to take an inventory, and also to retail the goods to customers with the assistance of the clerks of the vendor, this constitutes an actual and continued change of possession, and the sale is valid as against the creditors of the vendor, although there has been no formal discharge of the clerks of the vendor and rehiring of them by the vendee, and the vendor continues to occupy a room in the upper part of the store where he had previously slept.

Ford v. Chambers, 28 Cal. 13.

41. The validity of a sale of personal property, as between the vendee and an attaching creditor, when tested upon the question of the delivery and continued change of possession, is to be determined by the same rule whether the sale was absolute, or made by way of mortgage to secure an indebtedness.

Woods v. Bugbey, 29 Cal. 466.

42. The acts required to prevent a sale of personal property from being declared fraudulent for want of an immediate delivery and actual and continued change of possession, depend very much on the character and quantity of the property sold.

Lay v. Neville, 25 Cal. 545.

43. The plaintiffs purchased from B. a certain number of cattle, and presented to C., the agent of B., an order for their delivery. C. pointed out the cattle to the plaintiffs, as they were grazing in view, and told them that he delivered them possession, and then accepted an offer of employment from the plaintiffs, and remained in charge of the cattle until they were seized by the defendant: *Held*, that this was a delivery as immediate and as complete as the nature of the case would admit, and followed by an actual and continued change of possession.

Montgomery v. Hunt, 5 Cal. 366.

44. Where cattle, roaming at large, purchased in good faith, are collected together and marked with the brand of the purchaser, and then allowed to pasture on their accustomed range, these acts constitute a good delivery and continued change of possession.

Walden v. Murdock, 23 Cal. 540.

45. A mere execution of a bill of sale of cattle roaming at large, in which the brand with which they are marked is described, accompanied by a delivery of the branding iron, does not constitute a delivery of possession of the cattle. *Id.*

46. K. and S. were the owners of a mule team, which they used in hauling quartz-rock to their quartz-mill; the team was driven by one L., an employee. K. and S. sold the team to H., executing a bill of sale, and delivering the team by the discharge of L., the driver, who was immediately employed by H., and saying to H., "There is the team." K. and S. then hired of H. the team at eight dollars per day, and put it in the same business of hauling quartz-rock as before, and with L., the same driver. Team was kept and fed at K. and S.'s stable, as before the sale: *Held*, that there was no such actual and continued change in the possession of the property, under H.'s purchase, as to take the case out of the operation of the statute of frauds.

Hurlburd v. Bogardus, 10 Cal. 518.

47. S., a clothing merchant, whose goods were under attachment, sold them to W., who procured the release of the attachment, and removed the stock to his, W.'s, cigar store. Within less than two weeks thereafter, S. was engaged professionally as employee of W. in peddling out the goods and managing their sale at retail, in which condition they were again attached as the property of S.: *Held*, that there was no such actual and continued change of possession as was required by the fifteenth section of the statute of frauds, and that the goods were therefore liable to the attachment.

Weil v. Paul, 22 Cal. 492.

Segregation of Property.

48. If goods are sold, while mingled with others, by number, weight, or measure, the sale is incomplete, and the title remains in the seller until the bargained property is separated and identified.

McLaughlin v. Piatti, 27 Cal. 451.

49. A sale of a chattel can not apply to any article until it is clearly designated, and its identity ascertained. *Id.*

50. A sale of a given number of cattle, then running in a herd of a larger number, is an executory contract, and does not apply to any particular cattle until the number sold have been separated from the herd. *Id.*

51. Where A. had a large quantity of flour stored in the warehouse of B., and sold a portion of it to C., and gave an order for the flour sold on B., who accepted the same and gave C. in exchange a receipt for the same, and transferred it on his warehouse books to the account of C., but did not separate any specific portion from the flour of A. as the property of B., and the whole was subsequently seized in an action against A.: *Held*, that the sheriff was not liable to C. in the absence of segregation of the flour, but that B. was estopped by his receipt from denying his liability.

Adams v. Gorham, 6 Cal. 68.

52. Where the plaintiffs bought a certain amount of flour, being part of a large quantity on storage belonging to the vendor, and the plaintiff did not remove the flour purchased nor separate it from the remainder, but the vendor subsequently sold the remainder, and more, to other parties, who removed what they purchased, leaving on storage a less amount than had been purchased by plaintiff, which was afterwards attached in a suit against plaintiff's vendor: *Held*, that the sale and removal of all the flour, except that bought by plaintiff, was a segregation of plaintiff's flour, vesting in him a clear title at the time of the seizure.

Horr v. Barker, 6 Cal. 489.

53. Nor can the claim of a subsequent purchaser of flour from the same vendor, taking an order on the same storekeeper, embarrass the plaintiff's claim, there being no flour in store to meet the order in favor of such subsequent purchaser. *Id.*

54. And where the plaintiff's action, in such case, was brought for the value of the flour against another party claiming the flour, who had seized the same, the fact that plaintiff claims a less quantity of flour than he is really entitled to, does not operate otherwise than as a waiver of his claim to such additional quantity. *Id.*

55. The doctrine of segregation is not applicable to a man's property alone. In an action against a trespasser, and having claimed damages for a less quantity of flour than was his, it can not be objected that his action must fail for want of segregation of the flour for which he claims, from that which he does not claim, though it is his. *Id.*

56. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor, and crediting the purchasers with their respective lots: *Held*, that there was a sufficient delivery of possession without a separation of the various lots. *Id.*, 8 Cal. 603.

57. Where a vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from the larger mass, in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman. *Id.*

58. The different purchasers have a right to leave the goods, so by them purchased, in one mass, subject to an apportionment between themselves of any loss. *Id.*

59. Hay cut on land in possession of B. lies in three fields, of about one hundred and fifty acres, in swaths, cocks, windrows, and stacks. Plaintiffs mowed it, and boarded with B. B. mortgages the hay to plaintiffs for work, and they cease to board with B., whose dwelling is separated from these fields by a fence. Plaintiffs proceed to gather and stack the hay, until the levy of an execution on it eight days afterwards, by defendant, as B.'s property: *Held*, that even conceding removal from the premises to be essential to a complete delivery of the hay, still plaintiffs were entitled to reasonable time to do it, and that the court erred in assuming as matter of law that eight days was too long.

Smith v. Friend, 15 Cal. 124.

60. A sale of growing crops, the product of periodical planting and cultivation, does not come within the provisions of the statute of frauds, relating to sales of an interest in real estate, and therefore, though not in writing, is valid.

Marshall v. Ferguson, 23 Cal. 65.

61. Where A. purchases personal property, worth more than two hundred dollars, of B., but B. does not deliver him possession of the same, and A. then sells the goods to C., a third party, and receives his pay for the same, the sale by A. to C. is a sufficient delivery by B., and A. can not avoid the payment of the purchase money for want of delivery, or a note of memorandum in writing.

Id.

62. B. put in a crop on land leased of D., the lease providing that D. was to have one half the crop after expenses paid, and subsequently D., by written contract, sold to B. all his right, title, and interest in the crop which was then growing: *Held*, that the fact that D. was on the premises and occupied a house there, shows no possession of the crop as against B., under the contract.

Visher v. Webster, 13 Cal. 58.

63. Visher v. Webster, 13 Cal. 58, that where two parties are living on a ranch, and one sells his interest in the growing crops to the other, the fact that both parties continue to live on the ranch, and that the vendee works for the vendor as a hired man, does not make the sale void as against creditors, affirmed, and the principle applied to this case.

Bernal v. Hovious, 17 Cal. 541.

64. Growing crops are not goods or chattels within the meaning of the statute of frauds, and will pass by deed or conveyance, from the very necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession.

Bours v. Webster, 6 Cal. 661.

65. Bours v. Webster, 6 Cal. 661, that growing crops are not goods and chattels within the fifteenth section of the statute of frauds; and that, not being susceptible of manual delivery, until harvested and reduced

to actual possession, they pass by deed or conveyance from the necessity of the case, affirmed.

Bernal v. Hovious, 17 Cal. 541.

Stevens v. Stewart, 3 Id. 140.

When Void as to Creditors Only.

66. A sale of personal property, unaccompanied by immediate delivery, is void as to creditors, and this, though delivery be made before levy is made by the creditors.

Chenery v. Palmer, 6 Cal. 119.

67. And where such sale is absolute in terms, but with an understanding between vendor and vendee that it was only to operate as a mortgage, then it is a secret trust as to the surplus, and void as to creditors. *Id.*

68. Whether a sale of personal property is void as to subsequent purchasers must be determined under the fifteenth section of the statute of frauds.

Vance v. Boynton, 8 Cal. 554.

69. F. sold and delivered to V. P. certain goods, the possession of which V. P. retained for two or three days, when he leased the premises in which the goods were, and delivered the goods to F., his vendor, and one M., who, after carrying on the business in connection with F. for a few days, retired, leaving F. in the exclusive possession of the property, which possession continued until the goods were seized by L., as constable, under an execution against F.: *Held*, that the sale of the goods to V. P. was void as to creditors, and the goods were subject to the execution against F.

Van Pelt v. Littler, 10 Cal. 394.

70. The statute of this state makes a sale of personal property fraudulent and void as to creditors when there is not an actual and continued change of possession, and courts can not evade its force and effect by an inquiry into the consideration paid by the purchaser, or the good faith of the transaction.

Woods v. Bugbey, 29 Cal. 466.

71. The purchaser or mortgagee of a kiln of bricks while being burned must take that possession of the property which places him in the relation to the same that owners usually have to a like kind of property, in order to secure it against attaching creditors of the vendor. *Id.*

72. If the owner of a kiln of bricks, before the burning of the same has been complete, makes a sale thereof in good faith, and for a valid consideration to a creditor, and the vendor completes the burning of the kiln, exercising the same apparent control as before, the sale is to be deemed fraudulent as to an attaching creditor for want of a change of possession. *Id.*

73. A bona fide purchase made by a creditor of the goods of his debtor, who is in insolvent circumstances, is not fraudulent merely because such creditor thereby

obtains a preference over other creditors, and may be aware at the time that his purchase will have the effect of delaying or defeating the other creditors in the collection of their debts.

Walden v. Murdock, 23 Cal. 540.

74. A *bona fide* sale of cattle roaming at large over the plains, upon a defined or certain range, is not fraudulent as against the creditors of the vendor, merely because the sale is not followed by an immediate delivery of possession; but the parties are entitled to a reasonable time after the sale to prepare for a rodeo, and give the proper notices thereof, in order that they may separate the cattle purchased from stock owned by others, and to properly mark and brand them; and in the mean time the rights acquired by the purchaser will not be lost. *Id.*

Evidence of Fraud.

75. Where the defense to an action rests upon the fact of fraud in a sale of property to the plaintiff, the declarations of a person not a party to the action are admissible in favor of defendant, if such person was a party to the purchase alleged to be fraudulent, and his connection with the purchase may be established by the admissions, or conduct equivalent to admissions, of the plaintiff. Mamlock v. White, 20 Cal. 598.

76. The rules of law in regard to the right of a failing debtor to give a preference to some of his creditors have no application to a sale for cash to a person not a creditor, although the proceeds may have been applied to pay creditors. *Id.*

77. Where the purchaser has obtained the goods from the fraudulent vendee, in payment of a pre-existing debt, or as an execution debtor, it is not necessary, on the trial, to prove that he participated in the fraud of the fraudulent vendee.

Sargent v. Sturm, 23 Cal. 359.

78. In an action brought by a vendee of personal property against a sheriff to recover possession of the same, where the sheriff claims the property under an execution in favor of a creditor of the vendor, and attacks the sale for fraud, if the testimony is conflicting as to whether there was an actual and continued change of possession in the plaintiff after the sale to him, this question should be submitted to the jury. If, however, the facts are undisputed, it is a question of law, whether these facts constitute a continued and exclusive possession in the vendee. Hodgkins v. Hook, 23 Cal. 581.

79. Where, after sale of personal property, the creditors of the vendor attack the same for fraud, and on the trial there is evidence that the vendee, after the sale and delivery, exercised some slight acts of ownership and control over the property, but this is not shown to have been done with the knowledge

or consent of the vendor, the fact that the vendor does not offer any evidence explanatory of the vendee's acts, does not add anything to the weight of the evidence touching the vendee's connection with the property. *Id.*

80. The employment of the vendor by the vendee after the sale, may be proved as a fact tending to show that there has been no actual or continued change of possession; but when proved it does not become conclusive of the question, but only an element of proof to be weighed by the jury.

Godchaux v. Mulford, 26 Cal. 316.

81. In case of a sale of goods and chattels, the subsequent employment of the vendor by the vendee, in the subordinate capacity of a clerk or salesman of the same goods, is not absolutely incompatible with an absolute and continued change of possession, and is not of itself, regardless of all other facts and circumstances, conclusive evidence of fraud. Such employment is a circumstance tending to show that there has not been such a change of possession as the statute requires; but it is not, *per se*, a fraud which admits of no explanation. *Id.*

82. After a sale of goods and chattels, and an actual change of possession, the employment of the vendor by the vendee, in the capacity of a clerk or salesman, is not, *per se*, a conclusive evidence of fraud which admits of no explanation. *Id.*

83. The fact that the purchaser of a mining claim, after his purchase, takes a large amount of gold dust out of the same, is not admissible in evidence for the purpose of proving that the sale was fraudulent as to the creditors of the vendor by reason of inadequacy of the price paid.

Henry v. Everts, 29 Cal. 610.

Sale, How Taken out of Statute.

84. A delivery of goods, in order to take a case out of the statute of frauds, must be of such a nature that the property is placed under the control and power of the vendee; and the acts to change the possession of the property from the vendor to the vendee, must be such as to deprive the vendor of his right of lien as security for payment of the purchase money. Garlet v. Beiknap, 1 Cal. 399.

85. Where the vendor of personal property acquired his title to the property in fraud of the creditors of his vendor, his vendee, for a valuable consideration and without notice of the original fraud, is not affected by taint of his title. The title, although originally fraudulent, is cured by the subsequent conveyance to an innocent party.

Paige v. O'Neal, 12 Cal. 483.

86. The declarations of such vendor, made after the sale of the wheat, are not admissible for the purpose of proving that the sale was not *bona fide*. *Id.*

87. Our statute of frauds was not intended to go beyond the extreme rule adopted by the supreme court of the United States and the English courts, to wit, that retention of the possession of personal property by the vendor, after an absolute sale, is *per se* fraud. The word "actual" in the statute was designed simply to exclude a mere formal change of possession, and the word "continued" to exclude a mere temporary change. But the statute does not require that the vendor, under penalty of forfeiture of the goods, shall never have any control over or care of them. *Stevens v. Irwin*, 15 Cal. 503.

Fraudulent Assignment of Personal Property in Trust.

88. Where the complaint charged that A. was indebted to the plaintiff, and had conveyed his property to B. to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B., who had accepted it, and further charged that B. had subsequently reconveyed a portion of the property to A. without consideration, praying that B. be compelled to execute the trust in favor of plaintiff: *Held*, that A. was a proper and necessary party to the action, and that the order of A. on B. is not void by the statute of frauds. The conveyance by the former to the latter was a sufficient consideration to support their promise.

Lucas v. Payne, 7 Cal. 92.

89. By the acceptance of the order they became liable to the plaintiffs as trustees, which liability they could not escape by a subsequent fraudulent transfer of the trust property. *Id.*

90. A voluntary promise by the holder of defendant's agreement, that he would not assign it, was not binding; and where the contract was in fact made for the benefit of a company in which the obligee held stock, with knowledge of that fact on the part of the defendant, such promise was in fraud of the company's rights, and the defendant could not avail himself of it.

Cal. S. N. Co. v. Wright, 8 Cal. 585.

91. Nor if the fact is that defendant was kept in ignorance by the obligee of the contract, that he was acting for the company, can the defendant avail himself of the fact as a defense, no fraud being alleged, while he retains the consideration paid for his contract. He can not retain the consideration on the ground of fraud, and resist the payment of the penalty of an infraction of his contract on the same ground. *Id.*

92. If a defendant, sought to be charged as trustee on a contract within the statute of frauds, admits the contract in his answer, and does not claim the benefit of the statute, he is considered as waiving its pro-

tection; but if he claims the benefit of the statute in his answer, he is entitled to it.

Burt v. Wilson, 28 Cal. 632.

Fraudulent Mortgages of Personal Property.

93. Where notice of a mortgage is had by a subsequent purchaser or mortgagor, he is not protected by our statute of frauds.

Mitchell v. Steelman, 8 Cal. 363.

94. A mortgage stipulating for the enjoyment of the possession of personal property by the mortgagors until breach of the condition, is invalid under the seventeenth section of our statute of frauds, as to all persons except the parties to it.

Meyer v. Gorham, 5 Cal. 322.

95. The lien will not pass except by the transfer of the account; and as the account carries with it the lien, which is an incumbrance on the land, or an estate, or interest therein, it must be in writing.

Ritter v. Stevenson, 7 Cal. 388.

96. Where a debtor, who was at the time insolvent, executed a mortgage of all his property and effects to certain specified creditors, to secure his indebtedness to them, and to protect them from liabilities incurred by their indorsement of his paper: *Held*, that the mortgage was not an assignment either within the letter or spirit of the thirty-ninth section of the "act for the relief of insolvent debtors and protection of creditors," and did not create a trust for the use of the mortgagor, prohibited by the statute of frauds.

Dana v. Stanfords, 10 Cal. 269.

97. The eleventh section of the statute of frauds does not apply to mortgages, whether they contain the usual defeasance upon their face and thus create an open trust, or exist in the form of an absolute conveyance, with an understanding that they are intended as mortgages and thus create a secret trust.

Godchaux v. Mulford, 26 Cal. 316.

98. The trust mentioned in the eleventh section of the statute of frauds arises where the debtor places his property in the hands of a trustee having no beneficial interest therein, to hold for his benefit solely, and enable him to receive and enjoy its income to the prejudice of his creditors. *Id.*

99. Contracts for the sale of growing periodical crops (*fructus industriales*) are not contracts for the sale of an interest in the land, and need not be in writing in order to be valid. *Davis v. McFarlane*, 37 Cal. 634.

100. The intent of the provision relating to mortgages of growing crops, in section 17 of the statute of fraud (stats. 1856, p. 87), was to protect the lien of such a mortgage, without any delivery of possession, until the crop was so far harvested as to be capable of manual delivery and transportation; but the continuance of such lien after-

wards, as against a subsequent purchaser in good faith, depends upon actual delivery of the crop to the mortgagee, and his retention of the possession thereof.

Goodyear v. Williston, 42 Cal. 11.

101. Where a mortgage was given upon growing crops of wheat and barley, as provided in section 17 of the statute of frauds (stats. 1856, p. 87), and after they were cut and put into stacks and shocks, the mortgagor sold and delivered them to a purchaser in good faith, and for value: *Held*, that the lien of the mortgage, without possession in the mortgagee, extended only to a severance of the crops from the land, and that the purchaser took them relieved of the mortgage lien. *Id.*

CONTRACT FOR SALE WHEN VOID— MEMORANDUM IN WRITING, WHEN VOID UNDER STATUTE.

102. A contract for the sale of goods, for the price of two hundred dollars or over, is void, unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or unless the buyer shall accept or receive part of such goods; or unless the buyer shall at the time pay some part of the purchase money; but *held*, where the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised or exception taken to the insufficiency of the evidence, that this court would presume that sufficient evidence of a proper character was given to warrant the finding of the jury.

Bunting v. Beideman, 1 Cal. 181.

103. The memorandum required by the statute of frauds to be entered by an auctioneer in the sale-book, must be made at the very time of the sale, or the vendee will not be bound by the contract. *So held*, in a case where the sale at auction took place in the forenoon, and the memorandum was not made by the auctioneer before the evening of the same day.

Craig v. Godfroy, 1 Cal. 415.

104. A sale of personal property, with intent to benefit the seller and injure creditors, is fraudulent and void.

Riddell v. Shirley, 5 Cal. 488.

105. The plaintiff contracted with defendant for certain goods on board a vessel, and delivered to him a bill of sale, and an order on the captain of the vessel for the delivery of the goods. When defendant presented the order, he was informed that the goods could not be discharged for some time, to which defendant replied that he would then have nothing to do with them, and nine days elapsed before they were discharged, of which defendant had notice, but refused to take them, and pleaded the statute of frauds.

The court below charged the jury that the bill of sale and order took the case out of the statute of frauds: *Held*, that this was error.

Stevens v. Stewart, 3 Cal. 149.

106. Where a sale or mortgage of personal property was void for want of immediate delivery, subsequent advances after delivery can not be recovered where it appears that they were paid under the general contract. The contract being void, all subsequent acts relate to its inception, and are alike tainted with fraud.

Chenery v. Palmer, 6 Cal. 119.

107. Where H., the owner of barley, which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V.," and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterwards sells and delivers the same to B.: *Held*, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. Vance v. Boynton, 8 Cal. 554.

SALE OF REAL ESTATE.

108. The statute of frauds, requiring an instrument in writing to create an interest in land, does not apply to the taking up of mining claims. A mere verbal authority to one man to take up a claim for another is sufficient. No title is divested out of the government, but a right of entry given under it. Gore v. McBrayer, 18 Cal. 582.

109. A written but unsealed transfer of a legal estate in land is good as a contract to convey, under the statute of frauds.

Owen v. Frink, 24 Cal. 171.

110. A release of an equitable estate in land can only be proved by a deed or conveyance in writing, subscribed by the party granting the same, or by his lawful agent thereunto authorized by writing.

Millard v. Hathaway, 27 Cal. 119.

Hoen v. Simons, 1 Id. 119.

Toller v. Folsom, Id. 207.

Videau v. Griffin, 21 Id. 389.

McLaren v. Hutchinson, 22 Id. 187.

Bayles v. Baxter, Id. 575.

111. A conveyance that would come within the statute of frauds if made by an individual, if made by a corporation would be liable to the same construction, and if void in the former case, would be void in the latter; and such conveyance can not affect the lien of a judgment regularly obtained against the grantor.

Smith v. Morse, 2 Cal. 524.

112. The statute of frauds will never in equity be allowed to operate as a protection to fraud, and for the purpose of showing that a fraud has been committed, or is being attempted, parol evidence will be admitted, even against the words of the statute. *Hidden v. Jordan*, 21 Cal. 92.

113. No eviction is necessary to enable a vendee to recover back the **purchase money** of real estate, where the sale was void under the statute of frauds.

Reynolds v. Harris, 9 Cal. 333.

114. A lease for two years, executed by the lessees, and **by an agent** of the lessors, but who had **no written authority** to do so, is within the sixth section of the statute of frauds, and void.

Folsom v. Perrin, 2 Cal. 603.

115. Where A. agrees with B. that he will purchase from C., at a given price, a **sheriff's certificate of sale** which C. holds of a tract of land, and that B. shall furnish one-half of the money, and that the assignment of the certificate shall be taken in A.'s name, for the joint benefit of A. and B., and B. furnishes A. his proportion of the money, when in truth A. has already bought the certificate unknown to B.: *Held*, that A. is estopped from alleging that he had made the purchase before his agreement with B., and that on this ground said agreement is within the statute of frauds, and does not create a resulting trust.

Dikeman v. Norrie, 36 Cal. 94.

CONTRACTS FOR SALE OF REAL ESTATE.

116. The provisions of the sixth section (chapter 1) of the statute of frauds relate exclusively to contracts in respect to real estate.

Sandfoss v. Jones, 35 Cal. 481.

117. To take a contract for the sale of lands out of the statute of frauds (ch. 1, sec. 8), a mere **note or memorandum in writing**, subscribed by the vendor or his agent, containing the names of the parties and a summary statement of the terms of the sale, either expressly or by reference to something else, is all that is required. The note or memorandum required by the statute may be something different and less specific than the contract of sale itself, and may be valid under the statute, although insufficient as part of a pleading declaring on the contract of which it is the evidence.

Joseph v. Holt, 37 Cal. 250.

118. A contract by which P. agrees that if H. will, within a fixed time, find a purchaser of P.'s land at two hundred dollars per acre, P. will sell and convey the land to the purchaser, and that H. may have for his services all that can be obtained from the purchaser over two hundred dollars per acre, is not a contract for the sale of any land or interest in land, within the meaning of the eighth section of the statute of frauds.

Heyn v. Philips, 37 Cal. 529.

119. When two parties who are each in possession of adjoining tracts of land on the same quarter section, apply to the owner to purchase, each one half of the same, and

enter into a **mutual written agreement** that each shall deed to the other the land he obtains a title to, which is in the possession of the other, upon being reimbursed the money he pays for the same, these mutual promises constitute a sufficient consideration to support the agreement, and take it out of the eighth section of the statute of frauds.

Murphy v. Rooney, 45 Cal. 78.

120. An agreement in writing for a **mutual conveyance** of land in exchange is not void under the statute of frauds.

Brennan v. Ford, 46 Cal. 7.

121. If R. orally agrees with F. to give him a certain portion of the purchase money, and also a certain parcel of land for his services in effecting the sale of R.'s land, there being **no note or memorandum** in writing of the promise, the whole contract, as well for the money as for the land, is void, and no action will lie either for the money or the land.

Fuller v. Reed, 38 Cal. 99.

122. In such a case the injured party has no remedy at law upon the contract; he may, however, disaffirm the contract and maintain his action to recover back the money paid, or the value of the services rendered. *Id.*

122a. If part of a contract is void under the statute it is void *in toto*. *Id.*

123. If A. transfers property to B., and B. as a consideration agrees to pay the debt or debts of A., the creditor or creditors of A. who hold such demand or demands have a cause of action against B. without an assignment of the contract. Such contract need not be under seal.

Morgan v. Overman M. Co., 37 Cal. 534.

124. A., the owner of a lot of land in San Francisco, requested B. to sell the same, and delivered to him the title-deeds in order to enable him to effect a sale; B. agreed verbally with the plaintiff to sell the land to him, but A. refused to comply with the verbal agreement which B., his agent, had made with the plaintiff: *Held*, in an action by the plaintiff against A. to compel the execution of a deed or the payment of damages, that the agreement was void and could not be enforced, and that the defendant A. was not liable in damages.

Harris v. Brown, 1 Cal. 98.

Abell v. Calderwood, 4 *Id.* 90.

125. A mere parol agreement for the conveyance of land made before the adoption of the common law and the re-enactment of the statute of frauds in this state, is void, there being neither delivery of possession, nor of title-deeds, and no part payment of the purchase money.

Harris v. Brown, 1 Cal. 98.

126. A parol sale of real estate, made in California while the laws of Mexico were in force here, if fully executed, was valid, and passed the title to the vendee.

Hall v. Yoell, 45 Cal. 584.

127. When a purchaser of real property, under a verbal agreement, **pays the entire consideration** of the purchase, **enters into the possession** of the property, and expends large sums of money upon it in its improvement, there is exhibited such a state of facts as will take the case out of operation of the statute of frauds.

Hoffman v. Fett, 39 Cal. 109.

128. If there be a sale of real property, and the conditions of the sale, on the part of the purchaser, have been fully complied with, it will be presumed that the vendor undertook to make such a conveyance as will render the sale effective. *Id.*

129. The statute of frauds does not annul a sale in favor of creditors, solely upon the ground that it was not founded upon a valuable consideration.

Thornton v. Hook, 36 Cal. 223.

130. A verbal agreement for an exchange of real property, which has been carried into effect by the execution of proper conveyances in pursuance of the agreement, is not void under the statute of frauds.

Ryan v. Tomlinson, 39 Cal. 639.

131. A mere intruder on real property having no privity with the former owner, can not invoke the aid of the statute of frauds for the protection of such owner. *Id.*

132. A verbal agreement made by a grantee, when he buys land, and receives a deed therefor, to pay the grantor a further sum of money as a part of the price, out of the proceeds of the sale of the land when he sells it, is valid, and the statute of frauds does not require it to be in writing.

Price v. Sturgis, 44 Cal. 591.

133. Such contract is not for the conveyance of land, but for the payment of a certain sum of money upon the happening of a certain event. *Id.*

134. A sale of land at auction where no note or memorandum is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds.

People v. White, 6 Cal. 75.

135. In case of a sale of land, a verbal agreement made by the vendee when he receives the conveyance, to reconvey the land to the vendor, if he does not pay the purchase money when demanded by the vendor, is void under the statute of frauds.

Gallagher v. Mars, 50 Cal. 23.

136. Where plaintiff made a parol contract for the purchase of land, and subsequently, by parol, agreed with defendant to permit him to become the purchaser in his stead, and in pursuance of this agreement, and by direction of plaintiff the land was conveyed by defendant: *Held*, that in an action to recover the value of the assign-

ment, the defendant could not rely upon the statute of frauds.

McCarthy v. Pope, 52 Cal. 561.

137. Although the statute requires a contract for the sale of land to be in writing, yet, if in pursuance of a parol contract the land is conveyed, there is nothing immoral about the transaction. *Id.*

138. Had the owner refused to convey to defendants, a conveyance could not have been enforced, and the contract would be inoperative. But the contract having been executed, the statute of frauds cuts no figure between plaintiff and defendant. *Id.*

139. The statute of frauds only requires that the memorandum in writing for the sale of land shall be signed by the vendor or his agent. It need not be signed by the vendee, and need not be a specialty; and the power to an agent to make it may be given verbally. *Rutenberg v. Main*, 47 Cal. 213.

140. A memorandum in writing, made by an agent for the sale of the land of the principal, which declares that the agent has sold the land on account of the principal, and which is signed by the agent as attorney in fact for the principal, is sufficient in form, and is executed in such a manner as complies with the statute of frauds. *Id.*

141. Part performance of a parol agreement to execute a written lease of land, for more than one year, takes the agreement out of the operation of the statute of frauds.

McGarger v. Rood, 47 Cal. 133.

OTHER CONTRACTS WITHIN THE STATUTE OF FRAUDS.

Parol Agreements.

142. When a verbal contract of partnership is made for the term of more than one year, and the parties act upon it, and conduct the partnership business upon the terms agreed upon, and in the firm name, neither party can afterwards avoid the obligations of the contract, as to past transactions under it, on the ground that it was a contract not to be performed within one year from its date, and therefore within the prohibition of the statute of frauds.

Pico v. Cuyas, 47 Cal. 174.

143. A verbal contract, by which the plaintiff agrees to cut and deliver to the defendant, at the defendant's mill, saw-logs sufficient to keep the defendant's mill running to its full capacity for two years from its date, is not to be performed within one year, and is therefore void under the statute of frauds.

Patten v. Hicks, 43 Cal. 509.

144. For labor and services performed under a contract, which is void under the statute of frauds, a recovery may be had by declaring a *quantum meruit*, but not by declaring on the contract itself. *Id.*

145. A verbal contract between the lender and borrower that money loaned is to be repaid when nut-bearing trees, about to be planted on the borrower's farm, yield an income sufficient to pay the same, over and above paying the expenses of the farm and of the borrower's family, is void under the statute of frauds, because the parties must have contemplated that **more than one year** would elapse before the time of payment would arrive.

Swift v. Swift, 46 Cal. 266.

146. A parol promise to pay for **improvements made upon land** is not within the statute of frauds.

Godeffroy v. Caldwell, 2 Cal. 480.

147. Hoare and Hindley were **partners in a band of cattle**, which were pastured on a public range. In June, 1869, they dissolved the partnership and corralled and divided all the cattle they could find, and agreed that Hindley should retain the partnership brand, and Hoare the partnership ear-mark, and that any cattle which had the partnership brand and ear-mark after the expiration of one year should belong to Hoare, and that, in the mean time, they should make divisions, and alter the ear-mark of cattle coming to Hindley and the brand of those coming to Hoare: *Held*, that all that was to be done under the contract was to be performed **within one year**, and that it was not, therefore, in violation of the statute of frauds.

Hoare v. Hindley, 49 Cal. 274.

148. A contract to sell and deliver at a future day **one hundred shares of mining stock**, for the sum of one thousand three hundred and fifty dollars, is void, under the statute of frauds, if no part of the stock is delivered, and no portion of the purchase money is paid, and no note or memorandum of the sale or transaction is made or signed by the parties. Mayer v. Child, 47 Cal. 142.

Agreement to Answer for Debt or Default of Another.

149. A parol contract to answer for the debt of another is void.

Luce v. Zeile, 53 Cal. 54.

150. It is essential to the validity of a contract to answer for the debt, default, etc., of another, that it, or some **note or memorandum** thereof, be **in writing**; that it express the consideration; and that it be subscribed by the party to be charged thereby.

Ellison v. Jackson W. Co., 12 Cal. 542.

151. A promise by B. to perform J. W.'s contract, could furnish no consideration for a promise from E., nor could the consideration of the original contract attach to the subsequent promise of B. *Id.*

152. E. contracted with J. W. to construct an **extension to a ditch**, and after

the ditch was completed, it was to be paid out of the sales of water. At the time of the execution of the contract, B. held a mortgage upon the ditch. After E. had partly completed his work, B.'s mortgage fell due, and he brought an action to foreclose it, and had a receiver appointed to receive the water rents of the ditch. E. refused to go on and complete the work. B. agreed with E., that if he would go on and complete the work, he should be paid out of the receipts from the sale of water by the receiver. Under this promise, E. completed the work: *Held*, that this is an undertaking to answer for the debt, default or miscarriage of another, and is therefore within the statute of frauds. *Id.*

153. An indorsement made by a third person on a contract entered into between two parties, and made simultaneously with the contract, by which the indorser, without expressing any consideration received, agrees that the undertaking of one of the contracting parties shall be fulfilled, is an **original and not a collateral promise** of the indorser to answer for the debt of another, and not within the statute of frauds.

Otis v. Haseltine, 27 Cal. 80.

154. By such act the indorser makes the contract his own, and the consideration therein expressed becomes the consideration of his promise. *Id.*

155. The **promise of a guarantor**, when made before the delivery of the note, is not within the statute of frauds.

Ford v. Hendricks, 34 Cal. 673.

156. It is well settled in this state that the **promise of a guarantor** of a note is not within the statute of frauds, if made before the delivery of the note.

Howland v. Aitch, 38 Cal. 133.

157. But that fact is not the test as to whether the guaranty is an original contract or not. The true test is: Were the promises of the principal debtor and of the grantor parts of one and the **same original transaction**? Thus, where three days after the execution and delivery of a promissory note from A. to H., T. indorsed thereon, in pursuance of a previous agreement, "I guarantee the payment of the within note," upon the faith of which previous agreement H. had sold and delivered to A. certain horses: *Held*, that said indorsement was not within the statute of frauds. *Id.*

158. A contract in writing, agreeing to pay to the party of the second part such sums as he may afterwards advance to a foreman of a toll-road company, is not a promise to pay the debt of another, and not within the statute of frauds.

Gradwohl v. Harris, 29 Cal. 150.

159. Where the obligation with which it is sought to affect defendants personally

arises out of an alleged promise given by them to W. and A. Elder, of whom they bought the land mortgaged by Pangburn to plaintiff, **that they would pay a portion of the purchase money**, equal to the amount due or to grow due upon the note given by Pangburn to plaintiff and secured by said mortgage, this is not a promise to pay the debt of another, nor to pay the Pangburn note, but an original promise by them to the Elders, to pay their own debt to them by paying a certain amount of money to plaintiff. If such promise was given, plaintiff could recover upon it as the party beneficially interested.

Wormouth v. Hatch, 33 Cal. 121.

160. By the statute of frauds, a promise to pay the debt of a third person must be in writing, though to be performed within one year. Gordon v. Ross, 2 Cal. 156.

Comstock v. Breed, 12 Id. 286.

161. Where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds.

Happe v. Stout, 2 Cal. 460.

162. A guaranty, made by one who writes his name only on a promissory note, is not within the statute of frauds, for the want of a consideration expressed in writing.

Riggs v. Waldo, 2 Cal. 485.

163. A. executed a lease to B. and C., writing underneath it, "I hereby agree to pay the rent stipulated above when it shall become due, provided the said B. does not pay it." *Held*, that such a transaction is not embraced within the statute of frauds, as the credit given by the written guaranty of the third party is the consideration upon which the transaction is closed.

Evoy v. Tewksbury, 5 Cal. 285.

164. The statute requires the written agreement to answer for the debt of another to express the consideration upon which it is made; but where the agreement is executed at the same time as the lease, and forms the consideration for the execution, it is not a promise to answer for the debt of another, but must be considered as an original undertaking, and as a promise made, upon the strength of which another was enabled at the time to obtain possession of property and enjoy its use. Id.

165. Where a defendant entered into a contract with a builder for the construction of a brick house, and the builder applied to the plaintiffs, who were proprietors of a brickyard, for the sale of the necessary brick, and the defendant said to the proprietors, to induce the sale, that he would become responsible for all the brick furnished his building, and whatever contract or agreement was made with the builder he would see carried out, or would pay for the brick if the builder

did not: *Held*, that the promise of the defendant was within the statute of frauds.

Clay v. Walton, 9 Cal. 323.

166. Wherever the leading object of the promisor is not to become surety or guarantor of another, but to subserve some interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another. Id.

167. A guaranty indorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, and being in these words: "I hereby guarantee the fulfillment of the within charter, on the part of the charterer," is good. *Hazeltine v. Larco*, 7 Cal. 33.

168. The instrument referred to in the guaranty becomes part thereof. If the guaranty were executed subsequently, it would fail, for there is either no consideration for the promise in fact, or the new consideration is not expressed in the instrument referred to. Id.

169. The provision of the statute of frauds which requires the promise to pay the debt of another to be in writing, expressing the consideration, does not apply to the promise of A. to pay money he owes by contract with B. to C. This is paying A.'s own debt, and creating his own obligation, not assuming another's.

Barringer v. Warden, 12 Cal. 311.

170. Where A., who is indebted to B., promises, in consideration of his release, to B., to pay the amount to C., who is a party to the arrangement, it is sufficient consideration to support such promise. Id.

171. Where a sheriff seized and sold a wagon on execution in favor of R., who pointed out the wagon, requested the sheriff to seize it, and verbally agreed to hold him harmless, etc.: *Held*, in suit by the sheriff against R. for damages recovered against the sheriff for the seizure, that the agreement to indemnify is valid; that it was not a "special promise to answer for the debt, default or miscarriage of another," within the statute of frauds; because the sheriff was acting, not for himself, but as agent of R., and the promise was to be responsible for his acts as such agent. Stark v. Raney, 18 Cal. 622.

172. A guaranty not under seal, nor expressing consideration, made contemporaneously with the contract guaranteed, is a part of that contract, and the expression of the consideration in the contract takes the guaranty out of the statute of frauds.

Jones v. Post, 6 Cal. 104.

Fraudulent Contracts and Agreements as to Creditors.

173. If a part of the sum, secured to be paid by the promissory note, whether prin-

cipal or interest, is illegal, the note must defraud creditors, if enforced, and is, therefore, void, under the positive provisions of the statute. *McKenty v. Gladwin*, 10 Cal. 227.

174. The statute of frauds makes every bond or other evidence of debt, given with intent to hinder, delay, or defraud creditors, void. *Id.*

Miscellaneous Provisions.

175. An executed parol agreement is a good defense against an action upon a specialty. The statute of frauds contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of lands. *Beach v. Covillaud*, 4 Cal. 315.

176. Nothing can be regarded as a **part performance**, to take a verbal contract for the sale of land out of the operation of the statute, which does not place the party in a situation which is a **fraud** upon him unless the contract be executed.

Arguello v. Edinger, 10 Cal. 150.

177. Taking possession is held such act of **part performance**, as the party might be treated as a trespasser if he could not invoke the protection of the contract. And if, upon the faith of the contract, the purchaser should proceed to make valuable improvements, the most palpable fraud would be perpetrated if the vendor were permitted to withdraw from its execution. *Id.*

178. The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendants, instead of filing a bill in equity, is to require the court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issue upon the general denial. *Id.*

179. Where the answer discloses the fact that the contract is not in writing, but also avers acts of **part performance**, which take the contract out of the operation of the statute, the answer is not demurrable. *Id.*

180. The true rule is laid down in *Arguello v. Edinger*, 10 Cal. 160, that nothing can be regarded as a part performance to take the case out of the operation of the statute which does not place the party in a situation which is a fraud upon him unless the contract be executed.

Weber v. Marshall, 19 Cal. 447.

181. A plaintiff's recovery can not be

barred by the statute of frauds **unless the statute be pleaded.**

Osborne v. Endicott, 6 Cal. 149.

182. An unexecuted verbal agreement between joint proprietors of land for the division thereof according to certain boundaries, is not binding. Until executed, either party may rescind the agreement.

Woodbeck v. Wilders, 18 Cal. 131.

183. A verbal promise to pay a debt, by a discharged insolvent, is sufficient to take the case out of the statute.

Feeny v. Daly, 8 Cal. 84.

ASSIGNMENT, 62.

CONSIDERATION, 15.

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LIMITATIONS.

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STAY OF PROCEEDINGS.

1. ON APPEAL.

19. ON NEW TRIAL.

23. MISCELLANEOUS DECISIONS.

ON APPEAL

1. Pending an appeal, an order was granted by a justice of this court, staying proceedings on the judgment, though no "undertaking" was given to stay proceedings.

Ross v. Austill, 2 Cal. 183.

2. By the code the **undertaking** on appeal providing for the liabilities of the sureties upon condition of the affirmance of the judgment **operates as a stay**; and if, by a mere neglect to prosecute the appeal, and for that reason suffering it to be dismissed after the respondent has been deprived of his rights under the judgment by the undertaking, the sureties could be released upon the pretense that the judgment was not affirmed, it is evident that great injustice would in many instances be perpetrated, and a fraud practiced upon the respondents.

Karsh v. Light, 15 Cal. 327.

3. Where a suit is pending in the supreme court on appeal, the judgment below is sus-

pended for all purposes, and it is not evidence upon the questions at issue, even between the parties.

Woodbury v. Bowman, 13 Cal. 634.

4. An appeal from an order of reference stays the proceedings.

Smith v. Pollock, 2 Cal. 92.

5. Where the sureties to an undertaking, on appeal to the supreme court, justify in a sum less than double the amount specified in the undertaking, but more than double the amount of three hundred dollars, such undertaking is sufficient under section 348 of the code, though insufficient to stay the issuance of the execution.

Mok. Hill Co. v. Woodbury, 10 Cal. 185.

6. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal.

Dobbins v. Dollarhide, 15 Cal. 374.

7. A stay of proceedings from its nature, under an appeal, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction.

Merced M. Co. v. Fremont, 7 Cal. 132.

8. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time for them to file their bond to entitle them to a stay of proceedings under the statute, and in the mean time order a stay of all proceedings in the inferior court until the extended period shall have expired; in such case the court may impose such terms as shall appear to be proper.

Bradley v. Hall, 1 Cal. 199.

9. A justice of the peace has jurisdiction to grant appeals and stay proceedings thereupon, and his action can not be reviewed on certiorari.

Coulter v. Stark, 7 Cal. 245.

10. The stay of proceedings granted according to the statute on the execution of the undertaking on appeal is a sufficient consideration thereof.

Dore v. Covey, 13 Cal. 508.

11. It is only of orders or judgments which command or permit acts to be done, that a stay of proceedings on appeal can be had.

Hicks v. Michael, 15 Cal. 107.

12. On appeal from an order granting a new trial in such case, the verdict being in favor of the defendant and appellant, an undertaking for damages and costs, according to section 348 of the practice act, is sufficient to stay proceedings pending the appeal.

Ford v. Thompson, 19 Cal. 118.

13. A bond to stay proceedings is not necessary in order to perfect an appeal from a decree of the district court of the United

States, approving of survey of a Mexican or Spanish grant.

Thornton v. Mahoney, 24 Cal. 569.

14. An appeal from an order refusing to change the venue of an action operates as a stay of all further proceedings in the case in the court below, until such appeal is determined.

Pierson v. McCahill, 23 Cal. 249.

15. An undertaking in the sum of three hundred dollars, as required by the three hundred and forty-eighth section of the practice act, is sufficient to perfect such appeal and stay proceedings.

Id.

16. An appeal duly taken to the court of last resort suspends all proceedings in the court below.

Thornton v. Mahoney, 24 Cal. 569.

17. If, in foreclosure cases, a judgment *in personam* is rendered against the defendants, and also one enforcing a lien, and an appeal is taken from the whole judgment, in order to stay proceedings upon the whole judgment, the appellant must give an undertaking for costs, one in double the amount of the personal judgment, and one for the payment of waste and such deficiency as may remain due after the sale of the property, and all these undertakings may be in one instrument, or several, at the option of the appellant.

Englund v. Lewis, 25 Cal. 337.

18. In such cases, if the undertaking is given only for costs, and waste and deficiency, an execution on the personal judgment is not stayed pending the appeal; and if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property upon which the lien is foreclosed is not stayed pending the appeal.

Id.

ON NEW TRIAL.

19. The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the court of the power of vacating an order appointing a receiver made before the trial.

Copper Hill Co. v. Spencer, 25 Cal. 11.

20. A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment, and preserves all rights, until it can be heard and determined, and is not affected by the adjournment of the court for the term.

Lurvey v. Wells, 4 Cal. 106.

21. If, after the court has filed its findings of fact, and made an order sending the case to a referee to take and state an account, a motion is made for a new trial, the motion will not stay the proceedings pending before the referee.

Crowther v. Rowlandson, 27 Cal. 376.

22. The pendency of a motion for new trial does not stay proceedings upon the judgment. The party in whose favor the

judgment is rendered is entitled immediately to the proper process for its enforcement unless proceedings are stayed by the court.

People v. Loucks, 28 Cal. 68.

MISCELLANEOUS DECISIONS.

23. A stay of proceedings under the judgment will fully protect the losing party.

Hutchinson v. Bours, 13 Cal. 52.

23a. Notice of a motion to set aside an execution and a levy made thereunder, will not operate as a stay of proceedings.

Bryan v. Berry, 8 Cal. 130.

24. In an action pending in the superior court of the city of San Francisco, plaintiff had verdict and judgment. Defendant filed a statement to be used on motion for a new trial. Plaintiff filed and served certain amendments to the statement, but gave no notice within two days of the settlement of statement before the judge. The court made an order directing the motion for a new trial to be heard on the twenty-ninth of April, 1857. On that day, the court adjourned the hearing of the motion to the thirtieth, which was the last day of the existence of that court. On that day a motion for a new trial was denied. On the next day, papers and records of said court were transferred to the fourth district court. On the twenty-seventh day of May, 1857, fourth district court made an order for the plaintiff to show cause why the order of the superior court denying a new trial should not be set aside, and on the day fixed to show cause why district court set aside said order of the superior court: *Held*, that the order of superior court granting a stay of proceedings had the effect of extending the jurisdiction of the court, and that district court had the right to make the order.

Hart v. Burnett, 10 Cal. 64.

25. The presiding judge of the highest court in a state has no power to grant a stay of proceedings on a judgment rendered in that court until an application can be made to some justice of the supreme court of the United States to issue a citation on a writ of error.

Greely v. Townsend, 25 Cal. 604.

APPEAL, 259.

| EXECUTION, 47-49.

STEAMBOAT.

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COMMON CARRIER, 54-56.

STIPULATIONS.

1. GENERALLY.

20. EFFECT OF.

GENERALLY.

1. An agreement of counsel for the continuance of a cause not reduced to writing, will not be regarded by the court.

Peralta v. Marica, 3 Cal. 185.

2. Where a written stipulation is filed by the parties in the court below to govern the proceedings there, but has not been brought to the notice of the court for its adjudication, the appellate court will not regard it.

Clarke v. Forshay, 3 Cal. 290.

3. Counsel, in the trial of a cause, can not object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge, as would, in his judgment, be sufficient to present all the questions raised by the pleadings.

Marius v. Bicknell, 10 Cal. 217.

4. Where the parties in the court below stipulated that a motion for a new trial should be denied, they can not question in this court, the correctness of an order denying such motion.

Brotherton v. Hart, 11 Cal. 405.

5. Verbal stipulations as to the pleadings or evidence can not be regarded, except as they are admitted by the parties against whom they are invoked.

Patterson v. Ely, 19 Cal. 28.

6. An attorney can not bind his client by a verbal stipulation made during the progress of a trial, and not entered on the minutes, to waive his rights under an issue made in the pleadings.

Merritt v. Wilcox, 52 Cal. 238.

7. Verbal stipulations with reference to proceedings in pending actions can not be regarded except so far as they are admitted by the parties against whom they are sought to be enforced.

Reese v. Mahoney, 21 Cal. 305.

8. A stipulation not in writing and filed with the clerk nor entered in the minutes of the court at the time it was made, is not binding upon the parties, and can not be enforced by the court.

Borkheim v. N. B. Ins. Co., 38 Cal. 623.

9. B. had several actions against different parties, turning upon the same issues, and prosecuted and defended by the same attorneys respectively. Counsel, with consent of B., stipulated verbally in open court, that but one case should be tried, and the others should abide the result; but the stipulation was not reduced to writing and filed with the clerk, nor entered in the minutes of the court: *Held*, that the stipulation was void, and could not be afterwards en-

forced by a *nunc pro tunc* order, directing it to be entered in the minutes of the court. *Id.*

10. A party who has procured a judgment to be entered in his favor by means of one part of a verbal stipulation, is **not at liberty to repudiate the other part**; but, having received the benefit of the stipulation, must bear the burdens which it imposes on him.

Himmelman v. Sullivan, 40 Cal. 125.

11. An order vacating a dismissal of appeal, obtained upon a stipulation signed by counsel for respondent in ignorance of the dismissal, will be set aside on his motion.

Noriega v. Knight, 20 Cal. 172.

12. If the attorneys for appellant and respondent stipulate in writing **that the statement contained in the record is a correct statement** on motion for a new trial, and that the judgment roll, orders, and instruction given and refused by the court, the statement and stipulation constitute a true and correct statement on appeal to the supreme court, and may be used as such without further certificate or identification; all technical objections to the transcript are waived, and it will be presumed that a notice of motion for a new trial was regularly given, although none appear in the record.

Godchaux v. Mulford, 26 Cal. 316.

13. If a stipulation entered into by the respective attorneys in an action is in subsequent proceedings **virtually disregarded** by both parties, the court will not, after it has been thus disregarded, enforce it.

People v. Holden, 23 Cal. 123.

14. If a party has been injured by a disregard of a stipulation entered into by him, his remedy must first be sought in the court in which it was filed, or in some court of original jurisdiction.

Clarke v. Forshay, 3 Cal. 290.

15. When a motion is made to place a cause on the calendar of the supreme court in accordance with a stipulation of the parties, it must be shown that the transcript, and the briefs or points and authorities of both parties, have been filed, or the motion will be denied.

Plant v. Smythe, 43 Cal. 42.

16. A plaintiff who obtains judgment in violation of his written stipulation on file dismissing the action, may be restrained by the court in which judgment was obtained, from enforcing it.

McLeran v. McNamara, 55 Cal. 508.

17. The court can not alter or vary the terms of a written stipulation made by attorneys, or relieve them from its obvious consequences. *Keys v. Warner*, 45 Cal. 60.

18. A stipulation as to the location of one of the lines of a Mexican grant as surveyed, under a decree confirming the grant, will not be construed as admitting that the line was correctly surveyed, unless

from the whole reading of the same it appears to have been the intention of the parties. *San Jose v. Uridias*, 37 Cal. 339.

19. A stipulation that the petitioner has such an interest in the proceedings as to make him a proper party thereto, does not preclude inquiry into the facts going to show the existence of such interest.

Harpending v. Haight, 39 Cal. 189.

EFFECT OF.

20. Where the record contains a stipulation that there is no error therein to the prejudice of the appellants, provided the title to the whole of a tract of land did not pass by a certain deed in controversy, and the case is argued by appellants' counsel on that theory in his opening brief, and the court holds that the title to the whole tract did not pass, it will not notice other alleged errors on petition for rehearing.

Hihn v. Courtis, 31 Cal. 398.

21. Where counsel, in a cause pending in the supreme court, stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation. *Cahoon v. Levy*, 10 Cal. 216.

22. The supreme court will not examine errors assigned on appeal, where, after the service of the notice of appeal, the parties stipulated that all errors in the record, referee's report, decree, and judgment, were waived. *Glotsback v. Foster*, 11 Cal. 37.

23. A stipulation in the supreme court, that a cause be continued for the term, and that any motion may be made therein at the next term, by either party, which might have been made at the first term after the filing of the transcript, covers only the rights a party had at the time of the stipulation, and not those already lapsed by the laches of the party.

Reynolds v. Lawrence, 15 Cal. 359.

24. If an attorney stipulates, under a mistake of fact, that a notice of appeal has been filed, when no notice has been filed, the court below, upon a proper application, may relieve him from it, but the supreme court can not.

Bonds v. Hickman, 29 Cal. 460.

25. A stipulation that no execution shall issue until the determination of the appeal, is not a waiver of an objection that the notice of appeal was not filed in season.

Moulton v. Ellmaker, 30 Cal. 527.

26. A stipulation between parties to an action as to the kind of judgment to be entered, whatever force it may have in regulating the judgment to be entered, does not impair the effect of the judgment which is

entered, even if not entered in accordance with the stipulation.

Sample v. Wright, 32 Cal. 659.

27. A stipulation signed by the parties "that the foregoing twenty-one pages constitute the transcript on appeal from the order, and contain true, full, and correct copies of the affidavits referred to in the bill of exceptions, judgment, order, notice, bill of exceptions," etc., does not preclude respondents from denying the correctness or sufficiency of the bill of exceptions.

Wetherbee v. Carroll, 33 Cal. 549.

28. If the transcript does not contain all the judgment roll, but contains all that is necessary, the defect is waived by a stipulation that it contains all that is necessary for the purpose of the appeal.

Solomon v. Reese, 34 Cal. 28.

29. If counsel stipulate in open court that the jury may assess damages in currency if they find for the plaintiff, they are estopped from raising an objection to the verdict on that ground.

Dreyfous v. Adams, 48 Cal. 131.

30. A stipulation filed in the supreme court, consenting to a judgment, must be signed by the attorneys who are the attorneys of record for the parties in the court below, or by a party in person who did not appear by attorney.

Estate of Arguello, 50 Cal. 308.

31. If the parties, before a trial, agree on the facts, and then stipulate that either party may, on the trial, add such documentary evidence as he sees proper, the stipulation will be construed to mean evidence pertinent to the issue and which was in existence at the date of the stipulation.

Donner v. Palmer, 51 Cal. 629.

32. If the parties in an action of ejectment agree to the facts, which facts are based on the presumption that at a certain time the title to the demanded premises was in a third person, and the court is asked to determine which has acquired the title of such third person, and the court decides on the facts, neither party will afterwards be heard to assert, for the purpose of availing the effect of the judgment, that such third person had no title.

Id.

33. If, in an action to recover money, the complaint alleges and the answer denies that it was payable in gold coin, the attorney for the defendant can not bind his client by a verbal stipulation made during the progress of the trial, and not entered on the minutes, to allow the plaintiff, if he recover, to have judgment in gold coin.

Merritt v. Wilcox, 52 Cal. 238.

34. A general verdict in favor of the plaintiff imports a finding in his favor upon all the allegations of the complaint material

to his recovery; but it does not import a finding in his favor upon an issue as to whether money sued for was payable in gold coin.

35. The probate court has power to enforce the terms of a stipulation, entered into by parties litigant before it, in reference to a subject-matter of which the court has jurisdiction.

Grady v. Porter, 53 Cal. 680.

36. A court has power to relieve a party from the effects of a stipulation which admits a fact which is not true.

Richardson v. Musser, 54 Cal. 196.

37. If the finding of a fact on a material point is contrary to a stipulation of the parties made in the course of the trial as a substitute for evidence, a new trial will be granted, on the ground that the finding is contrary to the fact as stipulated, and therefore unsupported by the evidence.

Carpentier v. Small, 35 Cal. 346.

APPEAL, 185, 302,
352, 428, 777, 905.
ATTORNEY, 26, 28, 29.
CONTRACT, 11.
COURTS, 9.
EQUITY, 157.

FORFEITURE.
JUDGMENT, 51, 150,
155, 306.
NEW TRIAL, 518-521.
VERDICT, 50.

STOCK.

1. This case is distinguished from mere executory agreements, through a performance of the terms of which a party becomes entitled to property, because here C. was entitled, as of original right, to his stock, and the conditions annexed to the issuance of the certificates to him, even if not waived, were mere qualifications in favor of G. and B., in the nature of security to them, the substance of which security they enjoyed, though not in the precise way described.

Chater v. S. F. S. R. Co., 19 Cal. 219.

2. An agreement to subscribe for shares of a corporation upon a stipulated condition is not binding, unless the condition be complied with.

S. C. R. R. Co. v. Schwartz, 53 Cal. 106.

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STOLEN GOODS.

1. An auctioneer who receives and sells stolen property, innocently, and in the ordinary course of his business, is liable to the true owner for the conversion thereof; and that, too, without the previous prosecution and conviction of the felon, and although the auctioneer had paid over to the felon the money received on the sale of the goods, before notice that the goods had been stolen. Rogers v. Huie, 1 Cal. 429.

2. An auctioneer who, in the regular course of his business, receives and sells stolen goods, and pays over the proceeds of sale to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. Id., 2 Cal. 571.

STOPPAGE IN TRANSITU.

1. The right of a vendor of goods to a stoppage *in transitu* exists until they arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee to be forwarded, does not terminate the *transitu*.

Markwald v. Creditors, 7 Cal. 213.

2. The vendor of goods who has sold them on credit to one who is insolvent, has a right to stop the goods and take them into his possession at any time before they arrive at their place of destination, and go into the possession of the purchaser.

Blackman v. Pierce, 23 Cal. 508.

3. This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an

attachment or execution levied upon the goods by a creditor of the vendee. Id.

4. It renders a stoppage *in transitu* unnecessary, for there is a rescission before there could be a stoppage.

Le Cacheaux v. Cutter, 6 Cal. 514.

5. An express demand for the goods is not required in order to charge the carrier. If he is clearly informed that it is the desire of the vendor to retake the goods, the notice is sufficient. Jones v. Earl, 37 Cal. 630.

6. The vendor of goods upon credit may retake them, upon the discovery of the insolvency of the vendee, at any time before they have been delivered to the vendee, or before any third party has acquired *bona fide* rights in the goods. Id.

COMMON CARRIER, 18. | SALE AND DELIVERY, 33.

STREETS AND STREET IMPROVEMENTS.

1. GENERALLY.

14. DEDICATION OF STREETS.

20. POWERS OF LEGISLATURE AND BOARDS OF SUPERVISORS AS TO STREET ASSESSMENTS, ETC.

42. RESOLUTION OF INTENTION.

70. ADVERTISING FOR PROPOSALS.

77. ORDER FOR WORK.

87. CHANGE OF GRADE.

94. AWARD OF WORK.

96. CONTRACTS, EXTENSIONS, READVERTISING, RELETTING, ETC.

131. ASSESSMENTS, DIAGRAM, AND WARRANT.

187. DEMAND AND RETURN.

203. REMEDY BY APPEAL TO BOARD OF SUPERVISORS.

225. LIENS.

242. PUBLICATION.

254. PERSONAL LIABILITY.

257. LIABILITY OF CITY.

261. LIABILITY OF STREET RAILROAD.

262. FRONTAGE.

264. ACTIONS FOR STREET ASSESSMENTS.

302. INTEREST.

306. ESTIMATE OF BENEFITS.

313. EFFECT OF REPEAL.

317. CONSTRUCTION OF THE STATUTES.

346. AUTHENTICATION OF RECORDS.

GENERALLY.

1. The municipal government of a city, in causing street improvements to be made, acts under the authority conferred upon it by the legislature, and is subject to all the constitutional limitations and restraints imposed on the legislature, and has no other or

greater power than is and lawfully may be conferred on it by the legislative act.

Creighton v. Manson, 27 Cal. 613.

2. An attempt by the city of San Francisco to convert a public easement to private use, or to defeat the right of way over a public street, is beyond the power of a corporation, and the legislature has no authority to interfere with the disposition of the land and premises upon which the easement is situated, after title has passed from the state. Wood v. San Francisco, 4 Cal. 190.

3. Where a city is laid out with streets running to the water, such streets should be held to continue on to the high water, if the city front is filled in, or the space enlarged by accretion or otherwise. Id.

4. It was necessarily anticipated that the water lots would be filled up to a level, suitable for building or land carriage.

Eldridge v. Cowell, 4 Cal. 81.

5. All the public streets of the city of San Francisco running into the water, as laid down on the official map of the city, were, by operation of the act of March 26, 1851, extended and carried to the front line of the city, and, as such, are subject to the free enjoyment of the public, and exempt from executions against the city.

Wood v. San Francisco, 4 Cal. 190.

6. East street, San Francisco, extends from Folsom to Market street, the latter, and not Jackson street, being its northern terminus.

Burr v. Dana, 22 Cal. 11.

7. The fact that East street was dedicated on the old plan of the city, that is, the map or plan of 1850, is insufficient to extend the street as a public highway beyond its first limits, to wit, from Folsom street to the southerly side of Market, and to the bay.

Jacobs v. Kruger, 19 Cal. 411.

8. The twentieth section of the act for improving the streets of Oakland, which provides that when a street is constructed to the satisfaction of the council and marshal it shall be accepted, and that thereafter it shall be improved by the city, requires such acceptance of the street, to the full width of the street, when improved under regulations adopted by the council. Such regulations must specify, among other things, the character of the work to be done, before the street can be accepted. An acceptance of work done on a street is not sufficient to make the street an accepted street.

Oakland Paving Co. v. Rier, 52 Cal. 270.

9. The courts will take judicial notice of the streets of San Francisco as designated on the official plan or map of the city.

Whiting v. Quackenbush, 54 Cal. 306.

10. Section 19 of article XI of the constitution is not a provision which requires legislation to enforce it; and the provisions of the act of April 1, 1872, relating to street

improvements in San Francisco, which authorize the superintendent of streets to execute contracts for such improvements, in advance of the levy and collection of the assessment, are inconsistent with the section referred to, and ceased to be operative on the first day of January, 1880.

McDonald v. Patterson, 54 Cal. 245.

11. A municipal corporation may maintain ejectment to recover possession of streets which it owns, and is entitled to possess, subject to the right of citizens to pass and repass as an open highway.

San Francisco v. Sullivan, 50 Cal. 603.

12. One who claims title to land alleged to be a public street or highway can not maintain an action to quiet his title thereto against a street commissioner of a city, who claims no interest in the land.

Leet v. Rider, 48 Cal. 623.

13. Such street commissioner is the mere agent or servant of the city, and his acts done in the performance of his duty in opening streets are the acts of the city. Id.

DEDICATION.

14. Under an act of 1862, relating to the city of San Francisco (stats. 1862, p. 391, sec. 1), the mere dedication of land by the owner to public use, as public streets, lanes, alleys, or other public places, converts it into public streets, lanes, alleys, or other public places, for the purposes of said act, without any formal acceptance of the same as such by the board of supervisors, who may thereafter improve them in the manner provided by law, although until this is done there may not be any obligation to keep them in a safe or passable condition for public use.

Stone v. Brooks, 35 Cal. 490.

15. M., who was the owner of the middle one of three adjoining one-hundred-vara lots, which filled the space between Second and Third streets, in the city of San Francisco, offered it for sale, and sold portions of it at public auction in parcels or subdivided lots, each having a width of twenty-five feet, and fronting on either side on an extension of Perry street, which at that time, so far as actually opened, was but a *cul de sac*, extending at a right angle from Third street midway through the adjoining one-hundred-vara lot lying on Third street and terminating at M.'s said lot. But at said sale, M. had represented on a large map, by which the sale was made, said subdivided lots as each fronting on an extension of Perry street, made midway through her said lot, and terminating at the other adjoining one-hundred-vara lot lying on Second street. The sales were made to the highest bidder, and were absolute: *Id est*, that in law this constituted a dedication by M. of that portion of her lot which was represented on said map as an extension of Perry street to public use as a street, and as such was there-

after subject to the jurisdiction of the board of supervisors for all purposes of its improvement; which, when made, operates as a complete acceptance of the dedication, and perfects the right of the public to its use as a public highway for all purposes. *Id.*

16. A street or court which is a mere *cul de sac* may be dedicated to public use in like manner as a thoroughfare. *Id.*

17. P. executed to the city of San Francisco a quitclaim deed of certain strips of land to be used as public highways, under the name of "**Belle Air place**" and "**Pfeiffer street**," the same being part of a city lot occupied by himself and wife as a homestead. Afterwards, the parcels thus sold never having been open or used as highways, P. and wife executed a mortgage upon their homestead, describing it as bounded in part by a line running a certain course and distance "**to Belle Air place**," and thence a certain course and distance "**to Pfeiffer street**." The mortgaged premises having been sold under a decree of foreclosure in an action to which the husband and wife were parties, and the plaintiff having acquired the title of the purchaser, the mortgagors commenced to erect a building upon the spaces designated as streets, claiming that the same remained a part of their homestead and had not been dedicated as highways. In an action by plaintiff to enjoin this work: *Held*, that as to the mortgagees and those claiming under them, the mortgage was a dedication of the streets named as public highways, and vested in them a right of way; that the deed to the city might be referred to to show the width of these streets; that the homestead claim was barred by the foreclosure and sale; and that the right of way passed to the purchasers as an appurtenance of the lot, and therefore free from the claim of homestead.

Kittle v. Pfeiffer, 22 Cal. 484.

18. A deed which conveys to the present and future owners of town lots in a city, certain streets and public squares in such city, "for the public use of the inhabitants of such city, to be applied to such public purposes as the future incorporated authorities of said city from time to time declare and determine," dedicates the land to public use, and contains a sufficient designation of the grantees to make it operative as a conveyance. *Mayo v. Wood*, 50 Cal. 171.

19. If a city lays out and dedicates public squares on the pueblo lands within its limits, and the dedication is ratified by an act of the legislature, and congress afterwards relinquishes to the city the title of the United States to the lands, for the uses and purposes mentioned in the ratifying act, the act of congress confirms the dedication, and makes it operative upon the legal title, as well as upon such title as the city held prior to the act of congress.

Hoadley v. San Francisco, 50 Cal. 265.

POWERS OF LEGISLATURE AND OF BOARDS OF SUPERVISORS.

20. The legislative charter of the city and county of San Francisco confers the entire control, supervision and management of all the public streets, thoroughfares, etc., within its corporate limits, upon the board of supervisors and superintendent of public streets and highways. *Eustace v. Jahns*, 38 Cal. 3.

21. The law does not impose upon the owner of a lot fronting upon a public street in San Francisco the duty of repairing defects in the portions of the street upon which his lot abuts. *Id.*

22. Under the provisions of sections 3 and 8 of the act of 1862 (stats. 1862, p. 391), the jurisdiction is vested in the board of supervisors to determine whether the whole or a portion, and if a portion, what portion, of a street improvement shall be done as a single improvement. It is necessary to a proper execution of this important power, and to protect the interests of property-owners, that such determination should be distinctly and clearly expressed, so as to enable those interested to act intelligently. When so expressed the subsequent proceedings of the board must be in strict pursuance thereof as their sole authority, and if not so pursued, such subsequent proceedings will be void. *Dougherty v. Hitchcock*, 35 Cal. 512.

23. The board of supervisors of the city and county of San Francisco, in respect to street improvements, have whatever power is conferred by the statutes on that subject, and no other. The power which they possess must be exercised in the mode prescribed by said statutes, and in no other. "The mode in such cases constitutes the measure of the power."

N. P. Co. v. Painter, 35 Cal. 699.

24. The board of supervisors have no power, in making street improvements, so far as conferred by said statutes of 1862 and 1863, to do any kind of work which, for any cause, can not be let or contracted for in the mode prescribed by said statutes, or which the owners of the frontage are legally prohibited from performing. *Id.*

25. It was the intention of the statute authorizing street improvements in the city and county of San Francisco, to leave open for judicial inquiry all questions of a jurisdictional character, and to submit all other questions to the decision of the board of supervisors.

Chambers v. Satterlee, 40 Cal. 498.

26. Proceedings by which the citizen is to be divested of his property *in invitum* must be strictly pursued.

Stockton v. Whitmore, 50 Cal. 554.

27. By the act of April 3, 1876, providing for the change of grade of certain portions of Montgomery avenue, it was provided that the

county court should appoint three disinterested citizens, freeholders in the city and county of San Francisco, to assess benefits and damages to such lots of land as might, in their opinion, be more benefited than damaged: *Held*, that the act was impracticable, and could not be carried into effect; that, in the absence of any defined assessment district, every freeholder in the city and county had an interest to decide that his own real property was not benefited by the change of grade, and that it was therefore impracticable to appoint disinterested commissioners, as required by the act.

Montgomery Avenue case, 54 Cal. 579.

28. The legislature has power to vacate a street in a city; and it may delegate such power to the municipal authorities of a city, and after such power has been delegated to the municipal authorities, the legislature may revoke it in part as well as in whole, or without any express revocation, may itself exercise it.

Polack v. S. F. O. Asylum, 48 Cal. 490.

29. The municipal authorities of a city can not vacate a street without the consent of the legislature. *Id.*

30. The legislature may vacate a portion of a street, even if a person owns property fronting on another portion of the street which will incidentally be injured thereby. *Id.*

31. The state has no proprietary interest in the streets of a city dedicated to public use; and when it grants to a private corporation an easement over the streets not common to the public at large, it merely grants, in its sovereign capacity, a franchise, and not any proprietary interest in the streets.

San Francisco v. S. V. W. W., 48 Cal. 493.

32. As a general rule the fee of the streets in a city dedicated to public use is in the owners of the adjoining lands on each side, to the center of the street. *Id.*

33. The legislature has power to change a rule of evidence after the contract to which the rule applies has been made, and after the action in which the rule is to be applied has been commenced.

Himmelmann v. Carpentier, 47 Cal. 42.

34. There is no constitutional impediment which estops the legislature from enacting that, if a property-owner neglects to pay an assessment made for improving a street, it shall bear interest, even if the contract was made before the passage of the act.

Dougherty v. Henarie, 47 Cal. 9.

35. The legislature has no power to levy an assessment not uniform and equal, in an incorporated city for the purpose of improving a street.

Brady v. King, 53 Cal. 44.

36. The legislature, in providing for the

improvement of the streets of a city, may adopt one mode for a part of the streets, and a different mode for the remainder, and may authorize the levy of an assessment per front foot to pay for either mode of improvement. *Oakland P. Co. v. Rier*, 52 Cal. 270.

37. The board of supervisors of San Francisco possess all the authority in respect to the improvement of streets which is not conferred expressly, or by necessary implication, upon some of the officers mentioned in the statute. *Donnelly v. Tillman*, 47 Cal. 40. *Donnelly v. Marks*, *Id.* 187.

38. The board of supervisors of San Francisco can not delegate the power to determine where work is necessary on a street.

People v. Clark, 47 Cal. 456.

39. A contract having been entered into for the performance of work in grading a street, and the time mentioned in the contract for the performance of the work having expired, and the contractor having applied for an extension of the time, and the board of supervisors having refused to grant such extension of time, subsequently made an order for the extension of time: *Held*, that the order was unauthorized and void.

Turney v. Dougherty, 53 Cal. 619.

40. Under section 3 of the act of April 1, 1872 (stats. 1871-2, p. 804), the board of supervisors of San Francisco had the power to order the construction of a sewer or other street improvement, extending through two or more streets.

Mahoney v. Braverman, 54 Cal. 565.

41. The sixth section of the present street law of San Francisco (stats. 1871-3, p. 808), requiring the superintendent of public streets upon the failure of a contractor to complete his work before the expiration of the contract time, to report the same to the supervisors, and the supervisors to relet the work, is mandatory, and excludes the exercise by the board or superintendent, of any power to extend the time for completing the work after the expiration of the contract time, or an extension ordered during the running of the contract time, and such an extension is therefore void.

Beveridge v. Livingstone, 54 Cal. 54.

RESOLUTION OF INTENTION.

42. A resolution of the board of supervisors of San Francisco, declaring an intention to improve a street, may include a declaration of intention to both grade and macadamize. Such resolution sufficiently describes the work to be done if it declares that the street will be graded and macadamized from one designated point to another.

Emery v. S. F. G. Co., 28 Cal. 345.

43. Under the provisions of section 3 of the act of 1862, the mayor of the city and county of San Francisco is not required to

sign a resolution of the board of supervisors declaring their intention to improve a public street. *Cochran v. Collins*, 29 Cal. 129.

Hendricks v. Crowley, 31 Id. 471.

Taylor v. Palmer, Id. 241.

44. A resolution of the board of supervisors of the city and county of San Francisco, declaratory of intention to grade a street, must be presented to the president of the board for his approval.

Thompson v. Hoge, 30 Cal. 179.

45. Creighton v. Manson, 27 Cal. 613, affirmed as to necessity of a resolution of the board of supervisors of San Francisco of intention to grade a street being presented to the president of the board for his signature.

Id.

46. A resolution declaring an intention to improve a street in San Francisco is not vitiated because it states an intention to grade and macadamize from Mission to Howard street, while the contract executed under the resolution calls for grading and macadamizing that portion of the street "except where done."

Emery v. S. F. Gas Co., 28 Cal. 345.

47. The board of supervisors of San Francisco have power to cause to be graded the distance of several blocks, in one contract.

Himmelman v. Steiner, 38 Cal. 175.

48. A resolution of intention was for the grading of Clay street, from Taylor to Jones, and from Jones to Leavenworth streets, and the crossing of Clay and Jones street. The board ordered the work to be done; the advertisement for proposals was for the same work, the bidders being notified to put in separate bids for each block and the crossing, and by the resolution of award, the contract for the whole work was awarded to the lowest bidder, at specified prices for each block and the street crossing. The contract entered into was for one block only: Held, that the contract was wholly unauthorized.

Dougherty v. Hitchcock, 35 Cal. 512.

49. The board of supervisors of the city and county of San Francisco acquire jurisdiction of the subject-matter of improving a street in the city and county of San Francisco, after the expiration of the notice of intention to improve.

Dougherty v. Miller, 36 Cal. 83.

50. The place where work is to be done in improving a street in San Francisco must be determined by the judgment of the board of supervisors in the resolution of intention. The board can not leave the selection of the place where work is to be performed between any two points to the superintendent of streets, or any other person.

Richardson v. Heydenfeldt, 46 Cal. 68.

51. If a resolution of intention to improve a street in San Francisco provides that the

street shall be improved where necessary, the board of supervisors acquires no jurisdiction, and the assessment is void.

People v. Ladd, 47 Cal. 603.

52. A resolution of the board of supervisors, directing a publication of a notice of intention for street work, for ten days from and after a particular date, the publication of which was not in fact commenced until two days after the time fixed in the resolution, but was then made for the legal period of ten days, was a substantial compliance with the provisions of the law.

Chambers v. Satterlee, 40 Cal. 498.

53. In order to get jurisdiction to order street work done in San Francisco, the board of supervisors must describe the work in the resolution of intention.

Brady v. King, 53 Cal. 44.

54. The board of supervisors of the city and county of San Francisco must specify in a resolution of intention to perform work on a street, the work to be done. It is not sufficient to declare its intention to cause certain repairs to be made "where necessary."

Randolph v. Gawley, 47 Cal. 458.

55. A resolution passed by the board of supervisors of San Francisco, declaring their intention to improve a street, need not contain a complete plan and specifications of the proposed improvement. The resolution of intention need not describe the work with any more exactness than it is described in the law itself.

Harney v. Holler, 47 Cal. 15.

56. In the city of Stockton, if the council adopt a resolution of intention to improve a street, or part of a street, it has no jurisdiction to improve only a portion of the street embraced in the resolution.

Stockton v. Whitmore, 50 Cal. 554.

57. In San Francisco, the macadamizing of a street, and the construction of sidewalks, are different kinds of work, and when a street is ordered to be macadamized, it is meant that the roadway only is to be improved.

Himmelman v. Satterlee, 50 Cal. 66.

58. Under a resolution of intention to macadamize and curb a street, the board of supervisors of San Francisco do not acquire jurisdiction to order work to be performed on a sidewalk; and if the notice for sealed proposals calls for work also to be done on the sidewalks, the contract following the notice is void unless the work done on the sidewalks can be separated from that done on the roadway.

Id.

59. A resolution of intention to curb and macadamize a street does not include the sidewalk.

Dyer v. Chase, 52 Cal. 440.

60. The twenty-eighth section of the act to authorize the improvement of streets in the city of Oakland, which provides that

the council shall have full power to improve **Broadway street** in such manner as it may deem proper, does not dispense with the necessity of the passage of a resolution of intention, and its publication, before an improvement can be made on Broadway.

Oakland Paving Co. v. Rier, 52 Cal. 270.

61. Under said section, after a resolution of intention to improve Broadway street has been passed by the council, and published, so that jurisdiction is acquired, the council may order such portion of the proposed work to be done, as it may deem proper, or may leave the amount of work to be done on the crossings and culverts to the determination of the street superintendent. Id.

62. If, in improving a street in a city, the specifications require **work not mentioned in the resolution** of intention, it does not vitiate the assessment if such additional work is not mentioned in the contract, and it does not appear that it was done, or that any charge was made for it. Id.

63. In improving the street of a city, if the resolution of intention calls for "additional macadamizing," the specifications may provide for lifting the rock on the roadway, and relaying a part with new rock, and this is "additional macadamizing." Id.

64. The question reserved, whether the board of supervisors of San Francisco should order the publication of a resolution of intention to improve a street, or whether it may be published without such order.

Dyer v. North, 44 Cal. 157.

65. The provisions of the statute, which authorizes the board of supervisors to order street work to be done, after notice of their intention to order the work has been published for ten days, requires the **notice to be given by the board itself**, and the publication required can only be made by their authority. Chambers v. Satterlee, 40 Cal. 497.

66. After the board has acquired jurisdiction to act, by due publication of the resolution of intention, they **must still exercise their power in the mode** prescribed by law. Id.

67. The board of supervisors of the city and county of San Francisco have no jurisdiction to give notice of an intention to order or to order grading done on any street mentioned in the third section of the act of 1872, p. 805, in the absence of a **petition** signed by the owners of a majority of the frontage of the land made liable for the grading, except public property.

Turriil v. Grattan, 52 Cal. 97.

68. There is no substantial difference between the absence of a **petition** and a petition lacking the essential averment. Id.

69. A resolution of intention to improve a street in San Francisco, under the act of

April 4, 1870, **must be published five days**, exclusive of Sundays.

People v. McCain, 51 Cal. 360.

Advertising for Proposals.

70. An order of the board of supervisors of the city and county of San Francisco, **authorizing the clerk** of the board to advertise for proposals to do street work is sufficient, although it does not mention sealed proposals nor specify the time or place of giving notice.

Himmelmann v. Byrne, 41 Cal. 500.

71. A resolution of the board of supervisors of San Francisco, authorizing their clerk to advertise for proposals to do certain work mentioned in the resolution, on a street therein named, is sufficient authority to said clerk to advertise five days for proposals in the mode provided by law, as well as to post notices in the office of the superintendent of streets. Shepard v. Colton, 44 Cal. 628.

72. The **posting of the notice** inviting proposals for the execution of work, in the office of the superintendent of streets, for a period of three days instead of five, as required by law, is a violation of the statute in a matter affecting the substantial rights of persons interested, and is such a defect as renders all the subsequent proceedings void.

Hughes v. Reis, 40 Cal. 255.

73. The **notice inviting** proposals for improving a street in the city and county of San Francisco **must be posted** in the office of the superintendent of public streets and highways, for five official days; that is, before nine o'clock A. M. of the first day, and must remain posted until four o'clock P. M. of the fifth day.

Himmelmann v. Cahn, 49 Cal. 285.

Brooks v. Satterlee, Id. 289.

74. The erroneous use of the word "regraded" instead of "graded," in the notice inviting sealed proposals for the grading of a street, does not vitiate the notice.

Brady v. Feisel, 53 Cal. 49.

75. Under the act of March 27, 1872, "to reincorporate the city of **Stockton**," notices inviting sealed proposals to do street work must refer to a diagram and specifications of the proposed work.

Stockton v. Clark, 53 Cal. 82.

76. The adoption of a resolution by the city council of **Stockton**, directing the publication of advertisements inviting proposals for street work, to be done "in accordance with the plans and specifications thereof now on file in the office of the city clerk," is equivalent to the adoption of such plans and specifications, and is tantamount to a prior direction to the city surveyor to make a survey, diagram, estimates, and specifications. Stockton v. Skinner, 53 Cal. 85.

ORDER FOR WORK.

77. Under the consolidation act of 1856 for San Francisco, and the act of 1859 amendatory thereof, the board of supervisors have no power to order a contract for plank-ing, paving, piling or repaving a street which has been once paved, piled, etc., except in the instance given in section 53 as amended by section 10 of the act of 1859.

Blanchard v. Beideman, 18 Cal. 261.

78. In other cases not within this excep-tion, where the plank-ing or paving of a street or sidewalk needs local repairs, the supervisors can not authorize a contract to be made by the superintendent of streets for such repairs; but the proceeding must be by notice to the owner, etc., of the property, according to section 56 as amended by sec-tion 12 of the act of 1859. Id.

79. The **Nicolson pavement** being an invention, and the plaintiff being the sole owner, the board can not order the same to be laid down, as there can be no competition amongst bidders for laying it down which the street law provides for.

N. P. Co. v. Painter, 35 Cal. 699.

80. The board of supervisors of San Fran-cisco can not order the **Nicolson pavement** to be laid down, in cases where the lands of the property-owner are to be assessed, unless upon the petition of a majority of the own-ers, or their agents, in frontage, and upon the condition that the same shall not cost to exceed twenty-eight cents in coin per square foot. Id.

81. An order to improve a public street, made by the board of supervisors of San Francisco, after having acquired jurisdiction, is in the nature of a judgment.

Dougherty v. Foley, 32 Cal. 402.

82. An ordinance for the improvement of the streets, passed by the council before the expiration of the time for the presenta-tion of the protest, is not thereby invalid.

Burnett v. Sacramento, 12 Cal. 76.

83. The statute only inhibits the council from proceeding with the improvements in case of such protest, and it was competent for them to pass the ordinance in advance of the time, provided they did not attempt to enforce it until afterwards. Id.

84. The charter of the city of San Fran-cisco provides that when the common coun-cil think proper to open or improve a street, etc., notice shall be given, and if no pro-**test** be made, as provided, then the council shall proceed with the improvement: *Hell*, that when an ordinance had passed to give the required notice, which was given, and no protest made, the full discretionary power of the council had been exercised, and it be-came binding as a contract between the city and the property-holders to make the im-provement, the remaining acts on the part

of the city being mere ministerial duties of its proper officers.

Lucas v. San Francisco, 7 Cal. 463.

85. Parties who do not remonstrate against a proposed street improvement in San Fran-cisco can not claim the benefit of a re-monstrance filed by other parties.

Harney v. Heller, 47 Cal. 15.

86. If a remonstrance to a street im-provement in San Francisco is filed with the board of supervisors, and it is referred to a committee, and the board, before the com-mittee reports, and without any action di-rectly on the petition, directs the work to be done, it is practically a passing upon and a decision against the remonstrance. Id.

CHANGE OF GRADE.

87. Under the act of March 23, 1868 (con-cerning the change of street grades in San Francisco), it was the purpose of the legisla-ture to confine the award of damages to those who should petition for their allowance as provided by said act.

In re Beale Street, 30 Cal. 495.

88. The commissioners under the above act have no authority to award damages in excess of the amount claimed in the petition. Id.

89. A city has the right to raise the grade of a street; and if the contractor performs the work with proper care and skill, he is not responsible for any damage which may result to the contiguous property.

Shaw v. Crocker, 42 Cal. 435.

90. It is the duty of commissioners ap-pointed under that act to ascertain and re-port the damages to the owner of each spe-cific parcel of land affected by the proposed work, which should include the value of lands taken for the street.

Jacobus v. Oakland, 42 Cal. 21.

91. The legislature did intend that the aggregate damages to private property, in-cluding the value of land taken for the street, and the expenses of the commissioners, should be paid for in money by assessment upon the several parcels of land benefited by the proposed improvement, in proportion to the benefits to accrue to each. Id.

92. The only remedy for property-owners who have suffered damage under the acts of 1868 and 1870, relative to modifying grades of streets in San Francisco, is by application to the legislature for relief.

Appeal of Houghton, 42 Cal. 35.

93. The auditor, in making a duplicate copy of the assessment roll, under the act of March 30, 1868, for modifying the grade of certain streets in San Francisco, need not attach thereto a copy of the certificate of the mayor appended to the original roll, certifying to its correctness.

S. F. v. Certain Real Estate, 50 Cal. 188.

AWARD OF WORK.

94. The resolution of award is the letter of authority to the superintendent, and he has no more power to contract for the performance of only a part of the work therein specified than of additional work.

Dougherty v. Hitchcock, 35 Cal. 512.

95. In an action for the recovery of an assessment for the improvement of a street in San Francisco, it is necessary for the plaintiff to prove, if the same is denied, that notice of the award of the contract to the plaintiff for the improvement was published for five days, pursuant to an order of the board of supervisors.

Shepard v. Colton, 44 Cal. 628.

CONTRACTS—EXTENSIONS—RE-ADVERTISING—RELETTING.

96. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank, and sewer a portion of Mission street, in said city, "the same to be paid for by the property-holders adjacent, * * * the proposals to be opened and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured, as it progressed, by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer, and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treas-

ury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use: *Held*, that, as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committees of the two boards converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor; *held*, further, that the city is primarily liable; that she, and not the contractor, must look to the property-holders adjacent to the improvements for the necessary expenses; that the property-holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property-holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment.

Argenti v. San Francisco, 16 Cal. 255.

97. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him, on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: *Held*, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Id.*

98. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: *Held*, that plaintiff can not recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange

nor promissory notes, and that the treasurer must pay from that fund, and no other.

Id.

99. A contract to grade a street in San Francisco need not follow the precise language of the statute, or contain a condition in express terms that "the materials used shall be such as are required by the superintendent of streets." If by fair and reasonable construction it can be held to contain such condition, the call of the statute is answered. Taylor v. Palmer, 31 Cal. 240.

100. If a contract to do work provides that the work shall be done according to certain specifications which are annexed to it, the specifications are a part of the contract. Id.

101. Since the amendments to the consolidation act, passed in 1863, the board of supervisors of San Francisco may extend the time within which a contract to perform work on a street is to be performed. Id.

102. A contract to macadamize a street in San Francisco, made with the superintendent of streets, binds the party to use such materials as are required by the superintendent if it provides that the work shall be performed according to specifications annexed, and such specifications made by the superintendent name the material to be used.

Emory v. S. F. Gas Co., 28 Cal. 345.

103. After the board of supervisors of San Francisco have taken steps to acquire jurisdiction, and have ordered a public street of said city to be improved, and have let the contract, if the contractor fails to enter upon the performance of the work within the time fixed in his contract to perform, the board may readvertise for bids and relet the contract without taking steps to acquire jurisdiction as in the first instance.

Dougherty v. Foley, 32 Cal. 402.

104. Conlin v. Seaman, 22 Cal. 546, to the effect that the superintendent of streets of San Francisco has the power to extend the time for completion of contracts for the improvement of streets made by him, affirmed.

Houston v. McKenna, 22 Cal. 550.

105. The law of contracts is not applicable, when the state or county government is a party, in respect to the mode or measure of enforcement.

Sharp v. Contra Costa Co., 34 Cal. 284.

106. Where the owner of a lot neglects for three days, after notice from the superintendent of public streets of said city, to repair the street in front of his lot, the superintendent has a right to make a contract for that purpose; and an action will lie in the name of the party performing the work against the owner of the lot adjacent for the amount. Hart v. Gaven, 12 Cal. 476.

107. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A

municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts, has no application to cases of this character.

Argenti v. San Francisco, 16 Cal. 255.

108. In this case, the city having discharged the assessments, by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments.

Id.

109. The improvements in this case, being to particular streets, were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property-holders, and only indirectly to the city at large.

Id.

110. The street superintendent of San Francisco, under the consolidation act, has power to enlarge the time for completion of a contract for street improvements made by him, and if any property-owner feels aggrieved by such action he must appeal to the board of supervisors, or he will be deemed to have acquiesced therein.

Conlin v. Seaman, 22 Cal. 546.

111. Under the statutes regulating street improvements in San Francisco, the board of supervisors have the power to readvertise for bids where a contractor has failed to perform the work, without repeating the steps necessary to obtain jurisdiction.

Himmelman v. Oliver, 34 Cal. 246.

112. The legislature has the power to ratify the resolutions for the extension of the time for the completion of the contract.

Himmelman v. Steiner, 38 Cal. 175.

113. When the person who has contracted to grade a street in the city of San Francisco, fails to perform the work, and it becomes necessary or expedient to relet the job, the same course must be pursued in reletting which is prescribed in the first instance by the sixth section of the statute in relation to the improvement of streets in San Francisco.

Meuser v. Risdon, 36 Cal. 239.

114. In case of such reletting, the clerk of the board of supervisors, as such, has no

power to give the notice inviting proposals for the work, nor does the original resolution of the board inviting proposals confer such authority, nor can the board confer such authority on him by a general resolution, directing him in all cases where contractors fail to perform to readvertise for proposals. *Id.*

115. Each proceeding to improve a street in San Francisco, whether in relation to the first contract or a reletting on the failure of the first contractor to perform, is a separate and independent proceeding, and must stand or fall by itself. *Id.*

116. Under the statute regulating street improvements in San Francisco, the board of supervisors adopted a resolution of intention to grade Clay street from Taylor to Jones and from Jones to Leavenworth streets, and the crossing of Clay and Jones streets, and subsequently ordered said work to be done, and the clerk advertised for proposals for its performance, notifying bidders to put in separate bids for each block and said crossing. **The board awarded a contract for the whole work.** The only contract entered into by the superintendent of streets, etc., with the successful bidder was for the grading of **one block only**—that from Jones to Leavenworth streets: *Held*, first, that the resolution of intention and its publication constituted the sole authority of the board to proceed, in the statute mode, to order said work to be done, and that thereby no authority was conferred to act upon any other or different work; second, that the work designated in the resolution of intention constituted one distinct and entire subject-matter; third, that the resolution of award constituted the sole authority to the superintendent, who acted ministerially only in making a contract under it, and that the contract, by reason of variance between its terms and the resolution of award, was unauthorized and void; and, fourth, that a contract duly authorized under said act, and executed according to its requirements, is indispensable to the validity of any assessment upon property to pay for street improvements.

Dougherty v. Hitchcock, 35 Cal. 512.

117. Proposals for bids to make certain improvements in the city of San Francisco, consisting of more than one kind of work, were made by the board of supervisors, and let to R., who was the sole bidder therefor, as one job. One of said kinds of work was to put down the **Nicolson pavement**, the exclusive right to construct which in said city was at that time owned by the plaintiff, R.'s assignee, under letters patent of the United States: *Held*, that because this course had the effect to preclude all persons other than the owner of said patent right from bidding, and the property-owners from taking

the contract for any portion of said work, the contract as let was void.

Nicolson Pavement Co. v. Fay, 35 Cal. 695.

118. Whatever power said board of supervisors has in relation to the **Nicolson pavement** is derived from the statute relating thereto (stats. 1865-6, p. 720), under which the power can be exercised only upon the petition therefor of a majority of the owners, or their agents, in frontage, and upon the condition that the pavement shall not cost to exceed twenty-eight cents in coin per square foot. Where the board advertised for proposals and awarded a contract for the construction of said pavement in said city, without having received said petition: *Held*, that the contract was void.

Nicolson P. Co. v. Painter, 35 Cal. 699.

119. Where said board, while assuming to act under said statutes of 1862 and 1863, advertised for proposals to put down on a street in said city the Nicolson pavement, which had been patented under the laws of the United States, and awarded a contract therefor to R., who owned the exclusive right to put down said pavement in said city, and who alone put in a bid for said contract: *Held*, that the board exceeded its authority, and the contract was void. *Id.*

120. Although contracts are made on behalf of the city and county of San Francisco in the name of the superintendent of streets, he is but the agent of the corporation in that behalf; and, *pro hac vice*, his act is the act of the corporation.

Drew v. Smith, 38 Cal. 326.

121. In entering into a written contract for the performance of street work, ordered by resolution of the board of supervisors, the superintendent of streets becomes *pro hac vice* the special agent of the board, with authority to execute the contract which has been awarded, and no other or different contract. *Chambers v. Satterlee*, 40 Cal. 497.

122. An act performed by a special agent in excess of his authority, which is divisible in its nature, so that the part which he was authorized to perform can be separated from the rest, without injury to the principal; the latter will be bound by it so far as he authorized it, and it will be void only for the excess. *Id.*

123. A contract entered into by the superintendent of streets, under a resolution of the board of supervisors, ordering a street to be graded to the official grade, but which provided, in addition, that the roadway should be graded one foot below the official grade, is divisible in its nature, and is valid to the extent that it is authorized by the resolution of the board. *Id.*

124. If the street superintendent of a city enters into a written contract with a party to improve the streets of a city, which is void for want of authority to make it, and

the other contracting party makes a **written assignment on the back** thereof of "the articles of agreement on the other side thereof written, and all moneys hereafter due, payable, or to be paid therefrom, and the full benefit, profit, and advantage thereof," it is not a mere assignment of the written contract, but transfers to the assignee the right to collect, demand, and receive all moneys due or to become due for the work specified in the contract, even if recovered on a *quantum meruit*, or for work and labor.

Wetmore v. San Francisco, 44 Cal. 294.

125. If an ordinance of a city, providing for grading a street containing several blocks, requires that bidders shall bid on each block separately, a bid to grade the entire street at so much per cubic yard is an error which enables a lot-owner to defeat the collection of an assessment.

Stockton v. Creanor, 45 Cal. 643.

126. If the charter of a city authorizes the council to cause the streets to be graded and to let contracts for that purpose, and provides that the council may reject all bids, a committee of the council can not accept a bid or award a contract to grade a street. *Id.*

127. The owner of property adjacent to a street is not a party to a contract for the improvement of the same, made between a third party and the superintendent of streets. *Dyer v. Barstow*, 50 Cal. 652.

128. The owner of property adjacent to a street, and which is assessed for a street improvement, is first brought into relations with the proceedings when the assessment is issued. *Id.*

129. The act of April 4, 1870, relative to street assessments in San Francisco, does not apply to contracts made previous to the passage of that act, nor to the remedies for their enforcement. *Id.*, 53 Cal. 81.

130. If a corporation attempts to confer power on its president to contract with a city for the improvement of a street, and the power is defective, but the contract (in form) is made with the corporation, the work is done by the corporation, the assessment is issued to the corporation, and suit for the work is brought by the corporation, both the city and corporation are estopped to deny the due execution of the contract, and the lot-owner when sued for the assessment can not be heard to allege that the contract was not executed by the corporation.

Oakland Paving Co. v. Rier, 52 Cal. 270.

ASSESSMENT, DIAGRAM AND WARRANT.

131. Section 13, article XI of the constitution, provides for equality and uniformity of taxation upon property, but applies only to that charge or imposition upon property which it is necessary to levy to raise

funds to defray the expenses of the government of the state, or of some county or town. It has no reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of their property, and in which the public is only to a limited extent interested.

Burnett v. Sacramento, 12 Cal. 76.

132. For the expenses of such improvements, it is competent for the legislature to provide, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto, and specially benefited thereby. *Id.*

133. Where the charter of the city of Sacramento authorized the common council to levy a special assessment for grading and improving the streets of the city, and provided, that when the council thought it expedient to open, alter or improve any street, they should give notice, etc., and if one third of all the owners in value of the adjacent property protest against the proposed improvement within ten days after the last publication, it shall not be made; and a protest was presented more than ten days after the last publication of such notice: *Held*, that such protest was not presented in time, and was therefore ineffectual; *held, further*, that it must appear that one third of the owners in value of the adjacent property united in it. *Id.*

134. That provision of the charter authorizing the improvement, and the mode and manner of the assessment, is not in conflict with the thirteenth section of article XI of the constitution of this state. *Id.*

135. If a street is opened in a city, and to pay for the land taken, and the damages to improvements thereon or adjacent thereto, and injured thereby, and all other expenses, bonds are issued; and to pay the same and the interest thereon, an annual percentage is directed to be levied on the lots benefited thereby, which percentage is upon the enhanced value of the lots, as fixed by a board of public works, this imposition is an assessment and not a tax.

Doyle v. Austin, 47 Cal. 353.

136. In such case the interest to accrue on the bonds, and the discount suffered in converting them into cash, are incidental expenses, and the property benefited is only charged with the cost of the improvement. *Id.*

137. When a statute for opening a street in a city provides that, to pay the damages and expenses incurred thereby, an assessment shall be levied on the lots benefited "according to the enhanced value of the respective parcels of lands as fixed" in a report of a board of public works, the assessment must be limited to the increased value of each lot caused by the improvement, and

must not include the value of the lot without the improvement. *Id.*

138. When, to pay the expenses of opening a street in a city, an assessment is imposed on the lots to be benefited thereby, in proportion to the benefits accruing to each, the exemption from the assessment, of lots belonging to the United States, to this state, and to the city, does not render the statute void, or the assessment illegal. *Id.*

139. An assessment for improving a street in San Francisco must contain a description of the property assessed.

Himmelman v. Cahn, 49 Cal. 285.

140. An assessment made upon lots in a city for the purpose of improving a street may be apportioned by reference to the number of front feet to the lots, or any other standard which will approximate equality; yet, whatever standard is adopted, it must be levied with uniformity and equality.

People v. Lynch, 51 Cal. 15.

141. If, in levying such assessment, a lot of land within the district declared to be benefited is not assessed, and the whole expense is assessed upon the remaining lots, the whole assessment is void. *Id.*

142. Street assessments in Sacramento are required to be levied and collected as provided in the general revenue laws of the state.

Mayo v. Ah Loy, 32 Cal. 477.

143. Assessments for improvement of streets in Sacramento are required to be listed to the owner, if known; if not known, to him as "unknown owner." *Id.*

144. If such assessment is not paid, the district attorney must sue the person assessed, the real estate, and all "owners and claimants" to the same. *Id.*

145. When such assessment is thus made, and the suit is thus brought, and the summons is properly served, the judgment when rendered is conclusive and binding upon all the world. *Id.*

146. If the person who contracts with the street superintendent in San Francisco to improve a street, before the contract is made, makes a private contract with a part of the owners of the lots liable to be assessed for the improvement to do their work for less than the price allowed by the contract, this private contract is in fraud of the law under which the streets are improved; but the fraud is no defense in an action by the contractor to recover the assessment, and must be taken advantage of by a remonstrance to or an appeal to the board of supervisors.

Nolan v. Reese, 32 Cal. 484.

147. The word "assessment" is employed in the constitution to represent those local burdens imposed by municipal corporations upon property bordering upon an improved street, for the purpose of paying the cost of the improvement, and laid with reference to

the benefit the property is supposed to receive from the expenditure of the money. Property not benefited by the improvement can not be subjected to an assessment for it.

Taylor v. Palmer, 31 Cal. 240.

148. The power of "assessment" can not be exercised as an independent or principal power, like that of "taxation," but must be used as an incident to the power of organizing municipal corporations. *Id.*

149. To render valid an assessment on a lot for the improvement of a street in San Francisco, the various acts prescribed by the statute must, in all essential particulars, be strictly performed.

Smith v. Davis, 30 Cal. 536.

150. An assessment on a lot in San Francisco for street improvements must be made to the owner, if known, and if not known, the word "unknown" must be written opposite the number of the lot and the amount of the assessment.

Himmelman v. Steiner, 38 Cal. 175.

151. Under the San Francisco street assessment law, the assessment and diagram, as recorded, must show in what direction the streets run.

Norton v. Courtney, 53 Cal. 691.

152. The assessment must show the locality of the street assessed, and if a diagram is used, it must contain such references as will enable the description of the premises to be understood.

San Francisco v. Quackenbush, 53 Cal. 52.

153. A diagram for a street assessment in San Francisco is sufficient, if it correctly exhibits the street and street crossings on which work has been done, and shows the number of front feet assessed for the work contracted for and performed, and the relative location of each lot or portion of a lot to the work done.

Dorland v. McGlynn, 47 Cal. 47.

154. The description in an assessment for a street improvement may be made by a diagram; and on such diagram, the point of a scroll is as competent as the barb of an arrow to denote north. Accordingly, where the diagram in such an assessment exhibited the streets on which the work has been done, the lot itself as designated by its number, the number of its feet front on the street, and the depths of its side lines, and also a scroll designating the direction of the street: *Hehl*, that the description was sufficient.

Whiting v. Quackenbush, 54 Cal. 406.

155. An assessment on a lot for street improvements in San Francisco is void, unless made to the true owner, or to "unknown owners." *Taylor v. Donner*, 31 Cal. 480.

156. When an assessment for street improvements in San Francisco is made to a person as the owner, it creates no liability against any other person, and not against him unless he is the owner. *Id.*

157. The word "**unknown**," written in the assessment opposite the number of the lot, is sufficient to show that the name of the owner was unknown to the superintendent of streets, and is an exact compliance with the statute in that respect.

Hughes v. Reis, 40 Cal. 255.

158. An assessment on property for street work, made by the superintendent of streets, to "**unknown owners**," amounts to an official certificate by the proper officer that the owner of the particular lot designated was unknown to him. The certificate is conclusive of the truth of the fact so certified, and can not be collaterally called in question in an action brought upon the assessment.

Chambers v. Satterlee, 40 Cal. 498.

159. The superintendent of streets in San Francisco, unless he is satisfied beyond all doubt as to the ownership of a lot, may assess it to "**unknown owner**" (and it is almost impossible to show that he did know the owner), and when the assessment is made to "**unknown owner**," payment of an assessment on it for improving the street may be demanded publicly on the premises.

Himmelman v. Hoadley, 44 Cal. 213.

160. If a lot in San Francisco is assessed for a street improvement to a **person by name**, and not to unknown owners, the contractor can not recover judgment against another person for the assessment.

Blatner v. Davis, 32 Cal. 328.

161. An assessment on a lot in San Francisco for a street improvement, made to a **person by name**, is an assessment to him as owner. Such assessment, to be valid, must be made to the owner, if known. Id.

162. In a proceeding for the improvement of streets in San Francisco by contract, under the regulations of the consolidation act, the liability of the real owner is not released or affected by an **erroneous assessment** of the tax upon his property to another person.

Conlin v. Seaman, 22 Cal. 546.

162a. If the superintendent of public streets and highways in San Francisco, in assessing a lot for improvements on the street on which the lot fronts, makes the assessment to a **deceased person**, the assessment is void.

Smith v. Davis, 30 Cal. 536.

163. By the legislative acts of 1862 and 1863, concerning street improvements in San Francisco, it is made the duty of the **superintendent** of streets, in the first instance, to make the assessment for street improvements, and deliver the same, with a **warrant** attached, to the contractor, authorizing him to collect the money from the owners of the lots liable therefor. Smith v. Cofran, 34 Cal. 310.

164. An assessment for the improvement of a street in a city is a **municipal tax**, and in San Francisco the property-owner is not brought into relations with the proceedings

resulting in the assessment, until the tax is levied, which is when the assessment is made and issued.

Hancock v. Whittemore, 50 Cal. 522.

165. If an assessment for the improvement of a street in San Francisco is made after the death of the property-owner, the tax assessed is **not a claim against his estate** which is required to be presented to the administrator for allowance. Id.

166. The making of an assessment is an official act on the part of the superintendent, and its character and authority can be attested in only one manner, and that is the **official signature** of the superintendent; signing the warrant only, is not sufficient.

Dougherty v. Hitchcock, 35 Cal. 512.

167. Where an assessment is **void**, it is the duty of the superintendent to **make a new one**, without regard to time.

Himmelman v. Cofran, 36 Cal. 411.

168. The property-owner is for the first time brought into relation with the proceedings for the improvement of the street, when the assessment is made.

Himmelman v. Steiner, 38 Cal. 175.

169. An assessment for grading a street in San Francisco, which gives the **numbers of the lots** to be assessed, as **shown upon a diagram** attached to the assessment, and the frontage of each lot, and refers to the diagram for further description, sufficiently describes the property to be assessed.

Hughes v. Reis, 40 Cal. 255.

170. Unless all the provisions of the **statute**, prior to the award of a contract for a street improvement in San Francisco, are **complied with**, the defendant is not liable for the assessment.

Himmelman v. Danos, 35 Cal. 441.

171. Where the statute requires a series of acts to be performed before the owners of the property are properly chargeable with the tax, such acts are **conditions precedent** to the exercise of the power to levy the tax, and all the requirements of the statute must be complied with or the tax can not be collected.

Hughes v. Reis, 40 Cal. 255.

172. The tax collector of the city and county of San Francisco has no authority to add **five per cent.** to an assessment for widening Kearny street, on failure of the owner to pay the assessment when due.

Bucknall v. Story, 36 Cal. 67.

173. If, at the time the board of supervisors of San Francisco acquire jurisdiction to improve a street, and when the contract is entered into, any part of the land fronting on the street to be improved constitutes one lot, the contractor is entitled to have the cost of the improvement made opposite the lot assessed on the whole of the same, in one assessment; and no **subsequent change in**

cutting up the lot by selling parts of the same, can defeat that right.

Dougherty v. Miller, 36 Cal. 83.

174. When a contract is let for improving a street in San Francisco, and the length of the street is afterwards increased, and lots fronting on that portion added to the street are assessed for the improvement, the question arises as to whether the assessment is not void for want of jurisdiction.

Himmelman v. Hoadley, 44 Cal. 276.

175. An assessment for widening a street, void on its face, creates no lien on the property, and a purchaser at the sale does not acquire even a color of title which will operate as a cloud on the true title.

Bucknall v. Story, 46 Cal. 589.

176. If property is assessed for the widening of a street, not to the true owner, but to a stranger, and the owner pays the money to prevent a sale by the tax collector, he will be deemed to have known when he paid it that a sale by the tax collector would be a nullity, and would not invest the purchaser with even a colorable title, and in such case the payment will be deemed voluntary. *Id.*

177. When an assessment is void upon its face, because made to one who does not own the property, and the true owner, with a knowledge of the fact, but under a misapprehension of, or in ignorance of the law, pays the tax under protest, and to avoid a threatened sale of the property by the tax collector, it is to be deemed a voluntary payment, and he can not recover back the money in a suit against the tax collector. *Id.*

178. One who is a party to, and bound by legal proceedings in relation to an assessment for widening a street, can not attack these proceedings for mere error, in a collateral action. His remedy is by appeal. *Id.*

179. An assessment for the improvement of streets is a municipal tax, levied by the corporation upon the property adjacent to the street, to defray the expenses of the improvement, and no demand can be made a set-off against it unless expressly so authorized by the statute.

Himmelman v. Spanagel, 39 Cal. 389.

180. An assessment for street work in the city and county of San Francisco, under the consolidation act, is not "taxation," within the meaning of the thirteenth section of article XI of the constitution.

Chambers v. Satterlee, 40 Cal. 497.

181. An act validating an assessment for improving a street, if of any effect, makes the assessment valid only from the time of its passage. *People v. Kinsman*, 51 Cal. 92.

182. It is the duty of the superintendent of streets in San Francisco, after the fulfillment of a contract to improve the same, to make an assessment on the lots to cover the sum due for the work, and then to issue a

warrant thereon. No time is limited within which the assessment must be made, nor is the fact that a void assessment has already been made an excuse for not making a valid one. *Himmelman v. Cofran*, 36 Cal. 411.

183. An abortive attempt to make a valid street assessment does not exhaust the power of the superintendent, nor does it constitute a good defense to an application for a mandate to require the superintendent to make an assessment in the mode prescribed by law.

Himmelman v. Danos, 36 Cal. 411.

184. Assessments on lots for street improvements, in the city of San Francisco, to be valid, must be made to the true owner, if known; and if not, to "owners unknown."

Himmelman v. Steiner, 38 Cal. 175.

185. It is the duty of the superintendent of streets, if, upon reasonable inquiry, he entertains doubts about the ownership of property to be affected by the assessment, to assess it to "owners unknown." *Id.*

186. The statute prescribing the mode of making assessments does not require the superintendent to act upon presumption or probabilities, nor upon implied or express notice of the existence of facts, in his determination of the question of ownership; neither does it require that he shall undertake to determine the question of ownership as between different parties or claimants. When, from any cause, a rational doubt may exist as to the fact of ownership, he can not, in the sense of the statute, be held to know the fact; and then he is authorized, and required, to assess the premises to owner "unknown," and to leave the risk and responsibility of ascertaining the party who holds the legal title to the party interested in collecting the assessment by an enforcement of the lien. *Id.*

DEMAND AND RETURN.

187. A demand by a contractor against the owner of a lot in San Francisco for an assessment on the lot for street improvements is assignable.

Cochran v. Collins, 29 Cal. 129.

188. A person owning only one half interest in an assessment is competent to make the demand as to the entire assessment.

Gaffney v. Gough, 36 Cal. 104.

189. There are three modes in which demand may be made by the contractor for street assessments, to wit, first, of the person assessed; second, of his agents; and, third, a demand, publicly made, upon the premises assessed.

Guerin v. Reese, 33 Cal. 292.

190. The legal purpose of the demand is to give to the owner, as far as practicable, actual notice of the existence of the lien created by the assessment and resting upon

his property, so as to enable him to take the proper steps for its discharge. Id.

191. The warrant is a process in the hands of the contractor, which he is required to serve, and he will be held to the same measure of diligence in its service as is an officer holding legal process for service. In making the service it is the duty of the contractor first to make a reasonable effort to find and serve the person assessed; failing in this, it is his next duty to make a like effort to find and serve the agent of the person assessed; and only when such first and second efforts have failed, is he authorized to make service by a public demand for the assessments upon the premises assessed. Id.

192. The statute requires the return to state "the nature and character of the demand" made by the contractor. Under this requirement it is incumbent on him, by his return, to show a demand upon the person assessed, or a satisfactory reason why it was not done, before resorting to the other modes of making the demand. Where the return of a contractor to a warrant showed service made as to R. only by a public demand upon the premises assessed, and the only reason stated therefor was "that he [contractor] could not conveniently find R.," *Hell*, that the return was insufficient. Id.

193. When more than one person, either by the original contract, or by assignment from the contractor, is interested in a contract for improving a street in San Francisco, the demand required by the statute, for the payment of the assessment on a lot for improving the street, before the lot can be charged with a lien for the same, is sufficient, if made by one alone of the persons interested in the contract.

Gaffney v. Gough, 36 Cal. 104.

194. The statute does not prescribe any time within which the affidavit of demand shall be recorded by the superintendent of streets. *Himmelman v. Reay*, 38 Cal. 163.

195. In an action by a contractor to recover an assessment on a lot in San Francisco for improving the street, the return of an agent of the plaintiff, indorsed on the warrant for the collection of the assessment, showing a demand of payment of the assessment, is evidence of such demand.

Himmelman v. Hoadley, 44 Cal. 213.

196. When, in such case, the superintendent includes in the assessment on the lot fronting on the old street, the expenses of the work on that part added to the street, it is an error only, but it must be corrected by appeal to the board of supervisors, and it is not a defense in an action to recover the assessment. Id. 276.

197. An agent of an assignee of a street contractor is competent to make the de-

mand of payment of the assessment, and to make return of such demand on the warrant.

Himmelman v. Woolrich, 45 Cal. 249.

198. The assessment, diagram, and warrant, for improvements on a street in San Francisco, must be recorded before the demand of payment and return of the same by affidavit, or a failure to pay the assessment confers no right of action on the contractor. *Himmelman v. Danos*, 35 Cal. 441.

199. Where, in an action to recover a street assessment, a judgment of nonsuit had been rendered because of the insufficiency of the tone of voice in which the demand for payment had been made: *Hell*, that the judgment should not be disturbed because of error in holding the demand insufficient.

Himmelman v. Booth, 53 Cal. 50.

200. A demand for the payment of an assessment levied on a lot for improving a street in a city must be for the amount which is properly chargeable against the lot; and if the assessment is for improving roadway and sidewalk both, and the lot is chargeable only with the cost of improving the roadway, the demand must be for such sum. *Dyer v. Chase*, 52 Cal. 440.

201. A demand for the aggregate sum due on two lots, under a street assessment, is insufficient. The demand should be on each lot, for the amount assessed thereon.

Schirmer v. Hoyt, 54 Cal. 280.

202. When there is a tenant occupying a lot in San Francisco which has been assessed for street work, should not the demand for the payment of the assessment be made upon the tenant? *Quære!*

Himmelman v. Townsend, 49 Cal. 150.

REMEDY BY APPEAL.

203. The owner of a lot sued for street improvements in San Francisco can not show in defense that the contractor did not perform the work according to his contract, if the superintendent of streets has accepted the work as completed. His remedy is an appeal from the decision of the superintendent to the board of supervisors.

Cochran v. Collins, 29 Cal. 129.

204. The remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets that the contractor has fulfilled his contract, is an appeal from such decision to the board of supervisors.

Emery v. Bradford, 29 Cal. 75.

205. An error in determining whether a street contractor in San Francisco had fulfilled his contract is not a jurisdictional defect which vitiates an assessment levied on a lot to pay for the work specified in the contract. Id.

206. In an action by a contractor against

the owner of a lot in San Francisco to recover the tax assessed on the same for work done on the street in front of the lot under a contract with the superintendent of public streets, if the contract was fulfilled to the satisfaction of the superintendent, the defendant can not introduce evidence to prove that the work was not done according to the specifications of the contract nor in accordance with the ordinance. He must appeal. *Id.*

207. An assessment on a lot in San Francisco for a street improvement, if made to one alone of several joint owners, can be corrected only by an appeal to the board of supervisors.

Taylor v. Palmer, 31 Cal. 241.

208. For repairs to the space formed by the intersection of Battery and Market streets, the consolidation act makes no provision, unless the expense of such repairs could be charged as local repairs under section 56, solely upon the lots on the south side of Market street; and this question is not raised.

Bassett v. Enright, 19 Cal. 635.

209. Where a lot is not liable to be assessed for repairs under the consolidation act, the owner thereof is not a party directly interested in the contract, work or assessment within the forty-fifth section, and is not bound to appeal from the assessment. This section does not mean that a mere stranger to the locality must appeal from the assessment to the board of supervisors, or be cut off from his defense. *Id.*

210. By the provisions of said acts the assessment for street improvements and the warrant for the collection of the money from the owners of the lots, chargeable therefor, are required to be put in the hands of the contractor, who then has fifteen days from the date of the warrant within which to examine it, and if found in any respect to be incorrect or illegal, it is made his duty to apply to the board of supervisors, by appeal, to have it corrected and made legal.

Smith v. Cofran, 34 Cal. 310.

211. This power of correction, conferred on the board of supervisors, extends to a case where an assessment had been made by the superintendent against a person not then living, and not to the owner of the lot, or unknown owners, and was therefore illegal and void. *Id.*

212. Said statutes make it the duty of the contractor, if he have any objection to the assessment made by the superintendent of streets, for incorrectness or illegality therein, to appeal to the board of supervisors for that correction; and if he fails to avail himself of this means of protection afforded him by law, in case the assessment be incorrect or void, it is as much his own neglect as of the superintendent of streets, and he can not

hold the latter responsible in damages for the result. *Id.*

213. If the city of Oakland contracts with a corporation, through its president, for the improvement of a street, and the president has not full authority from the corporation to make it, the remedy of the lot-owner is by appeal to the city council.

Oakland Paving Co. v. Rier, 52 Cal. 270.

214. In such a case the defect in the contract is not cured by the failure of the lot-owners to appeal for its correction to the board of supervisors, because, had an appeal been taken, the defect could not have been remedied by the board.

Dougherty v. Hitchcock, 35 Cal. 512.

215. In case of an appeal to supervisors, provided for by law, where the proceedings are sufficient to give them a right to hear it, such right necessarily includes the power to determine it.

Barber v. San Francisco, 42 Cal. 631.

216. Where a contract for street work entered into by the superintendent of streets, is not in compliance with the resolution of the board of supervisors by which it is authorized, the remedy for the aggrieved party is by appeal to the board, and failing to avail himself of that remedy he can not afterward set up such irregularity as a defense to an action to recover the amount of the assessment.

Chambers v. Satterlee, 40 Cal. 493.

217. Where a petition on appeal to the supervisors of San Francisco from a street assessment, based upon the ground that petitioners did the work in front of their premises in time, and were not allowed therefor, omitted to show that petitioners had obtained the certificate from the surveyor required by law (stats. 1867-8, p. 361, sec. 8, subd. 11): *Hell*, that such petition was not bad on account of such omission, or insufficient to give the board jurisdiction.

Barber v. San Francisco, 42 Cal. 631.

218. The San Francisco street law of 1863, in providing for an appeal to the board of supervisors (stats. 1863, p. 530, sec. 12), does not exact from persons objecting to assessment the same strictness and precision in stating their objections, which would be required in a pleading at common law. *Id.*

219. In an action for street assessments in San Francisco, the admission "that after the completion of the work the same was accepted by the superintendent, and no appeal from the decision of the superintendent in reference thereto was taken to the board of supervisors," is conclusive of the case, and judgment should be taken for plaintiff without further proof.

Shepard v. McNeil, 38 Cal. 72.

220. If an appeal lies to the board of supervisors of San Francisco for errors in the

diagram for a street assessment, there is no other remedy.

Dorland v. McGlynn, 47 Cal. 47.

221. When an appeal from an assessment on a lot for improving a street in San Francisco is **taken regularly** and in proper time, the **board has no power to dismiss it**; and even if an order is made dismissing it the assessment does not become a finality, and an action can not be maintained on it.

People v. O'Neil, 51 Cal. 91.

222. In an action upon a street assessment in San Francisco (under the act of April 1, 1872), the defense was that the superintendent of streets entered into the contract before the expiration of five days from the first publication of the award, the period within which, under the sixth section of the act, the property-owners might elect to do the work: *Held*, that the **premature action** of the superintendent was one that **affected his power or jurisdiction**, and was void; and that it did not become valid by a failure to appeal to the board of supervisors.

Burke v. Turney, 54 Cal. 486.

223. In an action upon a street assessment, it appeared that an appeal had been taken from the assessment, which had been **dismissed** upon the report of the city and county attorney; but it did not appear that any testimony was offered by the party appealing: *Held*, that this was consistent with the fact that the only matter urged on the appeal was a question of law, and did not show that the appeal was improperly dismissed. *Mahoney v. Braverman*, 54 Cal. 565.

224. *Held further*, in the same action, that the **assessment was void** because the work was not completed within the time specified in the contract; and that it was **not made valid by the appeal**. *Id.*

LIEN.

225. The charter gives the contractor a **direct lien** upon the adjacent property for his work, but where the city has collected this money from the property-holders she is liable to the contractor therefor, and can be compelled to return the same. The city, being the trustee of the contractor, and also the agent of the property-holders, it follows that a liability created thereby is not a violation of that portion of her charter which limits the power of the corporation in contracting debts.

Lucas v. San Francisco, 7 Cal. 463.

226. A lien for a street assessment **attaches to the lots fronting on the improvement**, as they existed at the time the jurisdiction of the board of supervisors over the subject-matter attached under the statute, and such lien can not be affected by any subsequent changes in lines of the lots or transfers of the property.

Dougherty v. Miller, 36 Cal. 83.

227. A **statute creating a lien** upon a lot in the city, to secure the payment of an assessment levied on the lot for improvements in the street adjacent, **must be strictly construed**, and the proceedings authorized by the statute to create and enforce the lien must be followed precisely as directed, or the whole proceeding will be void. *Creighton v. Manson*, 27 Cal. 613.

228. Under the act of 1862, relating to streets in San Francisco, the **return by the contractor of the warrant of the superintendent of streets, within the time and in the form prescribed in the eleventh section of said act, is essential** to the continuance of the contractor's lien upon the lands, lots, and portions of lots assessed, after the time limited in said act for the contractor to make said return. As the contractor is not entitled to a personal judgment against the person assessed, he is bound to pursue the course specified in said act for the preservation of his lien upon the property charged therewith, otherwise he is without remedy for the collection of the assessments.

Guerin v. Reese, 33 Cal. 292.

229. Before a lien can be created on the land assessed, the **assessment, diagram, and warrant must be recorded, and the record officially signed** by the superintendent of streets.

Himmelman v. Danos, 35 Cal. 441.

230. Until the record is signed there is no official record; it is mere waste paper, of which no one need take notice. *Id.*

231. If at the time a contract in San Francisco is regularly let to improve a street, a lot fronting on the same is owned as one lot, the **owner can not, by selling a part of it before the assessment is made, prevent the whole of it from being assessed as one lot to pay the cost**, and can not, by such sale, prevent the contractor from having a **lien on the whole lot** for such assessment, even if the part sold extends along the entire front next to the street. Such lien attaches to the whole lot, into whosoever hands it may go. *Dougherty v. Miller*, 36 Cal. 83.

232. The jurisdiction of the board of supervisors of San Francisco to improve a street and render a lot fronting on the same liable for an assessment for the costs of such improvement, when it once attaches, **extends to the whole lot** through all the subsequent proceedings, although it may afterwards, and before the assessment is made, be divided by sales to different parties. *Id.*

233. A contractor for the improvement of a street **does not lose** his lien on lots fronting on the same, for the assessments made thereon, **by the mere lapse of two years** before the entry of judgment, from the date of recording the assessment, diagram, and

warrant, provided his action to enforce the lien is commenced within that time.

Randolph v. Bayue, 44 Cal. 366.

234. If an action to enforce a lien for an assessment for improving a street in San Francisco is commenced within two years after the lien attaches, the lien does not expire on the expiration of two years, but continues until the judgment is rendered.

Dorland v. McGlynn, 47 Cal. 47.

Dougherty v. Henarie, Id. 9.

Himmelmänn v. Carpentier, Id. 42.

235. A deed executed under a sale made for the non-payment of an assessment for widening Kearny street, in San Francisco, without other evidence, is not *prima facie* evidence of title.

Bucknall v. Story, 36 Cal. 67.

236. A lien for a street assessment in San Francisco can not be enforced without making all the owners of the property defendants, and serving them all with summons.

Hancock v. Bowman, 49 Cal. 413.

237. A lien for the improvement of a street in San Francisco can not be enforced unless the assessment and diagram as recorded contain a sufficient description of the lot to enable the court to enforce a lien on it.

Himmelmänn v. Bateman, 50 Cal. 11.

238. If an ordinance of a city provides that the city shall have a lien on lots for improvements made by the city on the street, which lien may be enforced by a suit against the owner, to authorize a judgment in favor of the city, enforcing the lien, it is necessary to allege that the defendant owns the lot, and if it is denied, prove it.

Santa Barbara v. Huse, 51 Cal. 217.

239. An action can not be maintained to enforce a lien for a street improvement, which lien did not exist at the time the action was commenced.

Reis v. Graff, 51 Cal. 86.

240. The assistant city and county attorney of San Francisco has no authority to commence an action under the act of April 4, 1870, to enforce the lien on a lot for an assessment for improving a street until after the tax collector of the city and county shall have published a notice for the period of thirty days that the assessment is in his hands for collection, and that the same will be delinquent if not paid in that time.

People v. Reay, 52 Cal. 423.

241. Where two or more lots are separately assessed for the expense of improving a street, each lot is chargeable only with the amount assessed upon it, and in enforcing the lien, the judgment should state the amount for which each lot is liable, and should order a sale of each lot, or so much thereof as may be necessary to satisfy such amount and costs.

Brady v. Kelly, 52 Cal. 371.

PUBLICATION OF NOTICE.

242. Sundays are included in the count of the "ten days" which a resolution of the board of supervisors of San Francisco, declaratory of an intention to perform work on a street, is required to be published.

Taylor v. Palmer, 31 Cal. 240.

243. A resolution of the board of supervisors of San Francisco, declaratory of their intention to perform such work on a street, need be only published ten days, Sundays included.

Miles v. McDermott, 31 Cal. 271.

244. Where, under the statute, a notice of intention to make street improvements, etc., in San Francisco, was required to be published daily (Sundays excepted) for ten days, in the newspaper having the contract for the city and county printing, which paper is required to be printed and circulated in said city; and when such notice was only printed in such paper for only eight out of ten consecutive days (the remaining two days not being Sundays), but on said two days no issues were made by said paper: *Held*, that the notice by publication was insufficient and void.

Haskell v. Bartlett, 34 Cal. 281.

245. To constitute a publication in a city paper, it must appear that the paper is both published and circulated in the city, the former alone being insufficient.

Id.

246. Where such a daily newspaper, having the contract for said city and county printing, issued daily two editions, to wit, a morning edition, which was circulated in said city and the country, and an evening edition, which was circulated in the country only: *Held*, that the publication of notice of street improvements in the evening edition of said paper only was insufficient and void.

Id.

247. Where a statute requires a notice to be published in a daily newspaper, but does not specify a particular language in which it must be published, a publication in a German newspaper, but in the English language, is sufficient.

Richardson v. Tobin, 45 Cal. 30.

248. A newspaper which is published six days in each week is a daily newspaper.

Id.

249. The publication of notice of an award of a street contract in San Francisco must be made in pursuance of an order of the board of supervisors. Without such order a publication of such notice is void.

Donnelly v. Marks, 47 Cal. 187.

Donnelly v. Tillmann, Id. 40.

Reis v. Groff, 51 Id. 86.

250. The notice of an award of a contract for improving a street in San Francisco, must be published by order of the board of supervisors. The clerk of the board can not

publish it without being authorized so to do by the board.

Himmelmann v. Satterlee, 49 Cal. 387.

251. A resolution of intention to improve a street in San Francisco, under the act of April 4, 1870, must be published **five days**, exclusive of Sundays or non-judicial days; and if the **last day** of a publication of five days falls on **Sunday**, the board does not acquire jurisdiction.

San Francisco v. McCain, 50 Cal. 210.

252. When the resolution of intention to improve a street in San Francisco requires the street to be graded to the official grade, and two notices are published inviting sealed proposals, and the record only contains the first notice, which requires the street to be graded one foot below the official grade, and is not published five days, and the award is made under the second notice, and judgment was for the plaintiff, the presumption is that the second notice was in accordance with the resolution of intention, and was published for the requisite time.

Himmelmann v. Carpentier, 47 Cal. 42.

253. In an action to recover a street assessment in San Francisco, the **complainant must allege** that the notice of the award of the contract was published by order of the board of supervisors.

Himmelmann v. Townsend, 49 Cal. 150.

PERSONAL LIABILITY.

254. The legislature has not, by the consolidation act for the government of San Francisco, and the amendments thereto prior to 1862, done anything more than to provide for a lien upon the lots adjacent to a street for improvements made on the street, and define the manner in which the same may be enforced. These acts do not create any personal liability on the part of the owners of such lots for such improvements, nor does the amendment of 1862 create any personal liability for work done or to be done under contracts entered into before its passage.

Creighton v. Manson, 27 Cal. 613.

255. The owner of land in a municipal corporation, bordering upon an improved street, can not be made liable for the cost of the improvement beyond the value of his land.

Taylor v. Palmer, 31 Cal. 240.

256. The legislature has not the power to charge the persons who reside on a street in a city with the expenses of an improvement on that street.

Creighton v. Manson, 27 Cal. 613.

LIABILITY OF CITY.

257. When the law compels the corporation to give out a contract for grading a street to the lowest bidder, it takes away from the corporation the responsibility arising

from the acts of the person taking the contract. *James v. San Francisco*, 6 Cal. 528.

258. The liability of the city for street improvements is limited to the expense of improving the crossings. The remainder is to be paid by the property fronting upon the streets. The city, in contracting as to the latter, must be regarded as the mere agent or trustee, and is therefore not primarily liable. *Lucas v. San Francisco*, 7 Cal. 443.

259. The act known as the consolidation act, passed in 1856, released the city and county of San Francisco from all liability for damages for injuries sustained by any person on its graded streets or public highways, in consequence of said streets or highways being out of repair.

Parsons v. San Francisco, 23 Cal. 462.

260. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as, for the time, made them dangerous.

James v. San Francisco, 6 Cal. 528.

LIABILITY OF STREET RAILROAD.

261. Companies operating street railroads in San Francisco are only required to keep in repair that part of the street lying between the rails along which the cars run and between which the horses travel. They are not required to repair that part of the street lying between a double track.

Robbins v. O. R. R. Co., 32 Cal. 472.

FRONTAGE, WHAT CONSTITUTES.

262. The clause in the sixth section of the act of 1862, amending the consolidation act relating to San Francisco, allowing the owners of the major part of the frontage of lots liable to be assessed for street improvements to take a contract at the price awarded without having put in a bid, means, in those cases where a small street terminates in a principal street, the owners of the major part of the frontage on the principal street.

Cochran v. Collins, 29 Cal. 129.

263. An assessment for improving a street in a city is a tax, and therefore must be levied with equality and uniformity. But if it be so levied under a system which apportions it with reference to the number of feet fronting on the improvement, or by any other standard which will approximate equality and uniformity, it is not void.

Whiting v. Quackenbush, 54 Cal. 306.

ACTION.

264. In suing a lot-owner for a street assessment, the contractor is *quasi* assignee or agent of the city, and is vested with all her rights. *Hendrick v. Crowley*, 31 Cal. 471.

265. If A. owns a lot on a street to be

improved, and takes the contract, and then assigns to B., who performs the contract, B. may sue A. for the assessment against his lot. *Id.*

266. An action to recover an assessment for improving a street in San Francisco should be brought in the name of the contractor, and not in the name of the city.

Dyer v. North, 44 Cal. 157.

267. The act of April 4, 1870, requiring actions to recover street assessments in San Francisco to be brought in the name of the city and county of San Francisco, instead of being brought in the name of the contractor, as was required by law before that time, does not apply to contracts for improving streets, entered into before April 4, 1870.

Dyer v. Pixley, 44 Cal. 153.

268. If the owner of a lot in a city pays an assessment levied on the same for improving it, which is illegal and void, it will be regarded as a voluntary payment, and he can not recover it back in an action at law against the officer, even if it was paid under protest after a threatened sale.

De Baker v. Carillo, 52 Cal. 473.

Complaint.

269. A complaint to recover the amount assessed on a lot in the city of San Francisco, for an improvement of the street on which the lot fronts, should show either by general or special averments a compliance by the board of supervisors with all the steps prescribed by law, to confer jurisdiction on the board.

Himmelman v. Danos, 35 Cal. 441.

270. An averment in a complaint in an action to recover upon a street assessment in San Francisco, that "the said superintendent duly made an assessment to cover the sum due for the work performed and specified in said contract, including the expenses thereof," is a sufficient averment of the assessment.

Himmelman v. Woolrich, 45 Cal. 249.

271. It is not necessary to aver in such complaint that the board of supervisors ordered their clerk to sign the resolution of intention to grade a street. *Id.*

272. It is not necessary in such action to aver that notice of the intention of the board was given in the resolution, nor to give the name of the official newspaper; and it is sufficient to aver that the contract "was in the form and contained the notices, matters, and conditions prescribed by law," and to aver that the work was completed within the time fixed by the superintendent. *Id.*

273. The power of the legislature to prescribe the requirements of a complaint in actions relative to assessments for street work, admitted by counsel.

Richardson v. Tobin, 45 Cal. 30.

274. In an action to recover a street assessment in San Francisco, an averment

that a resolution to do the work was passed by the board of supervisors, and that the resolution was signed by the clerk, and published ten days (Sundays excepted) in the official newspaper, is sufficient to support a judgment by default, or to authorize proof that the board directed the resolution to be published.

Dyer v. North, 44 Cal. 157.

275. In a complaint to recover an assessment for improving a street in San Francisco, it is sufficient to aver that notice of the award of the contract to the contractor, and the particulars thereof, were published for five days, without alleging that the board of supervisors passed a resolution directing notice of the award, etc., to be published.

Himmelman v. Haskell, 46 Cal. 66.

276. The fact that an assessment was made and issued is a material averment in a complaint to enforce the collection of street assessment in San Francisco.

San Francisco v. Eaton, 46 Cal. 100.

277. Laying the venue in the caption of a street assessment, by inserting the words "state of California, city and county of San Francisco, ss.," is sufficient to show that the property sought to be charged is within the jurisdiction of the superintendent of streets of that city and county.

Whiting v. Quackenbush, 54 Cal. 306.

278. The complaint, in an action to enforce a lien for a street assessment in San Francisco, must aver that the defendants are the owners of, or have some interest in the land sought to be charged with the alleged lien.

San Francisco v. Doe, 48 Cal. 560.

279. When the complaint does not allege the several steps to be pursued, required by the statute concerning street improvements, it is fatally defective.

Himmelman v. Danos, 55 Cal. 441.

280. The plaintiff, in an action to recover an assessment for improving a street in San Francisco, can not recover, except upon the presumption that a notice of intention to improve, containing a proper designation of the work to be done, was given, and that the contracts afterward awarded substantially conformed to the description of the proposed work as given in the notice.

People v. Clark, 47 Cal. 456.

281. When such notice is not set forth in the complaint, and a contract is set forth, it will be presumed that the contract given, conformed in its description of the work to the description in the notice, and if the description in the contract is for work on the street designated "where necessary," the complaint is fatally defective. *Id.*

Defenses.

282. In an action to recover an assessment for street improvements against the owners of the lot and certain persons who "have,

or claim to have," an interest or claim in, or to the premises, the nature and extent of such interest or claim must be set up before they can be admitted to defend the action. *Himmelmann v. Spanagel*, 39 Cal. 389.

283. The law of 1869-70, concerning street assessments in San Francisco, which prohibits any defense, except that the board did not acquire jurisdiction to order the work, or payment, or fraud in the assessment, was not intended to prevent the defendant from denying material averments in a complaint, but was merely intended to restrict affirmative defenses to those mentioned. *San Francisco v. Eaton*, 46 Cal. 100.

284. Damages for injury to the property against which the assessment was issued can not be set up as a counter claim in an action to recover an assessment for the improvement of the street.

Himmelmann v. Spanagel, 39 Cal. 389.

285. If the contractor, to improve streets in San Francisco, makes a private fraudulent contract with a part of the owners, it is no defense in an action brought by the contractor against another lot-owner to recover his assessment. If such fraud is not discovered in time to appeal to the board of supervisors, relief can only be obtained by a direct attack on the contract.

Himmelmann v. Hoadley, 44 Cal. 213.

286. In an action to recover an assessment levied on a lot for grading a street in a city, the lot-owner may show and rely on, as a defense, any substantial error in the proceedings which could not have been remedied by an appeal to the council.

Stockton v. Creanor, 45 Cal. 643.

287. H., a contractor to make certain street improvements, agreed with R., whose property was assessed for the improvement, and to whom H. was indebted, that H.'s debt might be credited by the amount of R.'s assessment. Before any work was done by H., he assigned his contract for making the improvement to D., who did the work, and afterwards assigned his claim for the improvements to the plaintiff. Neither D. nor plaintiff had any notice of the agreement between H. and R. In an action by plaintiff against R. for the amount of his assessment, it was held, that the indebtedness from H. to R. furnished no ground for a counter claim.

Himmelmann v. Reay, 38 Cal. 163.

288. The title to a lot on which an assessment for street improvements in San Francisco is made, if put in issue by the pleadings in an action for the assessment, may be litigated in that action.

Taylor v. Donner, 31 Cal. 480.

Evidence.

289. The thirteenth section of the statute in relation to street improvements in San

Francisco, to the effect that the assessment, warrant, and diagram, with the affidavit of demand and non-payment, shall be *prima facie* evidence of the defendant's indebtedness, does not establish a rule of pleading, but a rule of evidence only.

Himmelmann v. Danos, 35 Cal. 441.

290. A provision in a city charter which declares that the delinquent tax list on an assessment for grading a street shall be evidence to prove "that all the forms of law in relation to the levy and assessment had been complied with," does not make it conclusive evidence, but the lot-owner may go behind the same and show a substantial error in the proceedings. *Stockton v. Creanor*, 45 Cal. 643.

291. *Held*, that the provision of the statute, making the assessment, warrant, etc., *prima facie* evidence of the plaintiff's right to recover, is a rule of evidence, and not of pleading; and it was, therefore, competent for the defendants to disprove the presumption thus arising, by proving that the contract was prematurely made; that the defense is not an affirmative defense, and it is, therefore, unnecessary to decide whether the legislature can deprive a defendant of other defenses than those specified in the statute.

Burke v. Turney, 54 Cal. 486.

292. In an action upon a street assessment it appeared that ten days before the order of the board of supervisors directing the clerk to advertise for bids written objections were filed by the owners of more than one half in frontage of lots fronting on the improvement: *Held*, that under the first section of the act of 1863, relating to street improvements in San Francisco, such written objections displaced the *prima facie* proof of regularity made by the warrant, assessment, and diagram, and threw upon the plaintiff the burden of showing that the bar effected by the objections had been removed. *Dougherty v. Harrison*, 54 Cal. 423.

293. The ninth section of the act of April 4, 1870, as to street assessments in San Francisco, did not have the effect of changing the rule of evidence fixed in the fourth section of the act of March 26, 1868, which provides that the warrant, assessment, and diagram, with the affidavit and demand of non-payment, shall be *prima facie* evidence of the plaintiff's right to recover, so as to compel the plaintiff to prove all prior proceedings, but, under said act of 1870, the assessment or assessments, or original record thereof, are *prima facie* evidence of the plaintiff's right to recover.

Himmelmann v. Carpentier, 47 Cal. 42.

294. The records of the board of supervisors of San Francisco, concerning the publication of notices of the award of contracts for street improvements, can not be contradicted by parol evidence.

Dorland v. McGlynn, 47 Cal. 47.

Judgment.

295. A personal judgment can not be rendered against the owner of a lot in San Francisco for a street assessment. The lot may be charged with a lien for the assessment.

Gaffney v. Gough, 36 Cal. 104.
Couill v. Hastings, Id. 292.

Affirming *Taylor v. Palmer*, 31 Cal. 241.

296. A contractor who improves a street in a city, under a contract with the city authorities, for which improvement an assessment is made on lots fronting on the street, is not entitled to a personal judgment against the lot-owner for the amount assessed against the lot.

Randolph v. Bayue, 44 Cal. 366.

297. Upon the question whether a judgment is merely voidable or absolutely void, there is no distinction between judgments for taxes and judgments for other causes of action.

Mayo v. Ah Loy, 32 Cal. 477.

298. Although property on I street can not be lawfully taxed for improvements on J street, yet if it is done, and suit is brought and service of process obtained and judgment rendered as required by law, the judgment is not void, but only erroneous and liable to be reversed on appeal.

Id.

299. If the owner of the property assessed for street improvements in Sacramento is not made a party to a suit to collect the same, and the action is not brought against "all owners and claimants," and service is not made on the real estate, the judgment is void.

Id.

300. In an action to enforce a street assessment, judgment was entered against all the defendants except one, who had not been served with process, and who was alleged in the complaint to be interested: *Held*, that the judgment was erroneous: First, because the case had not been disposed of as to the defendant not served; and, second, because, in such a case as this, the statute gives no authority for a decree enforcing the lien, in the absence of any of the parties interested.

Diggins v. Reay, 54 Cal. 522.

301. In an action brought on a street assessment, in which it is admitted by the pleadings that several defendants are the owners of the lot, it is erroneous to order judgment for the amount of the assessment against only one of the defendants.

Clark v. Porter, 53 Cal. 409.

INTEREST.

302. A judgment rendered for street assessments in San Francisco draws interest from the time of its rendition.

Himmelmann v. Oliver, 34 Cal. 246.

303. Street assessments in San Francisco are not contracts within the meaning of the statute in relation to interest, nor by any

statute is interest allowable on street warrants issued for street improvements in that city.

Haskell v. Bartlett, 34 Cal. 281.

304. Street assessments in San Francisco do not draw interest.

Himmelmann v. Oliver, 34 Cal. 246.
(Altered by statute.)

305. Interest may be allowed on a street assessment in San Francisco, if the assessment has been made subsequent to the passage of the act of March 26, 1868, notwithstanding the contract for the work was awarded prior to that date.

Dougherty v. Henarie, 47 Cal. 9.

ESTIMATE OF BENEFITS.

306. It is not erroneous for commissioners appointed to estimate the benefits that will result to property-holders by the widening of a street, to assess the same upon the hypothesis that all lots on the street will be benefited in the ratio of their values, provided there is evidence warranting such a conclusion.

Appeal of Piper, 32 Cal. 530.

307. If commissioners appointed to assess damages and estimate benefits to lot-owners for widening a street, apportion the amount of money to be raised into two or more parts, one part on the property-holders of the street to be widened, and another part on the owners of property fronting on the cross streets determined to be benefited, and no complaint is made as to the correctness of this apportionment, the owners of lots on the street to be improved can not complain of the manner in which the part apportioned to the cross streets is afterward apportioned among the property-holders on those streets, and *vice versa*.

Id.

308. The benefits resulting from the widening of a street accrue to the owner through his estate in the land, whether the estate be a fee or a leasehold, and not through the buildings thereon. The enhancement in value accrues to the land, not to the buildings.

Id.

309. A statute authorizing the assessment of a portion of the expenses for widening a street in a city upon lots benefited, situate on cross streets adjacent to the street to be widened, is constitutional.

Id.

310. A statute authorizing the board of supervisors of the city and county of San Francisco to determine what part of the city will be benefited by the widening of a street, and to assess the expense of the improvement upon the specific portion of the city thus determined to be peculiarly benefited, is constitutional.

Id.

311. The determination of the commissioners, in the matter of widening Kearny street in San Francisco, as to who is the owner of a lot, or a building thereon, and entitled to the money to be paid for damages estimated, is not conclusive; but where the

right to the money is contested, the board of supervisors should pay the amount into the office of the county clerk, and leave the contest between the claimants to be settled by the courts in pursuance of the provisions of the statute. Appeal of Lefevre, 32 Cal. 565.

312. The commissioners appointed to estimate benefits and assess damages for widening a street in San Francisco under the act of April 4, 1864, may properly assess the expenses to be borne by a lot which is under lease, to the owner of the fee, where the benefits all accrue to such owner, without apportioning any part of the same to the lessee. Appeal of Reese, 32 Cal. 566.

EFFECT OF REPEAL.

313. The consolidation act of 1856, as amended in 1859, authorized the city authorities of San Francisco to enter into contracts with individuals for grading its streets, and provided that the charges under the contract should be borne by the owners of the adjacent lots. Section 59 authorized a contractor, upon the completion of his work, to sue each delinquent owner for the amount of his assessment. In March, 1861, a contract was entered into with plaintiff for grading a certain street, and the work under it was completed by him in April. May 18, 1861, an act was passed repealing section 59. In August, 1861, plaintiff commenced the present action against one of the delinquent owners to recover the amount assessed against him; *Held*, that plaintiff's right to maintain the action was not impaired by the repealing act; that the right to sue the property-owners was a part of the contract, and could not be taken away by legislation subsequent to his performance of the work.

Creighton v. Pragg, 21 Cal. 115.

314. That part of section 37 of the consolidation act of San Francisco, which speaks of a "space formed by the junction of two streets terminating at the same point," does not mean a space formed by the intersection of two streets; or the space formed where one street intersects and stops at another street which continues on—as where Battery intersects and stops at Market street; and for repairs to such space all the lots in the block adjoining the space can not be assessed, the latter part of section 37 not applying to such a case, and the provision therein for assessing all the lots where the streets are not parallel, and hence the blocks are of irregular shape, also being inapplicable.

Bassett v. Enright, 19 Cal. 635.

315. The plaintiff, in November, 1860, entered into a contract for the improvement of streets in San Francisco under the law of 1859, which provided that for payment an assessment should be levied upon the adjacent lots in proportion to their respective values. Before the completion of the work,

the amendatory act of 1861 was passed, providing for an assessment in payment of such contracts according to the street frontage of each lot: *Held*, that the provisions of the law of 1859 respecting the mode of assessment was part of the contract, and that the assessment, though made after the amendatory act, must be in the mode prescribed by the old law.

Houston v. McKenna, 22 Cal. 550.

316. The law making the assessment, warrant, and diagram, with affidavit of demand and non-payment, *prima facie* evidence of the indebtedness and right to recover, in an action to enforce a lien for a street assessment in San Francisco, was not repealed by the act of April 4, 1870, on the same subject.

Dorland v. McGlynn, 47 Cal. 47.

CONSTRUCTION OF STATUTES.

317. The constitution does not prohibit the legislature, or municipal authorities acting under authority of law, from imposing assessments upon lots in a city fronting on a street to defray the expenses of improvements of the street in the nature of grading and planking.

Emery v. S. F. Gas Co., 28 Cal. 345.

318. It rests in the discretion of the legislature to say upon what principle the assessment on lots fronting on a street, to pay for improvements on the street, shall be apportioned among the lots. *Id.*

319. The provisions of the statute concerning assessments of taxes on lots in San Francisco for street improvements, must be strictly followed in order to charge the lot or the owner. This rule is universal, and applies to all statutes upon the subject of taxation, whether for local improvements or public revenue.

Taylor v. Donner, 31 Cal. 480.

320. The liability of owners of property in San Francisco for assessments made by the city authorities for repairing the streets depends on the statute, and only inures after the steps required by the statute have been taken. Blanchard v. Beideman, 18 Cal. 261.

321. Under the act of 1859 the board of supervisors of San Francisco have power to provide for the grading of all located streets, whether new or old, and as well of those lying east of Larkin street as to the west of it.

Houston v. McKenna, 22 Cal. 550.

322. An assessment levied by a municipal government upon lots adjacent to a street to pay for improvements made on the street, if held to be a tax, can not be maintained, because it lacks the constitutional requirement of equality and uniformity.

Creighton v. Manson, 27 Cal. 613.

323. If, under the power to take private property for public uses upon making a just compensation therefor, the legislature pos-

asses the power to levy an **assessment** upon lots in a city adjacent to a street to pay for improvements made on the street, the assessment can **not exceed the value of the benefit** conferred on the lot or its owner by the improvement, and can be enforced only by proceedings to subject the lot to a sale in discharge of the lien. *Id.*

324. An assessment upon the different lots fronting on a street in a city in proportion to the number of feet frontage of each, for the purpose of raising money to pay the expenses of grading the street, is an **exercise of the sovereign right of taxation**, and not of the power to appropriate private property to public use under the right of eminent domain.

Emery v. S. F. Gas Co., 28 Cal. 345.

325. The act of 1862, making the **owner** of a lot fronting on a public street in San Francisco **personally liable** to a contractor for an assessment on the lot for improvements on the street in front of the lot, and giving the contractor, also a lien on the lot for the same, is not unconstitutional.

Walsh v. Mathews, 29 Cal. 123.

326. The lot-owner is not held liable on the theory that there is a contract between him and the street contractor. The **assessment** is levied and collected **by virtue of the sovereign power of taxation**, and its validity depends upon the same general principles applicable to taxes proper levied for ordinary governmental purposes.

Emery v. Bradford, 20 Cal. 75.

327. In actions to recover street assessments for street improvements a **strict compliance** with the provisions of law authorizing them must be shown to sustain a recovery. *Haskell v. Bartlett*, 34 Cal. 281.

328. The circumstances that the contract under which Patrick Creighton did certain street work in San Francisco expressly provided that the city should in no event be liable for any portion of the expenses thereof: *Held*, not to affect or in any manner invalidate the special act subsequently passed by the legislature (stats. 1869-70, p. 300), requiring the city to pay him.

Creighton v. San Francisco, 42 Cal. 446.

329. The amendatory act of February 1, 1870, ratifying and confirming all the orders and resolutions of the board of supervisors in reference to the "Second street cut" in San Francisco, and the proceedings of the superintendent of streets, and the contract, and all the acts and doings of the contractor under it (stats. 1869-70, p. 41), cured an omission of the supervisors to publish notice as required by the original act authorizing the improvement. (Stats. 1867-8, p. 595.)

S. F. v. Certain Real Estate, 42 Cal. 513.

330. In reference to proceedings of statutory creation for the improvement of certain streets in San Francisco: *Held*, that it

was competent for the legislature, by subsequent enactment, to **cure any defects or omissions** in the proceedings of the board of supervisors or superintendent of streets. *Id.*

331. The only obligation imposed upon the city and county of San Francisco, by section 21 of the street law of 1862 (stats. 1862, p. 391), if there be any, is to keep open and improved that portion of the street **constructed and "accepted"** in accordance therewith; and there is no obligation on the part of the city and county to pay assessments upon property for benefits derived from the opening and improvement of other portions of the same street. *Id.*

332. The act of February 1, 1870, in reference to the "Second street cut" in San Francisco (stats. 1869-70, p. 41), in providing that the judgment of the county court, either confirming or setting aside the report of the commissioners, should be "final and conclusive," obviously contemplated that all objections to the report founded upon the errors, misconduct, irregularities or omissions of the commissioners, should be heard and determined by the county court, and that it should not thereafter be open to attack in a collateral action. *Id.*

333. If an act commands a municipal body to proceed and grade a certain street, prescribing the way and manner of doing the same, and the grade to be adopted, and leaving nothing to the discretion of the municipal body, except certain incidents to the main work, courts will not construe the act as not mandatory because these incidents are left to the discretion of the body.

People v. Supervisors, 36 Cal. 595.

334. The acts of 1868 and 1870, to modify the grades of streets in San Francisco, in declaring that the judgment of the county court on the second report of the commissioners shall be "**final and conclusive**," means that there shall be **no appeal** from the judgment, and that it shall not be reviewed by the county court, except by motion for a new trial.

Appeal of Houghton, 42 Cal. 35.

335. The board of supervisors of the city and county of San Francisco has jurisdiction to **order a street to be graded** in any part of the city, **without a petition** first presented for that purpose, except when it is proposed to partially improve or grade a street west of Larkin street, without reference to its official width or grade.

Dyer v. North, 44 Cal. 157.

336. The legislature did not intend by the act of January 31, 1870, relative to the opening of streets in Oakland, to authorize the city council to proceed to open, extend, straighten, or widen any street, except in cases where the council were satisfied that the benefits to lands affected thereby, and to be assessed therefor, would exceed the dam-

ages to private property necessarily occasioned, and the expenses of the proceeding and work. *Jacobus v. Oakland*, 42 Cal. 21.

337. The board of supervisors of San Francisco can not by resolution transfer its appropriate functions to its clerk.

Meuser v. Risdon, 36 Cal. 239.

338. The power conferred on a board of supervisors to lay out, open, and grade streets in a city, carries with it, by necessary implication, the power to establish the grade of such streets.

Himmelmann v. Hoadley, 44 Cal. 213.

339. An order of a board of supervisors, establishing the location, width, and grade of streets, if passed without authority, is rendered valid by being subsequently confirmed by the legislature. *Id.*

340. Where the proceedings are free from fraud, and have been regularly conducted, the change of grade is absolutely fixed by the act of the board of supervisors in adopting the report of the commissioners.

In re Beale street, 39 Cal. 495.

341. What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, can not change the location of premises actually granted, or impair the right of the grantee therein. The taking of a part of a lot from an individual for the purpose of a public street, though it may, perhaps, give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Reynolds v. West*, 1 Cal. 322.

342. So far as the lot-owner is concerned, the city of San Francisco can not by its act ratify proceedings taken to grade a street, and impose an assessment on the lot for the same, so as to make the same valid, when they were invalid in the first instance. The power of ratification, if it exists, is in the legislature. *Meuser v. Risdon*, 36 Cal. 239.

343. The evident policy of the general law upon the subject of street improvements in San Francisco, as passed in 1862 and amended in 1863 (stats. 1862, p. 391; 1863, p. 525), is to secure and protect the persons who are made to pay the cost of the improvement from official mismanagement and wanton or reckless exercise of power, by advising them of what is proposed to be done, by enabling them to do the work themselves, if they so elect, and especially by securing the performance of the work by responsible persons, and upon the lowest terms. This policy can not be defeated by the board of supervisors, by setting aside the measures which have been provided for its enforcement.

Nicolson P. Co. v. Painter, 35 Cal. 660.

344. The act approved March 19, 1874 (stats. 1873-4, p. 487), validating street

assessments in San Francisco, if it has the effect to make assessments valid, operated on them only when it took effect, and, therefore, did not validate defective assessments in cases where actions were pending when the act was approved.

People v. McCain, 51 Cal. 360.

345. An act validating a void assessment for the improvement of a street, if constitutional, makes the assessment valid only from the date of its passage, so that pending suits brought to enforce the tax are not affected by the act.

People v. O'Neil, 51 Cal. 91.

AUTHENTICATION OF RECORDS OF STREET SUPERINTENDENT.

346. An assessment made by the superintendent of streets of San Francisco, to cover the sum due for the improvement of a street, is an official act, and must be attested by his official signature.

Dougherty v. Hitchcock, 35 Cal. 512.

347. An assessment not thus officially attested, though attached to the diagram and the superintendent's warrant, which were in due form and properly attested, does not constitute a valid assessment, and is not admissible in evidence, either by itself or in connection with the warrant and diagram. *Id.*

348. When the assessment, diagram, and warrant, and sworn return of demand of payment for a street improvement in San Francisco are recorded in the office of the superintendent of streets, a certificate of their recording should be attached to the same, signed by the superintendent. Without such certificate, the record is valueless. Whether such certificate should be affixed to the separate record of the assessment, diagram, and warrant, not decided.

Himmelmann v. Danos, 35 Cal. 441.

349. If the superintendent "originally" fails to authenticate his record by his official signature, it is his duty afterwards to make a valid assessment.

Shepard v. McNeil, 38 Cal. 73.

350. The proper mode for authenticating the record of the assessment, diagram, and warrant, in cases of a tax on lots for improving or grading a street in San Francisco, is to append thereto the official certificate of the officer whose duty it is to make the record. The assessment need not have a separate certificate.

Himmelmann v. Hoadley, 44 Cal. 213.

351. Such certificate need not specify the pages upon which the assessment, diagram, and warrant are copied; but if it does it will be limited to the pages specified, unless the record itself shows that the reference to the pages is a clerical error. *Id.*

352. When such record is copied upon six pages, ending with page 79, and the cer-

tificate states that "the foregoing on pages No. 79 is a true and correct record of the assessment, diagram, and warrant," it is apparent that the omission of the five preceding pages was a mere clerical error. Id.

353. The certificate authenticating the record of the assessment, diagram, and warrant, in case of tax on a street for improving the same in San Francisco, may be signed by a deputy of the street superintendent, in the name of his principal, and such deputy need not affix the word "deputy" to his signature if the certificate purports in the body of it to be the official signature of the principal. Id.

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ISSUANCE OF SUMMONS.

Waived by Appearance.

1. A voluntary appearance by a defendant gives jurisdiction of his person without the issuance of any summons. This was equally the case under the practice act as it stood in 1855.

Hayes v. Shattuck, 21 Cal. 51.

2. The only object of a summons is to bring a party into court, and if that object be attained by the appearance and pleading of a party, there can be no injury to him.

Smith v. Curtis, 7 Cal. 587.

3. The only purpose of a summons is to bring the defendant into court, and if he appears and answers, he waives any defect in the summons.

Randall v. Falkner, 41 Cal. 242.

4. The party not served with process, in an action against defendants jointly indebted (under the thirty-second section of

the practice act), is not a proper party defendant in action upon the judgment against the party on whom service of process was made. *Tay v. Hawley*, 39 Cal. 93.

5. The validity of the thirty-second section of the practice act, so far as it authorizes a judgment or an execution against any of the property of the party not served, commented on, and questioned. *Id.*

6. A notice signed by attorneys, and filed with the clerk after a complaint has been filed, stating that "we have been retained by, and hereby appear for, the above-named defendant, in the above-entitled action," is a sufficient appearance of the defendant, and is a waiver of summons, and judgment by default may be entered, if pleadings are not filed in the proper time.

Dyer v. North, 44 Cal. 157.

May Issue within One Year.

7. If the court is authorized to direct a summons to issue after the expiration of the year, the exercise of the power rests in the legal discretion of the court, and its action will not be set aside on appeal, unless it clearly appears that the discretion was not soundly exercised.

Dupuy v. Shear, 29 Cal. 238.

8. Since the amendment of 1860 to the twenty-third section of the practice act, the clerk is not authorized to issue a summons in an action, without an order from the court, after the expiration of one year from the filing of the complaint. This principle applies as well to causes in which the complaint was filed before, as to those in which the complaint was filed after the amendment took effect. *Id.*

9. When a plaintiff commences an action by filing a complaint and issuing summons, but makes no service on the defendant until nine years have elapsed, an order of the court, made on defendant's motion, striking out the complaint for want of prosecution, is not such an abuse of discretion as to justify the appellate court in reversing the order. *Id.*

10. A summons is not issued within one year after filing the complaint, within the meaning of the twenty-third section of the practice act, unless, within one year after filing the complaint, both a summons and a certified copy of the complaint, properly prepared and certified, are placed at the disposal of the party for service.

Reynolds v. Page, 35 Cal. 206.

11. Unless the summons and a certified copy of the complaint, duly attested and in a condition to serve, are placed at the disposal of plaintiff for service, within one year from the filing of the complaint, the action should be dismissed. *Id.*

12. The clerk of the district court is authorized, on demand of the plaintiff, and

without an order of court, to issue an alias summons after the expiration of the year during which the original must be issued.

Dunker v. Lutz, 48 Cal. 464.

13. Section 406 of the code of civil procedure, requiring the summons to be served within one year after filing the complaint, is mandatory.

Linden M. Co. v. Sheplar, 53 Cal. 245.

REQUISITES OF.

14. If the summons be radically defective, it will not support a judgment by default.

People v. Woodlief, 2 Cal. 241.

People v. Green, 52 *Id.* 577.

15. Where the summons was headed with the words, "district court," but was issued out of the county court, under the county court seal, and tested by the judge of said court, it was held good as the writ of the county court. *Crane v. Brannan*, 3 Cal. 192.

16. A statement in a summons, that "the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-one dollars and twelve cents, and interest at three per cent. per month from November 14, 1863, and the further sum of eleven dollars and twenty cents, and the costs of this action," is sufficient to answer the twenty-fourth section of the practice act, as a copy of the complaint is served with the summons.

King v. Blood, 41 Cal. 314.

17. The provisions in the twenty-fourth section of the practice act as to what the summons shall state, are not merely directory, but are mandatory.

Lyman v. Milton, 44 Cal. 630.

18. A summons must state the names of all the parties to the action. Where there are several parties defendant, it is not sufficient to give the name of one in the summons, followed by the words "et al." *Id.*

19. The question of the right to amend a summons by inserting the names of the defendants after motion to dismiss, spoken of. *Id.*

20. The court may allow a summons to be amended by inserting the notice of the cause of action, etc., required by the act of 1851.

Pollock v. Hunt, 2 Cal. 193.

21. A judgment rendered by default will be reversed if the summons was radically defective. The summons must state the cause or general nature of the action.

People v. Green, 52 Cal. 577.

22. In actions for fraud, the summons must apprise the defendant that on failure to answer, judgment will be taken against him for the fraud. A mere notice in the summons that a money judgment will be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

23. In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons is served on all defendants in that county, but a copy of the complaint on one only, the summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint.

Calderwood v. Brooks, 28 Cal. 151.

24. In an action for the recovery of a district school tax, the summons must contain a notice that "unless the defendant appears and answers, the plaintiff will apply to the courts for the relief demanded." The clerk is not authorized to enter a default in such an action. He is limited in this respect to actions in contracts for the recovery of money or damages. In all other cases application for judgment must be made to the court.

People v. Weil, 53 Cal. 253.

TIME WITHIN WHICH TO ANSWER.

25. The practice act allows a party ten days after the service of the summons to file his answer, if served in the county; twenty days, if out of the county, but within the judicial district; and forty days in all other cases. A non-resident of the state would come under the last clause, and be entitled to forty days after the service of the summons.

Grewell v. Henderson, 5 Cal. 465.

26. Where the summons was returnable in thirty instead of forty days, and did not state that judgment by default would be taken unless the defendant appeared and answered, nor specify any amount for which judgment would be taken: *Held*, that the summons would not support a judgment by default.

People v. Woodlief, 2 Cal. 241.

27. Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the court of first instance, at ten o'clock, and judgment was rendered against them at nine o'clock in the morning, of the same day: *Held*, that the judgment was irregular, and should be reversed, notwithstanding the court offered them permission to come in at a subsequent day and make their defense.

Parker v. Shephard, 1 Cal. 131.

28. A summons issued out of the superior court of the city of San Francisco was not defective if it omitted to notify the defendant to appear within twenty days, if served out of the county, but in the district in which the action was brought.

McCauley v. Fulton, 44 Cal. 356.

29. The second subdivision of the twenty-fifth section of the practice act, requiring the defendant to appear within twenty days after the service of a summons, had no application to the superior court of the

city of San Francisco, because its jurisdiction was confined to the county of San Francisco.

Id.

SERVICE OF.

29a. That court had power to send a summons for service out of the city of San Francisco.

Chipman v. Bowman, 14 Cal. 157.

What Constitutes Service of Summons.

30. If a copy of summons and a certified copy of a complaint are personally delivered to a defendant, and issued from a court of general jurisdiction, the court thereby acquires jurisdiction of the person of the defendant. An irregularity in the mode of delivery is merely a ground of application to the court to set aside the summons.

Peck v. Strauss, 33 Cal. 678.

31. Where there are several defendants, and all are served with summons in one county, the presumption is that all resided in the county where served, and a service of a copy of the complaint on one is deemed a service on all.

King v. Blood, 41 Cal. 314.

32. The "district" mentioned in the second subdivision of the twenty-fifth section of the practice act, which speaks of the service as summons in the district in which the action is brought, is the district or territory over which the court exercises jurisdiction.

McCauley v. Fulton, 44 Cal. 356.

33. A summons can not be served by delivering a copy to the attorney in fact of the defendant.

Drake v. Duvenick, 45 Cal. 455.

34. After a summons has been served on some of the defendants, and returned, it is competent to the court to order it delivered to the plaintiff for further service on other defendants in the same or another county.

Hancock v. Pruess, 40 Cal. 572.

35. When the summons is served after having been once returned, and the court thereupon assumes jurisdiction of the defendants, and renders judgment against them, it will be presumed in a collateral attack on the judgment that the court made the requisite order, permitting the summons to be withdrawn for further service.

Id.

36. A redelivery of the summons without an order of the court is an irregularity, of which the opposite party may avail himself by direct attack; but such irregularity will not render the service of the summons void.

Id.

37. A defendant may move to set aside the return of service of a summons, and if it is denied, may answer without waiving the benefit of an exception to the order denying his motion.

Kent v. West, 50 Cal. 185.

38. Before the amendments to the code of civil procedure, which went into effect July 1, 1874, the summons, in an action of unlaw-

ful detainer, was required to be served within the time directed by the order of the judge indorsed on the summons. *Id.*

39. Where the action was brought against R. W. Spencer, John Doe, and Richard Roe, and Spencer was served with a copy of the summons only: *Held*, that the service was good, and that he could not remain silent and then claim that the service was void; but should have searched the files of the clerk's office for the complaint.

Sacramento S. B. v. Spencer, 53 Cal. 737.

40. Where a party was insane and no guardian had been appointed for him, the practice act of 1850 required that he should be served personally. *Id.*

On Corporations.

42. A sheriff's return on the summons against a corporation that he served the same on the president and secretary of the company, is *prima facie* evidence that the persons named in the return were such officers. *Rowe v. Table Mt. Co.*, 10 Cal. 441.

43. In a suit against a corporation, the summons must be served on one of the officers or agents named in the practice act.

Aiken v. Quartz Rock Co., 6 Cal. 186.

44. Service on a party in possession of the property, who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. *Id.*

45. Where, in an action against an incorporated company, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:" *Held*, that it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier, or managing agent thereof.

O'Brien v. S. F. & T. C. Co., 10 Cal. 343.

46. In an action against a corporation, where the summons was served upon Bristol, who had been duly elected its president and presided at several meetings of its board of trustees, and who had never resigned, or been removed, or his office declared vacant, or a permanent president chosen in his place, though he had left the country and no longer took any part in the management of the corporation affairs, and at the meeting of the board, after his so leaving the country, another person was elected president *pro tem.* for that meeting, and was regarded by the stockholders as the president: *Held*, that Bristol was still president *de jure*, and the service upon the corporation valid.

Eel River N. Co. v. Struver, 41 Cal. 616.

On Partners.

47. The return of a sheriff on a summons that he had served it on one Pendleton, one

of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate.

Wilson v. Spring Hill Co., 10 Cal. 445.

48. Where the summons was issued against Adams & Co., and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co.: *Held*, that judgment by default could not be sustained.

Adams v. Town, 3 Cal. 247.

On Minors.

49. The requirement of the statute being positive that in actions against a minor under the age of fourteen years, personal service of summons must be made; in cases where he resides out of this state, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication.

Gray v. Palmer, 9 Cal. 616.

50. Service of the summons upon infants, although under the age of fourteen years, should be made by depositing a summons and certified copy of the complaint in the post-office, directed to the infant the same as to other defendants. *Id.*

51. Under the practice act of 1851, in an action against an infant, if he was over fourteen years of age, the summons was served by delivering to him personally a copy of the same, and a certified copy of the complaint.

Brown v. Lawson, 51 Cal. 615.

Personal Service, How Made.

52. Under the practice act, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statutes, the mode would be by showing the original under seal of the court, and delivering a copy.

Edmondson v. Mason, 16 Cal. 386.

Service in Suits against Counties.

53. In counties where there is a board of supervisors, having an acting chairman or president of such board, the original process and papers shall be served on such chairman or president, in the same manner as upon private persons; when there is no such chairman or president, they shall in like manner be served on the county judge of the county.

Laws of 1854, p. 194.

By Publication.

54. Section 30 of the practice act, being in derogation of the common law, must be strictly construed and pursued.

Ricketson v. Richardson, 26 Cal. 149.

Forbes v. Hyde, 31 Id. 342.

People v. Huber, 20 Id. 81.

No presumption in favor of jurisdiction will be indulged.

McMinn v. Whelan, 27 Cal. 309.

55. The word "person" in its legal significance, is a generic term, and was intended to include artificial as well as natural.

Douglass v. P. M. S. Co., 4 Cal. 304.

56. In proceeding against an absent defendant upon mere constructive service, the conditions of the statute must be strictly pursued, or the judgment can not be supported upon appeal.

Cohn v. Kimber, 47 Cal. 144.

Affidavit.

57. Where the attorney of record makes an affidavit that diligent search has been made for the defendant, and that he conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication.

Anderson v. Parker, 6 Cal. 201.

58. An affidavit for an order of the publication of the summons, upon the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of Fogg, who is an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the state, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the court jurisdiction of the person of the defendant.

Swain v. Chase, 12 Cal. 283.

59. An affidavit to obtain an order for the service of a summons by publication must show whether the residence of the person upon whom service is sought, is known to the affiant; and, if known, the residence must be stated. An affidavit which merely repeats the language or substance of the statute is insufficient. The ultimate facts of the statute must not be stated in the affidavit, but the probative facts, upon which the ultimate facts depend.

Ricketson v. Richardson, 26 Cal. 149.

60. It is not sufficient to state generally in such affidavit that, after due diligence, the defendant can not be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. Id.

61. Before jurisdiction of a defendant can be acquired by publication of summons, it must appear by affidavit, either that the defendant resides out of the state, or has departed from the state, or can not, after due diligence, be found within the state, or that he conceals himself to avoid the service of summons, and in addition thereto, it must also appear by affidavit, that a cause of ac-

tion exists against the defendant, or that he is a necessary or proper party.

Brady v. Seaman, 30 Cal. 610.

62. An affidavit to obtain an order for the publication of summons on the ground that the defendant can not, after due diligence, be found within the state, which does not state whether the residence of the defendant is known, and does not show that the affiant does not know where the defendant may be found, is insufficient to authorize the publication of summons. Id.

63. An affidavit in such case must state facts which show that due diligence to find the defendant has been used, and it must also appear therefrom that the diligence has not been rewarded with discovery. Id.

64. If the affidavit upon which an order for publication of summons is made is insufficient, the court acquires no jurisdiction of the defendant, and the judgment is void. Id.

65. When the affidavit for publication of summons presents some evidence tending to prove each jurisdictional fact, but of a character clearly too inconclusive to justify an order of publication, the order is erroneous, and the judgment will be reversed on appeal, but is not void. If there is a total want of evidence upon which to base the order, the judgment is void. In the former case the judgment can not be attacked collaterally, but only on appeal.

Forbes v. Hyde, 31 Cal. 342.

66. The existence of a cause of action against the defendant is a jurisdictional fact which must be made to appear before an order for publication of summons can be made, and if it does not appear by the affidavit, the order is void. Id.

67. Facts should be set out in an affidavit for an order to publish summons, and not a general expression of opinion or belief that an ultimate jurisdictional fact exists without the probative facts upon which such opinion or belief is founded. Id.

68. An affidavit to obtain an order for publication of summons, which states that the deponent "has a good cause of action in this suit against the said defendant, and that he is a proper party defendant thereto, as he verily believes," does not state any fact tending to show a cause of action, and an order and publication based on it are void. Id.

Hahn v. Kelly, 34 Cal. 391.

Order.

69. An order for the service of summons by publication must state the facts proved by the affidavit upon which it is based. It is not sufficient for the order to state, generally, that the defendant resides out of the state, or can not after due diligence be

found within the state, or that a cause of action exists against the defendant.

Ricketson v. Richardson, 26 Cal. 149.

70. Where, after complaint filed and before any summons was issued, an order was obtained from the judge that "summons do issue" and that it be published, and without any further order summons was subsequently issued and published: *Held*, that the attempt thus to acquire jurisdiction of the defendant was ineffectual, and that a judgment rendered against him by default, without any other service of process, was void.

People v. Huber, 20 Cal. 81.

71. An order to publish a summons made in advance of the issuance of the summons is a nullity. *Id.*

72. The judge has no power to order a summons to issue, but only to order a summons already issued to be served in a special manner. *Id.*

McMinn v. Whelan, 27 Cal. 304.

Forbes v. Hyde, 31 Id. 342.

73. The affidavit is only *prima facie* evidence of the facts stated.

Ware v. Robinson, 9 Cal. 111.

74. In a suit to enforce a lien for taxes, if the complaint is not verified, service of summons can not be made by publication and posting, without making an affidavit and procuring an order of publication, as in other cases. Martin v. Parsons, 50 Cal. 498.

75. On granting the order for the publication of summons, the court acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit.

Ricketson v. Richardson, 26 Cal. 149.

76. The question of the sufficiency of an affidavit and order for publication of summons may be raised by motion made in the suit or by an appeal supported by a statement. Sharp v. Daugney, 33 Cal. 505.

Publication of Summons.

77. A publication of summons weekly against a non-resident defendant, commencing on the tenth day of January, and ending on the ninth day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the tenth of April.

S. & L. Soc. v. Thompson, 32 Cal. 347.

78. If the last day of the publication of a summons is in the same week in which the three months expire, the publication is sufficient to give the court jurisdiction, although this day is less than three months from the first day of publication. *Id.*

79. If some of the publications of a summons, including the last, are made on Sunday, in the regular issues of the paper, it does not vitiate the service. *Id.*

80. If service on a defendant is attempted to be procured by publication, the summons must be published as it was when the order of publication was made.

McMinn v. Whelan, 27 Cal. 300.

81. Where the summons as published, on being compared with the original, discloses certain discrepancies of a purely literal character, it is held sufficient that, in sense and meaning, the original summons and the published version of it are identical.

Sharp v. Daugney, 33 Cal. 505.

PROOF OF SERVICE.

82. Service of summons may be proved by parol evidence. Hahn v. Kelly, 34 Cal. 391.

83. The proof of the former mode of service, if made by an officer, is by his affidavit or certificate, setting forth the mode, time, and place of such service; if made by a citizen, then by his affidavit setting forth said facts, and in addition the facts constituting his said qualifications. Proof of the latter mode of service is by the affidavit of the printer, his foreman, or principal clerk, setting forth the fact, where and how long the publication of summons has been made, and where a deposit in the post-office has been ordered, then an affidavit showing such deposit. *Id.*

84. Where S. and B. admitted "due service" of the summons in an action against them and others, the court thereby acquired jurisdiction of them, and as to them the judgment was valid.

Sharp v. Brunnings, 35 Cal. 528.

85. The return of service by the sheriff, on the party in possession, where no appearance is made, is *prima facie* evidence that the person served was the person in possession within the meaning of the statute.

People v. Fox, 39 Cal. 621.

86. When the return on a summons states that a copy of the summons was personally served on the defendant in the action, giving the time and place, this return, although informal, is yet sufficient to give the court jurisdiction of the person, so that the judgment is not void for want of jurisdiction, when collaterally attacked.

Drake v. Duvenick, 45 Cal. 453.

87. Such return does not show that a copy of the summons was not delivered to the defendant personally, and it has at least some legal tendency to prove that it was so delivered. *Id.*

88. If in such case there is more than one defendant, the fact that the return does not state that a copy of the complaint was served with the summons does not render the judgment void in a collateral attack. *Id.*

89. Where the affidavit of the publication of a summons, made by one who therein styles himself "the proprietor" of the

newspaper in which the publication was made, instead of "the printer," as required by the practice act: *Held*, that the terms "printer" and "proprietor" are, in the sense of the statute, synonymous.

Quivey v. Porter, 37 Cal. 458.

90. In making service of a summons, and in the return of such service, the provisions of the **statute** must be, and must be shown to **have been, substantially observed** and followed by the officer, otherwise the proceedings can not be supported upon a direct appeal taken. *People v. Bernal*, 43 Cal. 385.

91. **Mere irregularity** in the service of a summons does not render a judgment void for want of jurisdiction.

Drake v. Duvenick, 45 Cal. 455.

Return by a Deputy.

92. Courts can not know an under officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal.

Joyce v. Joyce, 5 Cal. 449.

93. A summons was served by a deputy sheriff and returned with the following signature to the return: *Elijah T. Cole, D. S. Judgment was rendered by default: Held*, that the judgment was null and void; the return should have been in the name of the sheriff by the deputy.

Rowley v. Howard, 23 Cal. 401.

94. Courts should presume that the sheriff served all process within his jurisdiction, where no place of service is stated.

Crane v. Brannan, 3 Cal. 192.

95. Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else.

Curtis v. Herrick, 14 Cal. 117.

Place of Service.

96. The only object of the designation of the place where process is served is to determine the period within which the answer must be filed, or when default may be taken.

Whitwell v. Barbier, 7 Cal. 62.

97. Where the evidence of the place of service is insufficient to authorize a judgment, advantage of it should be taken, either by appeal or on motion to vacate the judgment.

Pico v. Suñol, 6 Cal. 294.

98. The statute does not require an admission of service of process to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken.

Alderson v. Bell, 9 Cal. 315.

99. If the affidavit of service of summons states the county in which service was made

and defendant makes default, it will be presumed that he was a resident of the county where service was made.

Calderwood v. Brooks, 28 Cal. 151.

Return by any Other Person.

100. The affidavit of service required by this section **must show** that the **person serving** it was a white male citizen, **over twenty-one** years of age, competent to testify in the cause, and that a certified copy of the complaint accompanied the summons.

McMillan v. Reynolds, 11 Cal. 372.

101. The affidavit of service of summons must show affirmatively compliance with all the requirements of the law.

Id.

102. Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was at the time of such purchase cognizant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside.

Id.

103. An affidavit which avers that affiant on the day named "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action," is **insufficient**.

Id.

104. An affidavit of service of summons which states the facts constituting affiant a competent witness, is sufficient without stating that he is competent.

Dimick v. Campbell, 31 Cal. 238.

105. If a summons is served by a person other than a sheriff, and in his affidavit of service he states that he is twenty-one years of age, but **fails to state** that he was **twenty-one** years of age **at the date of service**, it is a mere irregularity, and a judgment by default rendered in the case can not be attacked collaterally.

Peck v. Strauss, 33 Cal. 678.

106. The service of a summons by a person not a sheriff, as provided by the practice act, is a service "according to the course of the common law."

Id.

Return Conclusive.

107. A sheriff's return is **not traversable**, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion.

Egery v. Buchanan, 5 Cal. 56.

108. The affidavit of deposit of summons in a **post-office** need not state that the deposit was made by a white male citizen, or that the affiant is such citizen. It is sufficient if the deposit and affidavit are made by a human being.

Sharp v. Daugney, 33 Cal. 505.

109. The affidavit of deposit of summons in a post-office need not state that there is a communication by mail between the place of deposit and the place to which the packet was addressed, nor that the post-office was a United States post-office. *Id.*

110. The failure to deposit in the post-office a copy of the complaint and summons, directed to a minor, is not cured by the appearance of the mother in her own behalf.

Gray v. Palmer, 9 Cal. 616.

111. In a collateral attack on a judgment, the return of a sheriff that he served a copy of the summons, will be held equivalent to a return that he served a copy certified by the clerk.

Brown v. Lawson, 51 Cal. 615.

Written Admission of Defendant.

112. Courts will take judicial notice of the signatures of their officers, as such; but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the court can not notice them.

Alderson v. Bell, 9 Cal. 315.

113. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient.

Montgomery v. Tutt, 11 Cal. 307.

Affidavit of Printer.

114. When service of summons is had by publication, proof of the publication can only be made by the affidavit of the printer, his foreman, or principal clerk; and the affidavit should state that the person taking the same holds one of these positions. An affidavit commencing in this way: "A. B., principal clerk, etc., being sworn, deposes," etc., is insufficient, and would not give the court jurisdiction of the person of the defendant.

Steinback v. Leese, 27 Cal. 295.

115. Where an affidavit of publication of a summons was made by a publisher and proprietor, and not by the printer, foreman, or principal clerk, it was held sufficient, as being within the spirit of the statute.

Sharp v. Daugney, 33 Cal. 505.

116. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons, or notice, in said paper, is sufficient, and it is unnecessary for the affidavit to describe him as principal clerk.

Gray v. Palmer, 9 Cal. 616.

117. If the affidavit of the printer states that the summons was published one month, and yet the court in its judgment states that

it was published three, or that service had been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made. This recital imports absolute verity.

Hahn v. Kelly, 34 Cal. 391.

Generally.

118. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction.

Jordan v. Giblin, 12 Cal. 100.

119. When some of the defendants are not served with process, the plaintiff may proceed against those served.

Ingraham v. Gildemeester, 2 Cal. 88.

Service, When Complete.

120. The practice act provides, in relation to service on non-residents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication." Held, that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer.

Grewell v. Henderson, 5 Cal. 465.

NEW SUMMONS.

121. When an order is made for the service of summons by publication, and a summons is issued, and a supplemental complaint is afterwards filed, and a summons issued thereon, the original action becomes merged in the action as supplemented, and the court will not acquire jurisdiction of the persons of absent defendants by publication of the original summons, but the summons issued on the supplemental complaint must be served by publication.

McMinn v. Whelan, 27 Cal. 300.

Forbes v. Hyde, 31 Id. 342.

APPOINTMENT OF ATTORNEY.

122. The provision of the practice act authorizing judgment, personal and final, against a defendant who concealed himself for whom the court has appointed an attorney, with privilege to the defendant to come in and deny in six months, is not in violation of the constitution of the United States, or that of this state.

Ware v. Robinson, 9 Cal. 107.

123. The court may appoint an attorney for an alleged concealed defendant, and a judgment against him will stand after six months have elapsed, unless he filed his bill to set aside the judgment on the ground of fraud, that he was not concealed. *Id.*

124. An affidavit which avers a cause of action against the defendant; that defendant

can not after due diligence be found in the state; that summons had been issued, but sheriff can not find him; that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county, is insufficient to authorize the court to appoint an attorney to represent such absent defendant.

Jordan v. Giblin, 12 Cal. 100.

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SUNDAY.

1. In the absence of any custom to the contrary, Sundays are computed in the calculation of lay days at the port of discharge; but where the contract specifies working lay days, Sundays and holidays are excluded in the computation.

Brooks v. Minturn, 1 Cal. 481.

2. The decision in the *People ex rel. Hepburn v. Whitman* was predicated upon an error in the printed copy of the constitution, the word "Sunday" being there used in the singular.

Price v. Whitman, 8 Cal. 412.

3. The ten days given by the constitution must be computed by excluding the day on which the bill is presented to the governor.

Id.

4. Considered as a municipal regulation, the legislature has no right to forbid or enjoin the lawful pursuit of a lawful occupation on one day of the week any more than it can forbid it altogether.

Ex parte Newman, 9 Cal. 502.

5. A writ placed in the sheriff's hands on Sunday can not be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Whitney v. Butterfield*, 13 Cal. 335.

6. The act of the legislature entitled "an act for the observance of the Sabbath" (stats. 1861, p. 655), prohibiting all persons, with certain exceptions, from keeping open their places of business on Sunday for the transaction of business, is constitutional.

Ex parte Andrews, 18 Cal. 678.

7. Such act violates neither the first section of article I of the constitution of this state, which declares "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing safety and happiness;" nor the

fourth section of that article, which declares that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state." etc. Id.

8. The legislature under our system has power to repress whatever is hurtful to the general good, and is generally the exclusive judge of what is or is not hurtful, the only limitations being those prescribed in the constitution. Subject only to such limitations, the legislature has power to pass laws regulating the relations, contracts, intercourse and business of society at large, and also of its particular members in respect to each other. Id.

9. The clause in the constitution guaranteeing the right of "acquiring property" does not deprive the legislature of the power of prescribing the mode of acquisition, or of regulating the conduct and relations of the members of society in respect to property rights. Id.

10. The legislature has not only the power to regulate, but the power to suppress particular branches of business deemed by it immoral and prejudicial to the general good, as gambling, lotteries, etc. The duty of government comprehends the moral as well as physical welfare of the state. Id.

11. Section 4 of article I of our constitution, as to the free exercise and enjoyment of religious profession and worship, prohibits all legislation which invidiously discriminates in favor of or against any religious system; but does not prohibit legislation upon subjects connected with religion, nor does it make void legislation, the effect of which is to promote religion, or even advance the interests of a sect or class of religionists. Id.

12. The act of 1861, "for the observance of the sabbath," is purely a civil regulation, and spends its whole force upon matters of civil economy, and was not designed to subserve any religious purpose. Id.

13. Where a party was charged with keeping open a bar for the sale of liquors on Sunday, in violation of the act of 1861, and was convicted and committed to custody, and applied to the supreme court for a writ of *habeas corpus*, claiming his discharge on the ground that he kept the bar as part of the business of a hotel, and therefore had not violated the law: *Hell*, that petitioner can not avail himself of this defense on this application, but must adopt some other mode, the complaint against him not showing that the bar was kept as part of the hotel business. Ex parte Bird, 19 Cal. 130.

14. Contracts made in this state on Sunday are not void because made on Sunday.

Moore v. Murdock, 26 Cal. 514.

CONST. LAW, 230, 428. | LIMITATIONS, 253.
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JURISDICTION, 215, | NATURALIZATION, 4.
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SUPERVISORS

1. ELECTION AND TERM OF OFFICE.
2. JURISDICTION AND POWERS.
50. ORDINANCES.
58. LIABILITY.
65. RECORDS, ETC.

ELECTION AND TERM OF OFFICE.

1. One who has held the office of supervisor is, after the expiration of his term, and the election and qualification of his successor, no longer an officer, either *de jure* or *de facto*, but if he attempts to act as such, is a mere naked usurper.

Trinity v. McCammon, 25 Cal. 117.

JURISDICTION AND POWERS.

2. From the necessity of the case, supervisors exercise judicial, legislative, and executive powers, in matters relating to the police and fiscal regulations of counties.

People v. El Dorado, 8 Cal. 58.

3. The board of supervisors of a county is a special tribunal with mixed powers, administrative, legislative, and judicial, and jurisdiction over roads, ferries, and bridges, is given to it by statute. Its judgments or orders can not be attacked collaterally, any more than the judgments of courts of record. Waugh v. Chauncey, 13 Cal. 11.

4. It is doubtful whether an appeal lies from the exercise of this discretion. But if it does it must be made direct to some superior tribunal. Id.

5. It is true, as a matter of law, that a board of supervisors in laying out a public road exercises judicial functions.

Damrell v. San Joaquin, 40 Cal. 154.

6. A board of supervisors of a county, in allowing or disallowing a claim, exercise judicial functions.

Tilden v. Sacramento, 41 Cal. 68.

7. A board of supervisors is a body with limited jurisdiction, and its jurisdiction must appear in the record of its proceedings.

Finch v. Tehama, 29 Cal. 453.

8. It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout this state, to transfer from the courts of sessions to the boards of supervisors the general and special powers and duties of a civil character, which had, before the passage of that act, been vested in such court.

People v. Bircham, 12 Cal. 50.

9. It was not the design, in this manner, to repeal any law, general or special, before existing; but, as, under the decision of *Burgoyne v. The Supervisors*, 5 Cal. 9, a question of the constitutionality of those laws which conferred duties and powers, not of a criminal cognizance, was made, the legislature meant to remove the difficulty by transferring all these functions to the boards of supervisors. Id.

10. Boards of supervisors are a quasi judicial body so far as concerns the examination and settlement of accounts and claims against a county; and the allowance and settlement by such boards are an adjudication of the claims, and conclusive.

El Dorado v. Elstner, 18 Cal. 144.

11. The clause in the act creating boards of supervisors in this state providing that the said boards "shall have authority at their last session before the general election in each year, to change the boundaries of the (supervisor) districts in their said respective counties," is merely directory, and does not prohibit such change at any other session. Tuohy v. Chase, 30 Cal. 524.

12. The board of supervisors of a county possess no power to allow the county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer.

People v. El Dorado Co., 11 Cal. 171.

13. Such a claim is not authorized by law, and the power of the board to allow accounts against the county is confined to those "legally chargeable." Id.

14. The board of supervisors are not empowered to create a debt or liability on the part of the county, for any purpose except as provided by law.

Foster v. Coleman, 10 Cal. 278.

15. When the account of a deputy assessor for one thousand six hundred and fifty dollars was audited and allowed by the board, and ordered to be paid, the order being in the following words: "Ordered, the sum of four thousand one hundred and twenty-five dollars be paid out of the fund for current expenses, to equal sixteen hundred and fifty dollars, in cash, at the rate of forty cents per dollar—October 29, 1856," and in pursuance of such order the county auditor drew his warrant for four thousand one hundred and twenty-five dollars upon the treasurer, and delivered it to the deputy assessor, who presented it to the treasurer, and by him it was indorsed and registered in its order of presentation, among the legal warrants against the county: *Held*, that the order was made without authority, and was void, and the fact that the market or cash value of county warrants was only forty per cent of the nominal amount, and the object of the action of the board was to give that which was, at

the time, an equivalent to cash, did not justify the action of the board. *Id.*

16. The power to declare an office vacant is vested, under the statute, where the duty to approve of the bond of the officer is lodged. That duty is imposed upon the county judge, and **not the supervisors**; and where the supervisors of Marin county declared the office of constable vacant, because the constable failed to comply with their order to file a new bond: *Held*, that they exceeded their jurisdiction.

People v. Marin Co., 10 Cal. 344.

17. The provision of the statute organizing boards of supervisors, which empowers them to "**require new bonds of any county or township officer**, with additional securities, whenever they deem the same necessary," does not leave the exercise of the power to their arbitrary discretion. By the terms "whenever they deem the same necessary," is meant whenever their judgment pronounces, after an examination of the facts of the case, that there is necessity for further security. *Id.*

18. In determining upon the **sufficiency of the bond of an officer**, and whether the officer, by his failure to comply with the requisition of the supervisors to file a new bond, has vacated his office, the supervisors exercise **powers of a judicial character**. *Id.*

19. An order of the supervisors, requiring a new bond of an officer, **should specify the ground upon which the order is made**; and where the supervisors of Marin county made an order as follows: "Ordered, by the board of supervisors, that John De Fries, constable of San Rafael township, file another bond, with two or more sufficient sureties, within fifteen days:" *Held*, that the order was fatally defective. *Id.*

20. Boards of supervisors have, under the statute, a general power to **grant a ferry franchise**, and to determine where, under what circumstances, and to whom it shall be granted. *Henshaw v. Butte Co.*, 19 Cal. 150.

21. Boards of supervisors have jurisdiction conferred upon them by statute to determine whether the public convenience requires a **bridge or ferry** within one mile of any other regularly licensed bridge or ferry; and it is a question, whether their determination upon this point is not final and conclusive. If, however, their **determination** on such matter is not final, it must be reviewed by certiorari, and **can not be attacked in a collateral action**.

Fall v. Paine, 23 Cal. 302.

22. A board of supervisors has no power to set apart a portion of the revenue of the county as a fund for current expenses.

Laforge v. Magee, 6 Cal. 285.

23. Where the board of supervisors of San Joaquin, under the act of 1860 (stats. 1860, p. 317), authorizing them to **levy a special tax for the construction and repair of seven public highways** leading from the city of Stockton, the fourth of which was, "a road running from the limits of Stockton, via Hamilton's ranch, known as the Sonora road," levied and collected the tax, and then, July 10, 1860, passed an order locating the route of this fourth road, along which plaintiffs lived, and afterwards assessed the damages to the owners of land, etc.; but, before they had obtained the right of way for this road, passed another order in March, 1861, annulling the first order and changing the location of the road, which rendered the lands of plaintiffs of less value: *Held*, that the first order laying out the road was unexecuted; that no rights of plaintiffs had vested, and that the board had power to make the second order; that the first order was not in the nature of a power exercised and exhausted, but was at most a proposed mode of executing a power, which could be changed at any time before rights had vested under it.

Burkett v. San Joaquin Co., 18 Cal. 702.

24. *Held, further*, that the remedy adopted by plaintiffs, a bill in equity to have declared void the second order of the board, and for injunction restraining the road commissioners from paying toward the second road any of the money collected on the tax, is objectionable. *Id.*

25. The board of supervisors of a county can not **settle with the county treasurer** at a special meeting of such board, unless they have first given public notice of such meeting, and specified in such notice that such business will be transacted.

El Dorado v. Reed, 11 Cal. 131.

26. In order to give the amplest opportunity to the district attorney, or citizens who desire to do so, to contest the allowance of improper demands against the public treasury, the **business of the supervisors is required to be transacted at the regular meetings** required by law; or if at special meetings, public notice must be given of the business to be so transacted; and unless such notice be given, the acts of the supervisors are a nullity. *Id.*

27. Boards of supervisors possess the power, as incidental to that of **buying, selling, and leasing of property**, and the management, care, and preservation thereof, as conferred by statute (stats. 1855, sec. 9, p. 51), to take all legal measures necessary to that end, by suit or otherwise, and therein are vested with **large discretionary powers**. *Hornblower v. Duden*, 35 Cal. 664.

28. If, in the exercise of their judgment and discretion, the board of supervisors conceive that the interests of the county are

involved in a certain question, and thereupon take legal measures, by suit or otherwise, to advance or protect those interests, the expense thus incurred becomes a legal charge against the county, notwithstanding the courts might ultimately hold that the board had adopted the wrong remedy, or were entitled to no remedy whatever. *Id.*

29. The board of supervisors of a county have no authority to **allow** an unaudited claim against a county, except it be done **within one year** after the claim shall accrue and become due.

Carroll v. Liebthaler, 37 Cal. 193.

30. A county owning stock in a railroad company is directly interested, like any other stockholder, in the conduct and management of its affairs, and, as a consequence, in the selection of its officers. The county would have a right, through her board of supervisors, to contest the election of such officers, if deemed to have been illegal, and to that end to adopt any remedy she might be advised was legal, and the expense thus incurred would become a legal charge against the county. Courts can exercise no control over the judgment and discretion possessed by boards of supervisors in such cases.

Hornblower v. Duden, 35 Cal. 664.

31. If a board of supervisors sell the stock owned by the county in a railroad corporation, in pursuance of a law authorizing such board to do so, its individual members are not entitled to any **extra pay** for the services thus rendered.

Andrews v. Pratt, 44 Cal. 309.

32. Boards of supervisors are the **guardians of the property interests of their respective counties**, and in that relation occupy a position of trust, and are bound to the same measure of good faith toward the county which is required of an ordinary trustee towards his *cuique* *que trust*, or an agent toward his principal. *Id.*

33. A supervisor is not entitled to any remuneration for services rendered the county as a supervisor, except his **per diem and mileage**, as fixed by law. *Id.*

34. The board, in which the corporate authority of a city is vested, is intrusted with its property in a **fiduciary capacity**, and its members can not bargain with reference to it, with a corporation in which they hold stock.

San Diego v. S. D. & L. A. R. Co., 44 Cal. 106.

35. Boards of supervisors have power to **employ other counsel than the district attorney** to assist in or to conduct the prosecution or defense of any suit to which the county is a party, which power extends equally to suits to which she is a party upon the record, and to those in the prosecution or defense of which she has, or is supposed to have, some interest. The judgment and dis-

cretion of the board in the exercise of this power are not open to review by the courts.

Hornblower v. Duden, 35 Cal. 664.

36. A resolution of a board of supervisors, after it has disallowed a claim, reciting that the services on which it is based have been performed by the claimant, but that the board has doubts as to its legality, and directing the district attorney to enter the appearance of the board in any court in which the claimant may commence an action, to require the board to allow the claim, which resolution is not agreed to or accepted by the claimant, is **revocable** at the pleasure of the board.

Tilden v. Sacramento Co., 41 Cal. 68.

37. When an act is passed authorizing the building of a toll bridge across a river, and the collection of such **tolls** as the board of supervisors of the county shall fix, with a proviso that the legislature may modify or change the rates, the power of the board of supervisors in the premises is not exhausted when they once fix the tolls, but the board may change the same from time to time, subject so the supervisory control of the legislature.

Stanislaus B. Co. v. Horsley, 46 Cal. 108.

38. No order made by the board of supervisors is valid or binding unless it is authorized by law. *Linden v. Case*, 46 Cal. 171.

39. No claim against a county can be **allowed unless it be legally chargeable to the county**; and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liabilities. *Id.*

40. If **illegal claims** are allowed by a board of supervisors against the county, it is the duty of the **auditor to refuse to draw warrants** therefor; and when the warrants are drawn, it is the duty of the treasurer to refuse to pay them. *Id.*

41. The board of supervisors of the city and county of San Francisco are the auditing officers of unliquidated demands against the city and county, and it is their duty to **allow such claims as are just in full**, or in some less but exact amount. They can not set aside an amount out of which a less sum may be paid by any committee or officer.

S. V. W. W. v. Ashbury, 52 Cal. 126.

42. The board of supervisors of the city and county of San Francisco has no authority, under the act of March 16, 1874, to accept from the government of the United States a vessel for a training ship for boys, if the act of congress granting the vessel contains provisions inconsistent with said act of March 16. *Glass v. Ashbury*, 49 Cal. 571.

43. The board of supervisors of the city and county of San Francisco may, **at one vote, allow several claims** against the city and county without the passage of an ordi-

nance, even **if the aggregate of the demands exceeds five hundred dollars**, provided each demand is for a less sum than five hundred dollars.

Sweeney v. Maynard, 52 Cal. 468.

44. The board of supervisors of the county has no power to contract for any of the **county printing**, without the ten days' public notice that such contract will be let to the lowest bidder which is required by section 4047 of the political code.

Maxwell v. Stanislaus, 53 Cal. 389.

45. A board of supervisors has authority to **erect a county jail**, without a law authorizing the levy of a special tax therefor.

Babcock v. Goodrich, 47 Cal. 488.

46. The erection of a county jail is among the expenses of the current year, and may be **paid for out of the money raised by the general tax** which the board of supervisors are authorized to levy. Id.

47. If a board of supervisors enter into a contract for the **erection of a county jail**, the work and labor to be paid for in installments, on the certificate of the architect that a certain sum has been expended, an account giving the sum total of an installment, without "all the items of the claim," certified to by the architect, is a sufficient compliance with section 4072 of the political code, to authorize the board of supervisors to allow the same. Id.

48. It is the estimate of the board of supervisors, at the time an account is presented for allowance, of what the revenue of the year will be, which must control their action in allowing or rejecting it. Id.

49. The board of supervisors, in passing upon a claim against the county, **act as a quasi judicial body**, and their allowance and settlement of the claim is an adjudication, which is conclusive.

Colusa Co. v. De Jarnett, 55 Cal. 373.

ORDINANCES.

50. It can not be assumed judicially that a city ordinance requiring the payment of fifty dollars every ninety days for the privilege of **retailing spirituous liquors** in quantities less than one quart, is a virtual prohibition of the sale of such liquors.

Ex parte Hurl, 49 Cal. 557.

51. A city ordinance requiring the payment of a **license** every ninety days for the privilege of **retailing spirituous liquors** does not violate any provision of the constitution. Id.

52. The ordinance of a town which authorizes the marshal to seize **sheep found running at large** in the streets, does not justify the marshal in seizing sheep which are being herded by a competent person and are under his control.

Sheet v. Arnold, 52 Cal. 455.

53. If the board of supervisors **consolidate the offices of recorder and auditor** of the county, the ordinance making the consolidation must not only be passed and published, but must be published by order of the board. People v. Bailhache, 52 Cal. 310.

54. The legislative department of a city government can act only through the medium of an ordinance, but the **ordinance may be in the form of a resolution**, or be preceded by the words "be it ordained," etc.

Creighton v. Manson, 27 Cal. 613.

55. The **publication of an ordinance** alone is sufficient to give it validity without a publication of the law authorizing it. All persons are charged with notice of a law on which the ordinance is founded.

People v. San Francisco, 27 Cal. 655.

56. The order in question does no more than lay down a mere rule for the future guidance of all men, irrespective of calling. It neither charges nor convicts the petitioner of anything, and **is not the exercise of judicial power**.

Ex parte Shrader, 33 Cal. 279.

57. The enabling statute under which the order of the board of supervisors was made is not in contravention of any constitutional provision, and the order is within the power conferred by the statute, and is valid. Id.

LIABILITY OF.

58. Boards of supervisors can not be sued in their official character, in ordinary common law actions, for claims against the public, county, or village they represent, without express statutory provision.

Hastings v. San Francisco, 18 Cal. 49.

59. The **verification of claims** or accounts against counties, contemplated by the "act to limit the time for presentation of claims against counties and for receiving payment for the same" (stats. 1857, sec. 1, p. 167), is a verification by oath annexed to the account.

McCormick v. Tuolumne Co., 37 Cal. 257.

60. If the board of supervisors allow a claim against a county more than one year after it falls due, its action is **void**, and the auditor should **refuse to draw his warrant** for the same.

Carroll v. Siebenthaler, 37 Cal. 193.

61. If an action could be maintained in any case on a **money judgment** against a county, it certainly can not be without first presenting such judgment to the board of supervisors for allowance.

Alden v. Alameda, 43 Cal. 270.

62. The statute relating to boards of supervisors, and providing for the disposition of claims against counties (stats. 1855, p. 51, sec. 24), contemplates that when a judgment is obtained against a county it shall have the force and effect of an audited

demand, in so far that it is no longer open to contestation, and makes it the duty of the supervisors to allow it as an audited claim, if presented within the proper time.

Id.

63. When a money judgment is recovered against a county **no execution can issue** on it, and the only remedy is to present it to the board of supervisors for allowance as an audited claim within the time prescribed by law (stats. 1855, p. 51), and if the board refuse to perform its duty by allowing it as such, it may be compelled to do so by **mandamus**.

Id.

64. The language of the statute of March 20, 1855, providing that no person shall sue a county in any case, or for any demand, without first presenting the claim to the board of supervisors (stats. 1855, p. 51, sec. 24), is sufficiently comprehensive to include a cause of action or demand founded on a judgment, which is itself but an adjudicated claim against the county.

Id.

RECORDS, ETC.

65. The statute requiring the **chairman and clerk** of a board of supervisors to **sign** the record of its proceedings, does not invalidate such record as proof of the action of the board if the clerk and chairman fail to sign, but has the effect merely of putting the party who desires to prove the official action of the board to some additional trouble in establishing the handwriting of the entries, their cotemporaneous character, and the official custody from which the book was produced.

People v. Eureka Lake, 48 Cal. 143.

66. The chairman and clerk of the corporate board, exercising powers municipal and *quasi* legislative, sign the record of its proceedings, not as certifying to their own official action, but as witnesses that the record is the record made up by the clerk, under the direction of the board.

Id.

67. The general rule, that every public document which is required by law to be executed by a public officer **must be verified by his official signature** does not extend to the proof of the records of a corporate board which exercises powers municipal and *quasi* legislative.

Id.

68. The effect of the statute requiring the clerk and chairman of the board of supervisors to sign the record of its proceedings is merely to make their signatures evidence identifying the minutes.

Id.

69. A **tax is not void** because the record of the board of supervisors in levying it is not signed by the chairman and clerk of the board.

Id.

70. The record of the proceedings of the board of supervisors is **under the control of the board**, and **mandamus** will not lie to

the clerk to compel him to correct the records. Wigginton v. Markley, 52 Cal. 411.

71. A member of a board of supervisors can not be interested in or receive **pay for work done on any contract** growing out of or connected with public works or improvements.

Domingos v. Sacramento, 51 Cal. 508.

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SURETIES.

1. IN GENERAL.
19. LIABILITIES OF.
53. JUDGMENT AGAINST.
59. RELEASE OF.
72. CONTRIBUTION.

IN GENERAL.

1. A surety has a **right to stand on the precise terms of his contract**. He can be held to no other or different contract.

People v. Buster, 11 Cal. 215.

2. The true meaning of the cases holding that a surety may stand upon the precise terms of his contract is that **no strained construction is to be given to his obligation**, and that you can not go beyond the fair import of the terms he employs in order to fasten upon him a liability; but a rational interpretation must be given to the language of his contract so as to reach the meaning of the terms used.

Pepole v. Breyfogle, 17 Cal. 504.

3. The sureties **may show in defense** either that the bond was not made, or that the decree was not made, or that the same has been obeyed, or that the same was obtained by fraud or collusion.

Irwin v. Backus, 25 Cal. 214.

4. As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court, or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule. Id.

5. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond.

Moses v. Thorne, 6 Cal. 87.

6. In the case of sureties on the official bond of a county treasurer, they all contract together, and with reference to the common responsibility. In case of a breach or loss, each surety has his recourse for contribution on his fellows. The discharge of one of the obligors affects the contract as to all, and amounts to a release of all as to all future acts of such official.

People v. Buster, 11 Cal. 215.

7. The respondents were **ball in a recognizance** conditioned for the appearance of M., to answer at court, upon an indictment found against him, on the nineteenth of April, 1852. M. appeared at the proper term, which was the June term following, and on the seventeenth of June moved to quash the indictment, for cause assigned, which was ordered by the court. Another indictment on the same charge was found by the grand jury then in session, at the same term, on the eighteenth of June, upon which M., being called, made default. Afterwards suit was brought upon the recognizance, against the bail, and judgment obtained thereon: *Held*, that the bail were entitled to relief against the said judgment.

People v. La Farge, 3 Cal. 130.

8. To suit on a recognizance for the appearance of a party charged with crime, the sureties can not set up as a **defense**, the fact that the amounts in which they justified were insufficient under the statute. The justification is no part of their contract.

People v. Shirley, 18 Cal. 121.

9. Sureties on the sheriff's official bond in this state stipulate for his official, not his

personal dealings, and are entitled to stand on the precise terms of their contract.

Schloss v. White, 16 Cal. 65.

10. When an administrator, in the course of proceedings on the estate, **gives two bonds**, one when letters are issued, and the other when real estate is about to be sold, and the condition of each of the two bonds is the same, and the burden of the sureties in each is the same, the **sureties** on the two bonds, in an action on them, may be made **joint defendants** in the same action.

Powell v. Powell, 48 Cal. 234.

11. If two parties execute a bond as sureties for a third, conditioned that he will fulfill a contract he has made with a fourth, to erect a building within a given time, and a written agreement is afterwards drawn up to be executed by the four, extending the time to fulfill the contract, and such agreement is signed by three only, it is not binding on either.

Barber v. Burrows, 51 Cal. 473.

12. If a surety has a counter bond or security from the principal debtor, the creditor will be entitled to the benefit of it, and may in equity subject such security to the satisfaction of his debt, so far as it can be done without trenching upon the rights of the surety himself.

Van Orden v. Durham, 35 Cal. 136.

13. Where D., as surety for H., executed a mortgage on his lands to secure the payment of notes executed by H. alone, the mortgage containing no covenant on the part of D. to pay said notes, but on the contrary expressly providing that D. should not incur any personal cost or liability, and afterwards took a mortgage or conveyance of other property from H., the principal, to indemnify himself against any loss he might sustain by reason of his mortgage to secure said notes of H.: *Held*, first, that the holders of the notes might subject the premises mortgaged by D. to the payment of the notes; or, second, that they might abandon the mortgage and subject the said property of the principal in the hands of D. to the payment of the notes; or, third, that they might have the property mortgaged to secure the notes sold, the proceeds applied to their satisfaction, and if any balance remained, subject the surplus of any property of H., the principal, in the hands of D., that might remain after fully compensating D. for any loss or damage resulting to him by reason of the appropriation of the property mortgaged by him to the satisfaction of the notes of H.; but, fourth, that the holders of the notes are not entitled to appropriate both the property mortgaged to secure the notes, and that conveyed or mortgaged by the principal, H. to the surety D., for the indemnity of the latter. Id.

14. The limit of the liability of D., in the

case stated, is his own property mortgaged, together with any surplus remaining in his hands from the securities received by him for his own indemnity, after fully indemnifying himself out of the latter for the damages resulting from the mortgage of his own property to secure the notes of H. *Id.*

15. D. should not be personally charged with costs in this action to foreclose the mortgage, and subject the securities in his hands to the payment of the notes, unless he either made an unsuccessful defense against the foreclosure of his own mortgage, or unless some surplus of the securities beyond the property mortgaged is found in his hands subject to be applied to the payment of the notes; nor should the mortgaged lands be charged with the costs of any unsuccessful attempt to obtain more than the rights of the note-holders justified under D.'s mortgage. *Id.*

16. One may be a surety only as between himself and his co-promisor, and yet, as to the creditor, both his apparent and actual character be that of principal. So *held*, in an action upon a promissory note, where it appeared that one S. applied to the plaintiffs for a loan, and that they agreed to let him have the money if he would give a note signed by himself and the defendants, as joint and several makers; and the note was so executed; but all the parties knew that the loan was made for the sole benefit of S., and that, as between himself and the defendant, the latter was merely a surety.

Harlan v. Ely, 55 Cal. 340.

17. The sureties on an appeal bond can not be sued until the judgment against their principal is in a condition to be enforced by an execution.

Parnell v. Hancock, 48 Cal. 452.

18. So long as there is an order of court in force, staying execution on the judgment, against a party who had appealed from a lower court, the sureties on his appeal bond can not be sued. *Id.*

LIABILITIES OF.

19. A mere neglect to sue the principal will not exonerate a surety.

Humphreys v. Crane, 5 Cal. 173.

20. The sureties on a bond, given by the party in the original suit, to perform any decree that might be rendered therein, stand in no better position. They are not parties to said suit, but are bound absolutely by the decree, subject to the single exception—that, if the decree be procured by collusion between plaintiff, their principal, and the defendant, they are not bound.

Riddle v. Baker, 13 Cal. 295.

21. In an action against the sureties on an administrator's bond for a breach of the bond by the principal, the proceedings taken

in the probate court, in passing on an account rendered by the administrator, and a decree rendered therein directing the administrator to pay over a sum found remaining in his hands, are admissible in evidence against the sureties, although the sureties were not parties to the same.

Irwin v. Backus, 25 Cal. 214.

22. Such decree is equally conclusive upon the administrator and his sureties; and upon the refusal of the administrator to obey the same, the liability of the sureties attaches, and they can not go behind the decree to inquire into the merits of the matter therein passed on. *Id.*

23. Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmation of the judgment, and charges the sureties on the undertaking on appeal.

Chase v. Beraud, 29 Cal. 138.

24. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of the appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required.

Bostic v. Love, 16 Cal. 60.

25. An undertaking on appeal, conditioned for the payment of what the judgment creditor has no legal right to receive, is not, as to such condition, binding upon the sureties.

Whitney v. Allen, 21 Cal. 233.

26. Where an appeal is taken to the supreme court from a judgment, by filing notice of appeal and undertaking, and the appeal is afterwards dismissed by the supreme court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal.

Ellis v. Hull, 23 Cal. 160.

27. When in a criminal proceeding a justice of the peace exacts, and the defendants give a security in the form of a bond on appeal which the statute does not require, no liability results from its execution.

People v. Cabannes, 20 Cal. 525.

28. A justice of the peace, on conviction of certain parties of the offense of fraudulent and malicious mischief, rendered a judgment imposing a fine, and in default of payment, imprisonment in the county jail. For the purpose of perfecting an appeal, defendants gave a bond reciting a money judgment (of the same amount as the fine) and binding the sureties for its payment, and setting forth substantially the conditions required in an undertaking on appeal to the county court in civil cases: *Held*, in an action against the

sureties on the bond, after affirmation of the justice's judgment, that the instrument was not authorized by the statute, and that no action could be maintained upon it. *Id.*

29. The sureties of a sheriff are not liable for the penalty imposed upon sheriffs by the political code (sec. 4179) for a neglect to levy upon property. The sureties are liable only for actual damages sustained.

Glascocock v. Ashman, 52 Cal. 493.

30. If the maker of a promissory note, as collateral security for its payment, assigns personal property to the payee, and, as additional security, third persons sign the note as sureties, the liability of the sureties becomes fixed at the time the collateral security is exhausted.

Dussol v. Bruguere, 50 Cal. 456.

31. The doctrine of contribution applies equally between those who are original co-contractors, that is, those who are jointly bound on their own account (not being copartners), as it does between those who are co-sureties, that is, jointly bound to answer for the debt or default of another.

Chipman v. Morrill, 20 Cal. 130.

32. Where several parties, owing distinct portions of the same debt, execute a joint note for the same, each is, as to his own proportion, principal; and as to the proportion of each of the other makers, a co-surety.

Id.

33. Thus, where C., M. and W. purchased property together, C. taking one undivided half, and M. and W. each taking one undivided fourth, and for the purchase money executed their joint note: *Held*, that C. was, as to his half of the debt, a principal and a co-surety with M. for the fourth due from W.; and with W. for the fourth due from M.

Id.

34. A surety paying a debt, for which several persons are liable in distinct proportions as principals, can not maintain a joint action against the principals for the amount thus paid, but his remedy is by a several action against each upon the implied assumpsit of each to reimburse what was thus paid for him.

Id.

35. C., in the case above stated, having paid the whole of a judgment, recovered upon the note: *Held*, that it is not a case for contribution between parties who have sustained a common loss upon a common liability, but that M. and W. are each severally liable upon an implied contract to repay C. one fourth of the judgment.

Id.

36. The sureties on an official bond are liable under the statute, notwithstanding it was approved by the wrong officer or board.

People v. Evans, 29 Cal. 429.

37. If after part of the sureties on an official bond sign the same, the penal sum is changed, and as changed it is approved and

filed for record, the sureties who sign before the change are not liable.

People v. Kneeland, 31 Cal. 288.

38. If after an official bond has been executed by a part of the sureties the penal sum is changed, and as changed it is executed by other sureties, the sureties signing after the change are not liable in an action brought on the bond as it was before the change.

Id.

39. The sureties, upon the official bond of an officer, are only responsible for the official acts, and not for private debts.

Hill v. Kemble, 9 Cal. 71.

40. The sureties of a party who covenants, in writing, to purchase meat of another party, for a fixed time at a fixed price, and pay him during the time a fixed rent for a slaughter-house, and to pay him liquidated damages for failure to fulfill the contract, are liable with the principal upon all the covenants of the principal contained in the contract. The clause with regard to damages has no reference to the rent of the building, and meat sold and delivered.

Lightner v. Menzell, 35 Cal. 452.

41. It is no defense to an action on a forfeited recognizance, that after it was given the bail was raised, and a new order of arrest issued without notice to the sureties, and that the officers were so negligent in their proceedings that the accused heard of them, and absconded before he could be rearrested.

People v. Eaton, 41 Cal. 657.

42. The sureties, in an undertaking in replevin, are not liable to the defendant for the value of the property, unless he recovers a judgment for the return of the property. A judgment in favor of the defendant which does not award him a return of the property, does not impose any liability on the sureties.

Mitcham v. Stanton, 49 Cal. 302.

43. The sureties on the bond of an administratrix are not responsible for her acts or default in the application of the funds of an estate, after they have, by order of the probate court, been turned over to her as a trustee, to be held and managed by her in trust, in pursuance of the will of the deceased.

Barker v. Stanford, 53 Cal. 451.

44. The liability of a surety on an attachment bond is on his contract. He is not liable as a trespasser, for a seizure of property attached by the sheriff, even if the bond was void.

McDonald v. Fett, 49 Cal. 354.

45. Where the defendants were sureties in a recognizance for the appearance of one H., who was charged with the crime of receiving two mules, alleged to have been stolen, and in a suit on such recognizance against the sureties, the court found that an indictment was found by the grand jury, at a subsequent term to the date of the recognizance, entitled "an indictment against H.

for receiving stolen goods." *Hehl*, that it does not follow, from this general description of the indictment, that it was for the same crime mentioned in the recognizance.

People v. Hunter, 10 Cal. 502.

46. A judgment entered on the forfeiture of a recognizance is the property of the state, and the legislature may release the same in such form and on such conditions as it thinks proper to prescribe.

People v. Bircham, 12 Cal. 50.

47. An action will not lie on a recognizance given in a criminal case unless the recognizance is made a matter of record in the court where it is returnable.

Mendocino Co. v. Lamar, 30 Cal. 627.

48. The district attorney can bring suit against bail at any time after the adjournment of the term, at which the recognizance was declared forfeited.

People v. Carpenter, 7 Cal. 402.

49. Sureties to a bail bond can not avail themselves, in defense to an action thereon, of an insufficiency of the justification of the undertaking. *Id.*

50. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor, the court of sessions having declared the bond forfeited for non-appearance, the sureties can not defend on the ground that the judgment of forfeiture was erroneous. That judgment can not be thus reversed.

People v. Wolf, 16 Cal. 385.

51. If, pending an appeal from a judgment for plaintiff in ejectment, the plaintiff sells or leases a part of the premises recovered, the sureties on an undertaking to stay a writ of restitution pending the appeal are not released from their liability on the same.

De Castro v. Clarke, 29 Cal. 11.

52. Where a contractor agrees with the owner to erect for him a building and furnish the materials and deliver the same discharged of all liens, and by the terms of the contract the owner is to pay seventy-five per cent. of the contract price each month as the work progresses, and the other twenty-five per cent. when the work is completed, and a third person becomes surety for the contractor; if the owner, during the progress of the work, pays the contractor more than the seventy-five per cent. the surety is discharged from his liability.

Bragg v. Shain, 49 Cal. 131.

JUDGMENT AGAINST.

53. Where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety.

Pico v. Webster, 14 Cal. 202.

54. But, in the case of official bonds, the sureties undertake in general terms that the

principal will perform his official duties; and a judgment against the officer in a suit to which they were not parties is not evidence against them. *Id.*

55. That the sureties had notice of the suit against the principal amounts to nothing, unless it was notice according to the statute, or unless they appear voluntarily as parties to the record. *Id.*

56. A judgment in an action against the sureties on an official bond, for a defalcation of the principal, should first fix the amount of the defalcation, and then proceed with a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, and then close with a proviso, that each judgment shall be satisfied by the collection or payment of amount of the defalcation, and costs.

People v. Rooney, 29 Cal. 642.

57. If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff can not afterwards have judgment against the sureties on the indemnifying bond, upon a notice of five days, unless he gave the sureties written notice of the action brought against him.

Dennis v. Packard, 28 Cal. 101.

58. Where a judgment was recovered against a surety upon an undertaking on appeal and the surety settled the judgment by paying a portion thereof, such payment did not operate as an assignment of the judgment against the defendant in the action in which the appeal was taken, so as to authorize the surety to recover the whole amount of such judgment.

McDermott v. Mitchell, 53 Cal. 616.

RELEASE OF.

59. Neglect to sue a contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. *Sacramento v. Kirk*, 7 Cal. 419.

60. Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued and levied upon property of the principal sufficient to satisfy the same. After the levy, the sheriff, under the directions of the plaintiff in execution, took the principal's note for the amount of the judgment, and released the levy. Subsequently a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff: *Hehl*, that the release of the levy of the first execution, and the taking of the principal's note, discharged the surety. *Morley v. Dickinson*, 12 Cal. 561.

61. The contract, until rescinded by the return of the note, was sufficient to postpone

any right to enforce the execution, although the note may have been given in fraud. *Id.*

62. The mere passiveness of a board of supervisors in not bringing a defaulting county assessor to settlement does not discharge him or his sureties.

People v. Jenkins, 17 Cal. 500.

63. If, in an action against the executors of an estate, brought by the legatees to recover a judgment for money found to be in the hands of the executors, and adjudged to be paid to the legatees by the probate court, a judgment is entered by consent of the parties under a stipulation in writing, and made a part of the judgment, payable in installments thereafter, the sureties, not consenting to the arrangement, are released from their liability on the executor's bond.

Fordyce v. Ellis, 20 Cal. 96.

64. If the principals in a bond given to a sheriff to release goods from attachment, tender to the plaintiff in the attachment suit, the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged from their obligation on the bond; and for the purpose of discharging the sureties, it is not necessary that such tender be paid into court, or kept good. *Curia v. Packard*, 29 Cal. 194.

65. A release of some of the sureties on a treasurer's official bond by proceedings in insolvency, and a failure of the county judge to summon the treasurer to show cause why he should not execute an additional bond, does not release the remaining sureties from future liability on the bond.

Sacramento Co. v. Bird, 31 Cal. 66.

66. The sureties on the official bond of a county treasurer can be discharged from further obligation on the same, only upon proceedings had before the board or officer which, at the time of the discharge, has power to approve of the official bond of such officer.

People v. Evans, 29 Cal. 429.

67. If the defendant obtains an order for the release of property attached in the action, by delivering to the court or judge an undertaking, executed by sureties, conditioned to pay the plaintiff any judgment he may recover in the action, and the property is thereupon released; whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiffs, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same the sureties are discharged from their obligation on the undertaking.

Hayes v. Josephi, 26 Cal. 535.

68. A. and B. executed a joint promissory note to C.; B. was surety for A. B. brought an action against C. after the maturity of the note, to compel him at once to proceed and collect the amount due on the note

from A., the principal, and obtained a decree requiring C. to commence legal proceedings against A. for the collection of the note, upon B.'s tendering to him a sufficient amount to pay reasonable costs and expenses, or be forever debarred from collecting the same from B. B. deposited with the clerk and sheriff a sufficient amount to pay their costs, and tendered to C. the services of an attorney employed by B. C. refused to commence the action, and A. subsequently became insolvent: *Held*, that this was not a compliance with the conditions of the decree by B., the surety, and that he was not released from his liability on the note.

Dane v. Corduan, 24 Cal. 157.

69. If a written contract for the extension of time within which to complete a building is intended to be signed by the owner, the contractor, and the persons who became sureties for the contractor for the fulfillment of his agreement, and is signed only by the owner, contractor, and one of the sureties, it is not obligatory, and does not release the sureties from liability for damages resulting from the failure of the contractor to fulfill his agreement.

Barber v. Burrows, 51 Cal. 404.

70. In an action against the sureties on an official bond, if the defendants allege in their answer that they signed with the express understanding that the bond should be signed by certain other persons, naming them, without stating that this understanding was with the obligee, it will be presumed that the understanding was with the principal in the bond.

Tidball v. Halley, 48 Cal. 610.

71. If the sureties on an official bond sign with an express understanding with the principal in the bond that certain other persons shall sign as sureties, and that unless such other persons sign, it shall not be delivered, a delivery of the bond to the obligee, without the signature of such other persons, does not render it invalid as to the sureties who do sign. *Id.*

CONTRIBUTION.

72. A surety who has satisfied the principal obligation is entitled to contribution from his co-sureties.

Taylor v. Reynolds, 53 Cal. 686.

73. The liability of the co-surety to contribution is primary, and not conditional upon the inability of the surety to recover from his principal. *Id.*

74. Neither notice of the satisfaction of the principal obligation, nor demand for contribution, is required before the commencement of the action for contribution. *Id.*

75. When an administrator gives two bonds, one when letters are issued, and the other when real estate is about to be sold,

and each bond contains the same condition, and the sureties assume a common burden, they are liable to contribution *inter se*.

Powell v. Powell, 48 Cal. 234.

76. When several are sureties, and all but one pay the whole sum for which all became liable, **those who pay may maintain a joint action** for contribution against the one who failed to pay his proportion, provided they jointly paid the money.

Dussol v. Bruguere, 50 Cal. 456.

77. If one of several sureties dies, his **executor may be joined** with a part of the sureties in an action against another for a contribution. Id.

78. If one of two sureties dies, and his executor pays all the money for which both became liable, without having the claim allowed in the probate court, he, as executor, can recover the demand for a contribution from the other surety. Id.

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SURVEY.

1. A private survey is no legal evidence of the facts it purports to contain, since, if

it were, any man might recover the land of another by including it in his own boundaries.

Rose v. Davis, 11 Cal. 133.

2. When a private survey is admitted as a **diagram**, but not as evidence, the court should clearly explain to the jury the precise purpose and effect of its admission. Id.

3. The **survey**, or map of the **United States surveyor**, of a grant, is inadmissible as evidence to establish boundaries, without proof of the orders or authority under which he acted. Id.

4. If the owner of a tract of land conveys a mile square of the same to one party, with a description in the deed so uncertain that the boundaries can not be determined with precision, and soon after sells to another party the same quantity bounded on the north by the first tract, an **agreement fixing the lines** of the first tract sold, made after the second sale by the common grantor and the first grantee, is not binding upon the second grantee unless he knew of, and acquiesced in the location of the lines.

Sneed v. Woodward, 30 Cal. 430.

5. If the owner of land conveys a mile square of the same to one party, with such description that the lines can not be located with precision, and soon after sells the same quantity to another person, bounded on the north by the first tract sold, and afterwards makes a survey and location of the lines of the first tract sold, in connection and by agreement with the first purchaser, to which survey and location the second purchaser is not a party, and in which he does not acquiesce, and the common grantor afterwards sells to other persons tracts of land adjoining the two first tracts, and surveys and deeds them in accordance with the first survey and location, these last surveys and the deeds given to the purchasers are not evidence against the purchaser of the second tract sold, or his grantees, to show that the first tract sold was located in accordance with the calls of the deed to such first purchaser. Id.

6. A witness who is not a county surveyor may be admitted to testify to a survey which he has made, although he is not called to rebut or explain a survey made by a county surveyor. Doherty v. Thayer, 31 Cal. 140.

7. An official map of a town plat which, by reference to monuments established, or by some other mode, **refers to a survey**, is presumed to correctly represent the survey as actually made; but if there is a discrepancy between the map and the survey in the field, the survey **must prevail**, if the position of the points and lines established by the survey can be proved.

O'Farrell v. Harney, 51 Cal. 125.

8. Adjoining land proprietors are not **estopped** by a survey made by them of a **disputed boundary line**, if the survey is

made to ascertain where the true line is as fixed by a conveyance, and the surveyor is not an arbiter to establish a line.

Spring v. Hewston, 52 Cal. 442.

9. A survey for the purpose of establishing a boundary line, made between a sole owner of the land on one side, and one of several owners of the land on the other side, does not estop the owners who did not join in it. Id.

10. In ascertaining the initial point of the survey of a tract of land from the field notes, when there is no monument to indicate it, the monuments, courses, and distances of the other points and lines of the survey are better and surer guides than the mere distance of the initial point from the south-east corner of a government township. Alviso v. Valletero, 52 Cal. 500.

11. As determined by the practice of the land department of the United States and of the state, lands are surveyed when the lines are run in the field and monuments or marks established by the proper surveyor. Oakley v. Stuart, 52 Cal. 521.

12. A county surveyor is prohibited, by considerations of public policy, from becoming the purchaser from the state of public lands which his official duties require him to survey.

Yoakum v. Brower, 52 Cal. 373.

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SUSCOL RANCHO.

1. The act of congress of March 3, 1863, providing for the survey and sale to the purchasers from Vallejo, of the land known as the Suscol rancho, withdraws said land from

the operation of the general laws providing for the disposal of the public lands.

Hastings v. McGoogin, 27 Cal. 84.

2. Prior possession by an inclosure, and a claim made before the register and receiver, to purchase land, a portion of the so called Suscol rancho, within one year from March 3, 1863, by one who was a *bona fide* purchaser from Vallejo, entitles him to recover in ejectment as against one who enters after March 3, 1863, and claims the same land under the general pre-emption laws of the United States. Id.

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IN GENERAL.

1. The words "taxation" and "taxed," in section 13 of article IX of the constitution, relate to such general taxes upon all property as are levied to defray the ordinary expenses of the state, county, town, and municipal

governments, and not to assessments levied on the lots fronting on a street in a city to pay the expenses of their improvements.

Emery v. S. F. Gas Co., 28 Cal. 345.

2. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract, and does not establish the relation of debtor and creditor between the tax-payer and state.

Perry v. Washburn, 20 Cal. 318.

3. Taxes are charges, imposed by or under the authority of the legislature, upon persons or property subject to its jurisdiction.

People v. McCreery, 34 Cal. 432.

4. A tax is a personal debt, or in the nature of a personal debt due from the property-holder, and not a mere charge upon the property, created by and depending upon the regularity of the proceedings given by statute.

People v. Seymour, 16 Cal. 332.

5. The powers of taxation and appropriation are limited by the eighth article of the constitution, and can not be extended to debts contracted in violation thereof.

Nougues v. Douglass, 7 Cal. 65.

6. Limitations by congress upon the right of a state to tax its citizens are to be strictly construed.

People v. Shearer, 30 Cal. 645.

7. Taxes are due and payable in the county where the property is first assessed; and if the property, after it has been assessed, be removed into another county, and there assessed, the first assessment is unaffected thereby, and payment of the latter assessment is not a discharge of the former. People v. Holladay, 25 Cal. 300.

8. If the tax upon the franchise has been illegally imposed, or a valid legal objection appears upon the face of the proceedings, the plaintiff has a perfect remedy at law, and a court of equity has no power to interpose.

De Witt v. Hays, 2 Cal. 463.

Robinson v. Gaar, 6 Id. 273.

9. The purchaser of property in San Francisco, at a sale for the taxes of 1858, is not entitled to an injunction restraining the sale of the same property for the unpaid taxes of 1857.

Cowell v. Washburn, 22 Cal. 519.

10. Taxes are not debts, within the meaning of that clause of the act which provides that the notes shall be "a legal tender in payment of all debts, public and private." Congress, by these terms, only intended such obligations for the payment of money as are founded upon contract.

Perry v. Washburn, 20 Cal. 318.

11. The constitution of this state does not prohibit the legislature to tax occupations, nor to authorize municipal corporations to tax them for purposes of revenue.

San Jose v. S. J. & S. C. R. Co., 53 Cal. 475.

12. When power is conferred on a muni-

cipal corporation to "license and regulate" occupations, the whole charter and the general legislation of the state pertinent to the subject must be consulted, in order to determine whether the power to "license and regulate" includes the power to tax occupations for revenue purposes. Id.

13. A license fee, or charge for the transaction of any business, is a tax within the meaning of the term "tax" as employed in section 6 of article VI of the constitution, and in section 833 of the code of civil procedure.

Santa Barbara v. Stearns, 51 Cal. 499.

14. The fact that a statute designates as a "tax" that which in its elements is an "assessment" does not make it a "tax." The question whether it is a "tax" or "assessment" must be decided by the nature of the imposition.

Doyle v. Austin, 47 Cal. 353.

LEGISLATIVE POWER.

15. The power of taxation was given to the legislature without limit, for all purposes allowed by the constitution.

Nougues v. Douglass, 7 Cal. 65.

16. The state has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines of the state.

People v. Naglee, 1 Cal. 232.

17. The taxing power is an incident of sovereignty, the exercise of which belongs exclusively to every state, and attaches alike upon everything which comes within its jurisdiction.

People v. Coleman, 4 Cal. 47.

18. The legislature has a right to authorize a local tax for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition or without it, or by, or without, a submission of the proposition to the people, and it is not essential that the improvement should be within, or confined to the locality taxed, and a subscription for stock, to be paid for by taxation, is a valid contract to pay it.

Pattison v. Yuba Co., 13 Cal. 175.

19. The interest of the occupant of a mining claim is property, and, under the constitution, it is in the power of the legislature to tax such property.

State v. Moore, 12 Cal. 56.

20. The constitution provides that all property shall be taxed; but the quo modo is a matter of legislative control, and the statute must be steadily followed.

De Witt v. Hays, 2 Cal. 463.

21. The power of apportionment, with the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment.

Burnett v. Sacramento, 12 Cal. 76.

22. The fact that the legislature has once

exercised its powers in limiting the extent of **taxation in municipal corporations**, under the thirty-seventh section of article IV of the constitution, does not prevent the legislature from again exercising its power by enlarging the authority to tax.

Blanding v. Burr, 13 Cal. 343.

23. The only **limitation** upon the taxing power of the legislature is the provision for equality and uniformity found in the thirteenth section of article IV of the constitution. Id.

24. The legislature can impose a **general tax** upon all the property of the state, or a **local tax** upon the property of particular political subdivisions, as counties, cities, and towns. The cases in which its powers shall be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualifications of equality and uniformity in the assessment. And, except as especially restricted, its power of appropriation of the moneys raised is co-extensive with its power of taxation. It may appropriate them to claims which have no legal obligation, and are founded only in justice. The power of appropriation which the legislature can exercise over the revenues of the state for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town, for any purpose connected with their present or past condition, except as such revenues may, by the law creating them, be devoted to special purposes. In creating the law imposing the tax, it can prescribe the objects to which the money raised shall be applied. It is only for the convenient administration of the government that the state is divided into counties, cities, and towns. Id.

25. The legislature **possesses the entire control and management of the affairs** of the state. It can levy such taxes as it may deem expedient, subject only to the constitutional requirements of equality and uniformity, and devote the proceeds of the taxation to such specific objects as it may think proper. But, after having made an appropriation, in view of a contemplated contract to be based thereon, and such contract is made, and funds to meet the appropriation are received into the treasury, it can not deprive the party with whom the contract is entered into of such funds, by repealing the appropriation. In other words, the **control of the legislature** over particular funds, when received, may be **subject to the obligations of a contract** made with reference to them. By such contract, the legislature does not derogate from its power, or that of any subsequent legislature. It only acts finally upon a particular subject, which is thus placed beyond the reach of future action. It is true, the legislature

may not direct any taxation, may repeal all laws relating to the collection of revenue, and thus prevent the receipt of any funds upon which the appropriation can operate; but this possibility does not affect the right of the parties when such funds are actually received. *McCauley v. Brooks*, 16 Cal. 11.

26. The only **restriction** imposed upon legislative discretion in the matter of taxation by our constitution is **that it shall be equal and uniform**, and in proportion to the property taxed. This is not a restriction of the absolute power to impose taxation, but affects the mode of its exercise only. In every case where the legislative act imposing taxes conforms to and is not in conflict with constitutional restrictions, it is binding and obligatory, and beyond the control of the judicial department of the state government.

Beals v. Amador Co., 35 Cal. 624.

27. The principle upon which taxation is to be imposed by the state government is pointed out by the constitution; but the **extent** to which it may be carried is **left unlimited**, except by legislative discretion.

S. & V. R. R. Co. v. Stockton, 41 Cal. 148.

28. The legislature may, in strict conformity with its constitutional powers and duties, recognize a moral obligation as the sole basis for the imposition of taxes.

Beals v. Amador Co., 35 Cal. 624.

29. Where, by a prior statute for the ascertainment of a **debt** due from one county to another, and to provide for its payment by a tax which was thereby imposed, without allowing or making provision for the payment of **interest thereon**, under which enactment the debt was fully paid, it is competent for the legislature, by subsequent enactment, to provide for the payment of interest on such debt by the imposition of a further tax for that purpose. Id.

30. Where, in such case, said debt has been assigned to, and was exclusively owned by, a private individual, before said past enactment, the tax thereby imposed was no less, for that reason, for a public benefit. Id.

31. Although the legislature can not by law transfer the duties of the office of **tax collector** from a person elected as such, to one who was not so elected, yet it may provide for the election of a person as tax collector who may enter upon the discharge of his duties before the expiration of the term of a tax collector elected under the law as it previously existed.

Mills v. Sargent, 36 Cal. 379.

32. The collection of **poll taxes** or of license taxes, or of any taxes other than taxes upon property, may be transferred from one to another class of officers at the will of the legislature, although those duties may

have pertained to one of those officers when the incumbents were elected.

Mitchell v. Crosby, 46 Cal. 97.

33. By the constitution of California, the legislative department of the government is **vested with the power of taxation**, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; and there is no restriction upon this power as to the objects to which, or the time for which appropriations may be made, except that "no appropriations for a standing army shall be for a longer time than two years."

People v. Pacheco, 27 Cal. 175.

34. The legislature can not, by law, **fix the assessed value of property**.

People v. Hastings, 29 Cal. 449.

35. The power of "taxation" is a power which the legislature takes, from the law of its creation, to impose taxes upon the property of the citizens for the support of the government. Taylor v. Palmer, 31 Cal. 240.

36. The power of taxation is a **necessary incident to sovereignty**, and under our system of government it pertains to the legislative department. A tax must have its origin in a law enacted for that purpose.

People v. McCreery, 34 Cal. 432.

37. The power of the legislature over the whole subject of taxation, including the property to be charged, the amount of the tax, the mode of levying, assessing and collecting it, etc., is as ample as over any other matter that is a proper subject of legislative action. The provisions of section 13, article XI of the constitution, are limitations, and not grants of power; but as limitations, are, according to their terms, mandatory upon the legislature. Id.

38. Under the provisions of section 13, article XI of the constitution, to wit: "Taxation shall be **equal and uniform** throughout the state;" and "All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law:" *Held*, first, that by the words "all property in this state," is meant all private property, or all property other than that belonging to the United States, or this state, or that which is public property; second, that the words "taxation shall be equal and uniform throughout the state," relate to taxation of property, and that the legislature has no power to exempt any private property in this state from taxation; and, third, that the rate of taxation on property, for state purposes, shall be uniform throughout the state. People v. Coleman, 4 Cal. 46; and High v. Shoemaker, 22 Id. 363, so far as in conflict herewith, are overruled. Id.

39. Where the general revenue law subjects all solvent debts to taxation, any other law which singles out a class of such debts

and exempts them from taxation is repugnant to the clause of the constitution which provides that taxation shall be equal and uniform throughout the state.

People v. McCreery, 34 Cal. 433.

People v. Gerke, 35 Id. 667.

People v. Black Diamond Co., 37 Id. 54.

People v. Whartenby, 38 Id. 461.

Approved in People v. Eddy, 43 Cal. 331.

40. It was not intended by the framers of the constitution that the legislature should have the power to exempt any kind of property from taxation.

People v. Eddy, 43 Cal. 333.

41. So much of the general revenue act as **exempts possessory claims** and improvements upon the public lands from taxation is **unconstitutional and void**.

People v. McCreery, 34 Cal. 433.

People v. Gerke, 37 Id. 677.

Affirmed in People v. Black Diamond Coal M. Co., 37 Cal. 54.

42. A state revenue law is not unconstitutional because there is a **want of uniformity between the particular laws** prevailing in the several counties, with regard to the enforcement of the payment of delinquent taxes. People v. C. P. R. Co., 43 Cal. 399.

43. A clause in an act imposing a tax, which allows the board of supervisors to **remit the tax** upon such property as they may deem just, does not render the whole act unconstitutional. People v. Whyler, 41 Cal. 351.

44. Is the statute allowing the assessor to deduct from solvent debts due the taxpayer the amount of his indebtedness constitutional? *Quære?* Lick v. Austin, 43 Cal. 500.

45. The legislature can not authorize the board of supervisors of a county to **remit a tax**, or part of a tax, within a specified district. An order of the board attempting to do so is null and void, because in conflict with the provision of the constitution which requires taxation to be equal and uniform, and which requires all property to be taxed.

Wilson v. Sutter, 47 Cal. 91.

46. An act authorizing a board of supervisors of a county to remit the taxes, or a part of the taxes, upon any portion of the property within a district, is unconstitutional, even if the tax is imposed for local purposes to be expended within the district. Id.

REVENUE ACTS.

47. There is nothing in the **act of 1856**, which simply alters the mode of levying taxes, the result not being changed, which, in substance, conflicts with the act of 1851 in those provisions which offered a security to the creditors for their debts. It is just as clear that the law does not contemplate the imposition of **double taxation** in any one year for the purpose of raising the money provided for by the act of 1851; and, there-

fore, the terms of the act of 1856, in this respect, supersede those provisions in the act of 1851 which declare the duty of the assessor to add to the list the several sums of money which are intended to be raised by the act of 1851. *People v. Bond*, 10 Cal. 563.

48. The omission in the revenue act of 1857, to tax all the lands in the state, did not render the act void for unconstitutionality. *High v. Shoemaker*, 22 Cal. 363.

49. The oath to be made, under the revenue act of 1857, to the "list" or "statement" of taxable property, need not be in writing. Nor need the tax-payer furnish in writing such "list" or "statement." It is sufficient if he give the assessor the necessary information to make out the "list."

People v. Quinn, 18 Cal. 122.

50. The revenue act of 1857 does not authorize sales for taxes assessed prior to its passage, but only for the fiscal year or years following its passage.

Burr v. Hunt, 18 Cal. 303.

51. The sixth article of the revenue act of 1854, which declares "all goods, wares and merchandise, provisions, or any other property whatsoever, brought or received within this state, from any other state, or from any foreign country, to be sold in this state, owned by any person or persons not domiciled in this state," to be consigned goods within its intent and meaning, and provides that all persons selling such goods shall be subject to a tax for the use of the state, at the rate of fifty cents on each one hundred dollars of the amount of sales made by them, is not repealed by the revenue act of 1857. *Crosby v. Patch*, 18 Cal. 438.

52. The limitation of the general language of the sixty-fourth section of the revenue act of 1860, shown to have been the sense of the legislature in previous acts.

Ah Hee v. Crippen, 19 Cal. 491.

53. The act of 1859 does not repeal these sections of the revenue act of 1857 by implication, as the rule is usually applied, but upon the principle that when the legislature makes a revision of particular statutes, and frames a general statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, this is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored.

State v. Conkling, 19 Cal. 501.

54. The sixty-fourth section of the revenue act of 1860, which declares that no person who is not a citizen of the United States, or who has not previously declared his intention to become such (Californian Indians excepted), shall be allowed "to take gold from the mines of this state, or hold a mining claim therein," without a license as pro-

vided in the act, does not refer to mines contained in lands which are the property of individuals, but simply to mines in the public lands of the state or the United States.

Ah Hee v. Crippen, 19 Cal. 491.

55. Under the revenue act of 1861 it is the duty of the tax collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same, and the performance of this duty may be enforced by mandamus.

Perry v. Washington, 20 Cal. 318.

56. The act entitled "an act to provide revenue for the support of the government of this state, from a tax upon foreign and inland bills, passengers, insurance companies, and other matters," passed May 14, 1862, has no reference to the execution of the inspection laws of this state, and is not in the nature of a police regulation, but is a measure designed for revenue purposes only.

People v. Raymond, 34 Cal. 402.

57. The word "debts," as used in the revenue laws of this state, includes not only debts due and payable on or before the first Monday of December of the year for which an assessment is made, but debts to become due and payable at any time thereafter.

People v. Arguello, 37 Cal. 524.

58. The general revenue system provided in the political code, which went into effect in 1872, applies to the city and county of San Francisco.

S. & L. Soc. v. Austin, 46 Cal. 415.

59. By section 3891 of the political code it is made the duty of the auditor to deliver the poll tax blanks to the assessor.

Mitchell v. Crosby, 46 Cal. 97.

60. Where, by a statute, it was required that a certain sum should be annually divided by the board of supervisors among the collectors of taxes of a county, for their salaries, and the only rule of division prescribed was that "the due proportion" of each collector should be paid to him: *Held*, that by "the due proportion" was intended such portion of the sum as the board of supervisors should determine, in view of the services required of each collector.

Faughnan v. Tuolumne Co., 35 Cal. 133.

61. Where taxes are levied under a law which is repealed by a subsequent act, unless it be made apparent by clear and unequivocal language that the repealing act was intended to have a retrospective operation, it will be inferred that the intent of the legislature was that the taxes should be collected in accordance with the law in force at the time they were levied.

Oakland v. Whipple, 44 Cal. 303.

62. It was the intention of the legislature in adopting the codes to establish one rev-

venue system, which should be applicable alike to all the counties.

Mitchell v. Crosby, 46 Cal. 97.

63. When the code mentions **assessors**, it means district assessors as well as county assessors, so long as the present district assessors remain in office. Id.

LEGALIZING ACTS.

64. The legislature has power to pass **curative acts** by which the various acts and proceedings of the officers and board charged with the levying and assessing of taxes are rendered valid and legal, notwithstanding that errors and irregularities have intervened. But where the officer or tribunal had no power or jurisdiction, the act is void, and subsequent legislation can not cure the defect.

People v. Goldtree, 44 Cal. 323.

65. The legislature has the power of **taxation** without restriction as to mode or limitation as to time; and if, from accident or oversight, or remissness on the part of the tax-payer, the time for payment has passed, or the mere mode of charging him has not been followed by the officers, the legislature may still compel him to pay.

People v. Seymour, 16 Cal. 332.

65a. The legislature may prescribe a mode of **correcting an informal assessment**. Id.

66. The act of May 17, 1861, was only designed to legalize **assessments** in some respects **formally defective**, though substantially good, and was not intended to make good an assessment which was totally invalid for not stating either the kind or quantity of property assessed, or not describing it, when real estate.

People v. Holladay, 25 Cal. 300.

67. The legislature possesses full power to legalize **defective and invalid assessments** of delinquent taxes, and to provide for their collection. Id.

68. When an **assessment** is so defective as to be **totally void**, the legislature can not cure it by legislative enactment having a retrospective operation, so as to create an obligation where none existed before. Id.

69. The first section of the act of May 17, 1861, entitled "an act to legalize and provide for the collection of delinquent taxes in the counties of this state," legalizes **every assessment** for taxes made the three years preceding March 1, 1861, however defectively and imperfectly it may have been made in any respect. Id.

70. The act of April 4, 1864, legalizing the assessments of property made in 1862 and 1863, does not cure the defect of a **want of valuation by the assessor** of property assessed during those years.

People v. S. F. S. U., 31 Cal. 132.

71. The act of 1866, passed for the pur-

pose of legalizing **defective assessments**, did not legalize **complaints**, in actions then pending, which were defective by reason of not describing the land assessed.

People v. Mariposa Co., 31 Cal. 196.

72. Courts have no power to go behind assessments legalized and confirmed by an act of the legislature, to inquire into alleged errors and irregularities in the assessment.

People v. Todd, 23 Cal. 181.

73. The act of March 19, 1878, "to legalize the assessment of taxes in San Francisco," etc., is not unconstitutional.

San Francisco v. S. V. W. W., 54 Cal. 571.

74. The foundation of proceedings for apportioning and collecting a tax upon property is the **valuation**, which, under the rule of the constitution, must be made by the **assessor**, and the legislature can not supply this defect, if it existed, by any curative act. But all the details of the proceeding in making the valuation are subject to legislative control, and if error has intervened, it is subject to the curative power of the legislature, provided a valuation, good in substance, has in fact been made by the assessor, though in mode, form, etc., not conforming to the statute.

People v. McCreery, 34 Cal. 432.

LEVY OF TAXES.

75. The legislature has power to levy a tax upon all the property in the state, either **before or after the value** of the property is **ascertained**. People v. Latham, 52 Cal. 598.

76. If the tax levy contains an **illegal item**, such item will not invalidate the levy as to other items, if the levy is so made that the illegal item may be separated from the other items of the levy.

De Fremery v. Austin, 53 Cal. 380.

77. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character. It is a **legislative act**; it requires the exercise of legislative power, which, for certain governmental purposes in the county, may be devolved upon a board of supervisors, but can not be delegated to any branch of the judicial department.

Hardenburgh v. Kidd, 10 Cal. 402.

78. If a tax is illegal and void, a sale under it is a nullity, and a deed of property sold for such a tax conveys no title.

Low v. Lewis, 46 Cal. 549.

79. An act amendatory of the consolidation act, passed in 1866 (stats. 1865-6, p. 436), provides that "on or before the first Monday of May, annually, the board of supervisors of said city and county shall levy the amount of taxes for state, city, and county purposes, required by law to be levied upon all property not exempt from taxation." The order levying said taxes for said year, under which said assessment of defendant's property was made, was **passed by said**

board on the first Monday of May, and only received the approval of the mayor on the following day. Under the consolidation act said approval was necessary to give force to said order. The said revenue acts require the annual levy of taxes to be made on or before said first Monday of May: *Held*, first, that said order was invalid, and said taxes were not legal so far as they depended on the action of said board; second, that said state taxes for their levy did not depend on the action of said board, but rested upon the several statutes providing for their levy, but that the levy of said city and county taxes did depend on said order, and were illegal.

People v. McCreery, 34 Cal. 432.

80. Prior to February, 1866, by divers general and special legislative acts, the board of supervisors of Tehama county were authorized and required to levy upon the taxable property of the county, in addition to the state tax, divers rates of taxes "for county expenditures," "for interest fund," "wagon road fund," "contingent fund," "school fund," and "for road fund." On the twenty-sixth of February, 1866, the legislature passed a special act, which did not in terms repeal any former act, but directed said board "to levy at the same time that other state and county taxes are levied, eighty cents upon each one hundred dollars' worth of the taxable property of said county, which tax * * * shall constitute the entire tax in said county for county purposes." *Held*, that, except said act providing for the levy of a tax "for county purposes," which was by implication repealed, said former legislative acts were unaffected by the passage of said special act of February 26, 1866.

People v. Gerke, 37 Cal. 223.

81. The "interest tax fund" mentioned in the act of March 18, 1868, "to provide for the government of the county of San Diego," was intended to take the place of the "interest tax," required to be levied by the act of May 4, 1855, "to fund the debt of said county and provide for the payment of the same," and was also intended to pay the interest on the old bonds of the county in case the holders should not choose to accept the terms of payment offered by the said act of 1868.

People v. Morse, 43 Cal. 534.

82. A charge imposed by law upon the assessed value of all property, real and personal, in a district, is a tax, and not an assessment, although the purpose be to make a local improvement on a road.

Williams v. Corcoran, 46 Cal. 553.

LIEN.

83. The levy of a tax created a judgment and lien on the property, having the force and effect of an execution, and could be enforced in the same manner.

Yuba v. Adams Co., 7 Cal. 35.

84. Under the revenue law of 1854, the lien of the state for state and county taxes attached on the first day of March of each year, and continued until the tax was paid. Neither a failure by the officer to include a delinquent tax of one year with the tax of the subsequent year, nor a sale of the property for taxes of the succeeding year, divested the lien for the prior tax.

Cowell v. Washburn, 22 Cal. 519.

85. The lien of a tax extends back to the assessment, and the assessment creates a lien which is not extinguished until the tax is paid. *Reeve v. Kennedy*, 43 Cal. 643.

86. The assessment of taxes and the lien which it creates, are matters of public record, of which all persons are bound to take notice, and the purchaser of land is bound at his peril to see that taxes have been paid.

Id.

87. In the fiscal year 1868-9, no liability for assessment and taxation could accrue upon a bond and mortgage which was not in existence on the first Monday in March preceding, that being the time fixed by the statute when the lien for taxes attached.

People v. Kohl, 40 Cal. 127.

TAXABLE PROPERTY.

Real Property.

88. The fact that the title of land is in dispute between the claimants and the United States, and that the claimants under a Mexican grant are not in possession, affords no ground for exempting the land from taxation. *Robinson v. Gaar*, 6 Cal. 273.

89. Where a claim to a tract of land, under a Mexican grant, somewhere within a certain larger tract, was ascertained, and the land segregated by a survey, under a decree of confirmation by the United States supreme court: *Held*, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey.

Palmer v. Boling, 8 Cal. 334.

90. The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation; and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege of the government, not an incident to the property.

State v. Moore, 12 Cal. 56.

91. When land of the United States has been paid for, and a certificate of purchase

has been given to the purchaser, it is liable to taxation, although the patent may not have issued. *People v. Shearer*, 30 Cal. 645.

92. The possession by the citizen of, and his possessory interest in, the public lands for mining, agricultural or other purposes, constitutes a species of property recognized by law, and is subject to taxation by the state. *Id.*

93. Improvements on the public lands of the United States, whether owned by a pre-emptioner or one occupying public lands without license, are liable to assessment and taxation if made so by the revenue laws of a state. *People v. Shearer*, 30 Cal. 645.

94. Under the revenue act of 1861 a person's "claim to and possession of" lands, or his "claim to" or his "possession of" such lands, may be assessed for taxation. *People v. Frisbie*, 31 Cal. 146.

95. The "claim to and possession of" land is property liable to taxation, even if the land belongs to the United States. *People v. Cohen*, 31 Cal. 210.

96. A tax on a "claim to and possession of" land is not a tax on the land itself. *Id.*

97. A "claim to" and "possession of" land is "property" liable to taxation within the meaning of the thirteenth section of the eleventh article of the constitution. *People v. Frisbie*, 31 Cal. 146.

98. A grant of three square leagues of land made by the Mexican government, to be selected within exterior boundaries containing a much larger tract, after two prior grants have been located within the same boundaries, is real estate liable to taxation, although not yet surveyed, provided there is land enough within the exterior boundaries to satisfy the grant or any part thereof. *People v. Crockett*, 33 Cal. 150.

99. The term "claim to . . . any land," as used in section 5 of the revenue act of 1861, means not only an assertion of title to, but an actual possession of, the land claimed. *Id.*

100. Possession, with a claim of ownership, is a subject of taxation, and imposes on the occupant the duty of paying the tax levied on the property. *Reiley v. Lancaster*, 39 Cal. 354.

101. A possession of and claim to public land of the United States is property, and as such is taxable to the claimant, without violating the act of congress by which this state was admitted into the union. *People v. Black Diamond Co.*, 37 Cal. 54.

102. If a party be in possession, "having the possession, charge, or custody thereof," claiming the land, he has an interest subject to taxation as real estate. *Barrett v. Amerein*, 36 Cal. 327.

103. The provisions of the constitution

and revenue laws, upon the subject of taxing property, are to be understood as referring to private property and persons only, and not as including public property and the state, or any subordinate part of the state government, such as counties, towns, and municipal corporations.

People v. Doe G., 36 Cal. 220.

104. The state has in no manner provided for taxing itself or its own property, nor has the state authorized suits to be instituted by itself against itself or its property for the collection of any tax. *Id.*

105. A tax suit *in rem* was brought in the name of the people against a tract of land situated in the city of Sacramento. In due course a judgment as demanded was rendered therein, and the property sold, and the proceeds of sale applied to the satisfaction of the judgment. M., who, as purchaser, had in due course received a sheriff's deed, applied for a writ of assistance to be let into possession, when, it being shown at the hearing that a part of said tract was, at the time the tax was levied and said suit was commenced, the property of said city, and constituted a part of the city cemetery, the application, as to such part, was denied: *Held*, that said application was properly denied, and that said suit, so far as it related to said city and its said property, was *coram non judice*. *Id.*

106. The property of the United States, or of this state, or of a municipal corporation, is not subject to taxation for revenue purposes. *Doyle v. Austin*, 47 Cal. 353.

107. The state of California has authority to impose taxation for state purposes upon that portion of the Central Pacific railroad, and the telegraph line in connection therewith, lying within its limits. *People v. C. P. R. Co.*, 43 Cal. 399.

108. A railroad corporation, organized under the laws of a state, can not claim an exemption of its property, lying within the limits of a state, from state taxation, because the corporation thus created has been subsequently adopted by the federal government, and is employed in the service of the general government, in the carriage of mail, munitions of war, etc. *Id.*

109. Growing crops are private property, and subject to taxation, the provision of said statute exempting them notwithstanding. *People v. Gerke*, 35 Cal. 677.

110. The property of a municipal corporation is not liable to taxation for municipal purposes. *Low v. Lewis*, 46 Cal. 549.

110a. A municipal corporation can not tax its own property. *Id.*

111. If a city, being the owner of water, and the reservoirs and pipes connected therewith for supplying its inhabitants with pure

water, for a consideration paid by a party, concedes to him the use and possession of the water and works for a term of years, with the right to sell the water, and enjoy for his own use the rents and profits, with also the right to lay additional pipes, the city, at the expiration of the term, to pay the party the value of improvements made by him, such party has an interest in the water works which is the subject of taxation.

Los Angeles v. L. A. W. Co., 49 Cal. 638.

112. A party in possession of a lot to which another has acquired the title by a deed for a sale for taxes is under no obligation to pay a tax levied after the tax deed is given. Maina v. Elliott, 51 Cal. 8.

113. When the act of congress making a grant of public land to a railroad company to aid in its construction provides that the president shall appoint commissioners, who shall report when a section of the road is completed, and that the company shall pay the costs and charges of the commissioners, and that patents for the land shall not issue until such commissioners have reported favorably on a section and their costs and charges have been paid, the land is not subject to state taxation until such commissioners have been appointed and have reported, and their costs and charges have been paid by the company. C. P. R. Co. v. Howard, 51 Cal. 227.

114. Such lands are not subject to state taxation until the company has complied with the conditions on which they were granted, and is entitled to a patent therefor. Id.

115. Under the provisions of the act of congress admitting California into the union, no parcel of the public lands can be taxed by the state, until a patent for it has been issued to a private person, or until such private person has become vested with a perfect equity, leaving only the dry legal title in the United States. Id.

116. If a grant by congress to a railroad company of public land to aid in its construction contains conditions, by which the grant is liable to be defeated, the land can not be taxed while the conditions are in force and are not fulfilled. Id.

Personal Property.

117. Under the second section of the revenue act of 1857, taxing all property within the state, except certain descriptions of property, among which are mining claims, a flume, constructed by a mining company along the bank of a river leading to the claims of the company in the bed of the river is not exempt. Hart v. Plum, 14 Cal. 148.

118. The fact that such flume is an auxiliary to the working of the claim does not ex-

empt it. It is not so affixed to the claim as to be a part of it. Id.

119. The case of the People v. Moore, 12 Cal. 56, simply holds that the value of a mining claim itself can not be taxed; but this does not exempt everything near the claim necessary to give it value. Id.

120. Under the seventy-fourth and seventy-fifth sections of the revenue act of 1861, pp. 442, 443, Wells, Fargo & Co., as common carriers of gold dust, are compelled to pay the license tax fixed by those sections on each of their branch establishments in the different counties of the state, as well as upon the principal house in San Francisco. People v. Wells, 19 Cal. 293.

121. Bonds of the state of California are personal property within the meaning of the term "personal property" as used in the revenue act, and are subject to taxation. People v. Home Ins. Co., 29 Cal. 533.

122. The bonds of this state owned by a foreign insurance company doing business in this state, and deposited with a banker, in pursuance of the act "to tax and regulate foreign insurance companies doing business in this state," and under the control of an agent of the company, are subject to taxation in this state. Id.

123. The bonds of this state which are owned by a foreign insurance company, but kept in this state, in accordance with the act of the legislature, requiring such companies to deposit bonds here as security for their liabilities, are a portion of the capital of the company, and are property in this state within the meaning of the revenue act. Id.

124. The percentage on premiums which foreign insurance companies doing business in this state pay to the state under the act to regulate foreign insurance companies doing business in this state, is not a substitute for taxation. Id.

125. Money belonging to litigants, but placed in the hands of a county treasurer by order of the court, subject to the order of the court, is liable to taxation, and may be assessed to the treasurer by name, and when the assessment is levied it becomes a lien on the money in the treasurer's hands. People v. Lardner, 30 Cal. 242.

126. An assessment upon "the capital" of a corporation, *eo nomine*, held to be valid. San Francisco v. S. V., 54 Cal. 571.

TAXATION OF CREDITS AND DOUBLE TAXATION.

127. A. & Co., having on general deposit with B. & Co., of Marysville, seventy-five thousand dollars, a tax for county purposes was levied thereon, and payment demanded, both of B. & Co. and A. & Co.: Held, that the tax was legal. Yuba Co. v. Adams, 7 Cal. 33.

128. A mortgage, as such, is not liable to be assessed for taxes, but the assessment should be made of the debt which the mortgage was given to secure, and the debt, where the creditor resides in the state, has no *situs* for the purpose of taxation apart from the residence of the owner.

People v. Eastman, 25 Cal. 601.

129. The lender of money is not subject to double taxation by reason of the statutory provision requiring payment of taxes on money loaned by him and on solvent debts due him over his own indebtedness; whether said statutory provision results in imposing double taxation upon the borrower of money, when security by way of mortgage or otherwise is given, does not arise in this court.

People v. McCreery, 34 Cal. 432.

130. The owner of land who had been assessed with the same, and had paid the taxes thereon, and who, during the same year, had sold the land and taken a note and mortgage, payable at a future day, for the purchase money thereof, was not liable to reassessment with the amount of such mortgage for the same fiscal year.

People v. Kohl, 40 Cal. 127.

131. Choses in action are property subject to taxation, even when secured by mortgage.

Lick v. Austin, 43 Cal. 590.

132. The levying a tax upon money at interest, as well as upon the property mortgaged to secure it, does not present a case of double taxation as against the mortgagee.

People v. Whartenby, 38 Cal. 461.

133. The state is not bound by the stipulation between the mortgagor and the mortgagee that the former shall pay all the taxes levied on the mortgaged debt.

Id.

134. By the provisions of the revenue act it is the "money at interest" which is subject to be taxed, and not the mortgage, as such. Money at interest is to be taxed in the county in which the creditor resides.

Id.

135. When money is deposited in a savings bank to be loaned out for the benefit of the depositor, if it is taxed to the depositor, and the bank has loaned the money and is taxed upon the note and mortgage, it is double taxation.

S. & L. Soc. v. Austin, 46 Cal. 415.

136. The courts have no authority to declare that solvent debts are not taxable, because to tax them might amount to double taxation. The mode and manner of assessing solvent debts is a matter of legislative discretion.

Id.

137. If a debt for money lent, which is secured by mortgage, is taxed, and the mortgaged property is also taxed, it is double taxation, and a violation of the constitution.

Id.

138. In a case of double taxation, to entitle a party to relief in the courts, it must

appear that the tax has once been paid or tendered.

Id.

139. Because the same subject-matter has been twice taxed, it by no means follows that both taxes are void, and that it must escape taxation.

Id.

140. It was the purpose of the first session of the acts of April 1 and April 4, 1870 (stats. 1869-70, pp. 584, 710), to exempt from taxation solvent debts secured by mortgage upon real estate, and not merely to regulate the duties of assessors.

People v. Eddy, 43 Cal. 331.

141. It is within the power, and is the duty of the legislature to prescribe the mode in which all property shall be assessed; but the legislature can not, under the pretense of regulating the duties of assessors, exempt property from taxation which the constitution requires to be taxed.

Id.

142. If land subject to a mortgage is taxed, and the debt secured by the mortgage is also taxed, and the tax on the debt is paid by the mortgagee, the mortgagor can not complain of double taxation.

Lick v. Austin, 43 Cal. 590.

143. Order No. 800 of the board of supervisors of the city and county of San Francisco, prescribing the payment of taxes and assessments as a condition upon which persons in possession of outside lands in said city should be entitled to the benefit of the act of congress of March 8, 1866, did not contemplate the payment of taxes and assessments twice on the same land.

Randall v. Austin, 46 Cal. 54.

144. It was the intention of said order, that such taxes and assessments should be paid by the person, or his predecessor in interest, who was in possession March 8, 1866, or had been wrongfully deprived of the possession, and was entitled to recover it. The act of March 14, 1870, prescribing the method of proceeding for the possessors to obtain from said city a conveyance of said land entitled to record, which requires contesting claimants each of them to pay to the tax collector the taxes and assessments on the land, was intended to enforce a mere deposit of the taxes and assessments, and the unsuccessful party to the litigation has a right to withdraw his deposit.

Id.

145. Solvent debts are "property" within the meaning of that word as used in the constitution, and are liable to taxation.

Id.

146. Solvent debts are liable to taxation.

People v. Ashbury, 46 Cal. 523.

147. The revenue act does not make a corporation liable for taxes assessed on its capital stock, when such capital is represented by shares of stock which are not the property of the corporation.

People v. National G. B., 51 Cal. 508.

148. Credits are not property in the sense in which the word property is used in section 13 of article XI of the constitution, and can not be assessed for taxes, or taxed as property, even if secured by mortgage.

People v. Hibernia Bank, 51 Cal. 243.

149. Solvent debts, promissory notes and mortgages are not liable to taxation. Bank of Mendocino v. Chalfant, 51 Cal. 369.

150. Neither promissory notes, solvent debts, nor mortgages are subjects of taxation; and if assessed along with other property and the tax collector can separate the legal from the illegal portion of the tax, and the legal portion is tendered him and he refuses to receive it, and the whole tax is then paid under protest and to prevent a sale of the property, the illegal portion may be recovered back. Id.

Where Taxable.

151. A steamboat, whose owners reside in New York and by whom it was sent to San Francisco and used in navigation within the state, is liable to assessment and taxation. Minturn v. Hays, 2 Cal. 590.

152. That the same property is taxed in New York is no ground why it should not be taxed in California, when it is within the limits of the latter state. Id.

153. The language used in the eighth section of the act of 1851, "that every person shall be listed in the county where he resides," does not exempt the property of non-residents of the state from taxation. Id.

154. Under the revenue law of 1800, choses in action and property of an intangible character, such as debts and the like, are properly assessable in the county where the owner resides at the time of the assessment. People v. Park, 23 Cal. 138.

155. A judgment for a debt for foreclosing a mortgage given to secure it, is only subject to taxation in the county where the owner of the judgment resides, and then the money due on the judgment alone is taxable. People v. Eastman, 25 Cal. 601.

156. Personal property is to be assessed and taxed in the county in which it is situated, except money and gold dust, which may, at the option of the owner, be taxed in the county in which he resides.

People v. Niles, 35 Cal. 282.

157. To authorize the taxing of personal property in any other county than that in which the owner resides, it must appear that such property is kept or maintained in such county, and is not there casually or in transitu, or temporarily, in the ordinary course of business or commerce. Id.

158. Personal property, transiently within a county, can not be there taxed, but

should be taxed in the county in which the owner resides.

Oakland v. Whipple, 39 Cal. 112.

159. A vessel sailing from the port in which the owner resides is not liable to taxation in another county because it is temporarily in such other county for the purpose of being freighted.

People v. Niles, 35 Cal. 282.

PROPERTY EXEMPT.

160. Money invested in the purchase and opening of mining claims is not within the provisions of that portion of the revenue act which provides for the levy of a tax on "all capital loaned, invested, or employed in any trade, commerce, or business whatsoever."

State v. Moore, 12 Cal. 56.

161. Lands, within this state, belonging to the United States, are, both by the provisions of the state revenue law and by the terms of the act of congress admitting California into the union, exempt from state taxation. People v. Morrison, 22 Cal. 73.

162. In order to hold improvements upon public lands liable for a state tax, the assessment must be upon the improvements *eo nomine*, and not upon the land itself. Id.

163. The bonds of the United States, issued in pursuance of the acts of congress, are not subject to taxation.

People v. Home Ins. Co., 29 Cal. 533.

164. The public domain of the United States is exempt from taxation. What is meant by the term "public domain," as here used, discussed.

People v. Shearer, 30 Cal. 645.

165. Land, as such, in the occupancy of a pre-emptor, whose right to purchase as such pre-emptor has been determined in his favor, is not subject to taxation until the pre-emptor has paid for the same. Id.

166. The property of all asylums and charitable institutions which are supported in whole or in part by the state, is exempt from taxation.

S. F. L. P. & R. S. v. Story, 32 Cal. 63.

167. The legislature has omitted to provide for any tax on this species of property; the naked right to collect wharfage can not be assessed *eo nomine* or made liable.

De Witt v. Hayes, 2 Cal. 463.

168. The constitutional provision, "that taxation shall be equal and uniform throughout the state," is not violated by a revenue act exempting from taxation church and school lands, and lands of the United States.

High v. Shoemaker, 22 Cal. 363.

169. The provisions of the second section of the general revenue act of 1857, as amended in 1859 (stats. 1859, p. 343), and the act fixing the rate of taxation for state purposes, passed April 2, 1866 (stats. 1865-6,

p. 786), so far as they provide for the **exemption of any private property** within this state from taxation, are unconstitutional and void. Said acts are to be read and construed as if such void provisions had never been incorporated in them.

People v. McCreery, 34 Cal. 432.

170. Notwithstanding said provisions exempting private property from taxation are void, yet the residue of said acts are complete in themselves, and furnish a valid and plain rule of action, which must be enforced as the authentic expression of the legislative will.

Id.

171. An act taxing the property of a district for a local improvement, which **exempts personal property** from its operation, is **unconstitutional**, because not levied on all the property in the district.

People v. Whyler, 41 Cal. 351.

172. The principle upon which the business of a corporation, created by the federal government as an agent in the execution of its powers, is exempt from state taxation, does not apply to the real property of the corporation lying within the limits of a state.

People v. C. P. R. Co., 43 Cal. 399.

173. If such contract provides that the party of the second part shall bear all expenses on account of the water works, except state, city, and county taxes, it does not exempt the property from taxation on behalf of the city.

Los Angeles v. L. A. W. Co., 49 Cal. 638.

174. The legislature has no power to exempt any property from taxation. The crediting of taxes heretofore paid upon property under an invalid levy does not amount to an exemption from taxation of the property upon which said taxes were paid.

People v. Latham, 52 Cal. 598.

ASSESSMENT.

175. A tax, in order to be valid, must rest upon an assessment made in the mode prescribed by law, by an assessor elected by the qualified electors of the district, county, or town in which the property is taxed for state, county, or town purposes.

People v. Hastings, 29 Cal. 449.

176. A tax, to be valid, must rest upon an assessment made by an assessor elected by the qualified voters of the district, county, or town in which the property is taxed for state, county, or town purposes.

Reily v. Lancaster, 39 Cal. 354.

177. An assessment made by an assessor elected by the qualified electors of the city and county of Sacramento is not a sufficient basis for the levy of a tax in the city of Sacramento for city purposes.

Id.

178. The listing and valuation of real estate, for the purpose of taxation, is an essential prerequisite to the validity of all

subsequent proceedings. The assessment must be made by the assessor.

Ferris v. Coover, 10 Cal. 589.

179. If no valuation was placed by the assessor upon the property, none can be placed upon it by the board of equalization. The board may alter the valuation, in order to equalize it, but can not place the valuation in the first instance.

Id.

180. When the assessor has completed his assessment roll, and delivered it to the clerk of the board of supervisors, his functions cease.

People v. S. F. S. U., 31 Cal. 132.

181. If the assessor in his assessment roll does not fix the valuation of property by marks in the column of valuation, showing whether the figures indicate dollars, cents, or eagles, the auditor, when he carries out the tax in the duplicate, can not supply the defect.

Id.

182. A valuation by the assessor is essential to the validity of a property tax, and neither the legislature nor the auditor can make the valuation if the assessment is defective in this particular.

Id.

183. An assessment for taxes must be made against the owner, when known. The individual, not the property, pays the tax. The property shows the amount of the tax with which to charge the owner, and is security for payment.

Kelsey v. Abbott, 13 Cal. 609.

184. The assessment must be as certain, as to the person taxed, as it is to the amount of the tax, and to the property.

Id.

185. The making of a certified copy by an assessor of an assessment roll made by another assessor a previous year, is not an assessment of property.

People v. Hastings, 29 Cal. 449.

186. The object of the eighth article of the act of 1854, p. 102, if in force, is to procure a true statement of taxable property. But these provisions are directory. If the value of the property be rightly fixed by the assessor, the assessment is valid, though that value was arrived at in a way different from that pointed out by the statute.

Hart v. Plum, 14 Cal. 148.

187. If an assessor can not find the persons to be taxed he may, nevertheless, assess their property.

Id.

188. The provision that the assessment must be made on or before the first Monday of May is directory. And, generally, when a time is fixed by statute within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory, unless the nature of the act to be performed, or the language of the legislature shows that designation of the time was intended as a limitation of the power of the officer.

Id.

189. In this case the assessment could be

made after May, by virtue of the second proviso in the eleventh section of the act. *Id.*

190. The **flume**, though not delivered to the company by plaintiff, the contractor, until after the assessment, was the property of the company at the time of the assessment, taxable to it, and not to the contractor. *Id.*

191. All **personal property within a county** on the first Monday of March is assessable in that county if not removed from that county before the assessment is actually made, and if assessed in that county before it is removed from it, the tax is payable in that county; but if removed from that county to another before actually assessed, the assessor of that county may make the assessment and transmit the same to the assessor of the county to which the property is removed. *People v. Holladay, 25 Cal. 300.*

192. The revenue act of 1861 does not authorize the board of equalization of a county to add to the assessment roll other property than that assessed by the assessor. The **board may require the assessor to enter on the assessment roll other property** which has not been assessed; but when entered by the assessor he and not the board must give it a proper valuation.

People v. Reynolds, 28 Cal. 107.

193. It is the duty of assessors under said act to assess all property in their respective districts, counties, etc., subject to taxation, which comprehends **all property except that which may be denominated, generally, public property.**

People v. McCreery, 34 Cal. 432.

194. The **omission** of an assessor to assess certain parcels of property subject thereto, whether arising from a misapprehension of the law, as by giving effect to void provisions of a statute, or a mistake of fact, will not invalidate his general assessment list. *Id.*

195. The legislature is not prohibited by the constitution from creating more than one revenue district in a county, and providing for the election of assessors and collectors of revenue in each district.

People v. C. P. R. Co., 43 Cal. 399.

196. An illegal assessment of real property imposes no obligation on the owner to pay the tax for which it was levied, nor does it create a lien thereon on the property assessed.

People v. Pearis, 37 Cal. 259.

197. An act of the legislature authorized a tax for road purposes upon property along a road in a portion of Santa Clara county, and provided that it might be assessed by the county assessor, and it was so assessed: *Held*, that the assessment was void, because not made by an assessor elected by the electors of the district.

Williams v. Corcoran, 46 Cal. 553.

198. If an assessment or "debts" be too

high, it is not therefore void, upon the ground that if legal taxes are blended in the same assessment with illegal, the whole is invalid; but it is merely an overvaluation, which the board of equalization will correct upon proper application.

People v. Arguello, 37 Cal. 524.

199. In order to impart any validity to the acts of an assessor, the provisions of the statute must be strictly followed, and all its conditions fully complied with by him.

Moss v. Shear, 25 Cal. 38.

200. The assessor is required to **transmit** to the assessor of the proper county, where the property is situated, **lists of property**, both real and personal, owned in such county, and the assessor receiving such lists is required to assess the property therein contained, unless he has already done so.

People v. Niles, 35 Cal. 286.

201. The acts of the officer making the assessment for taxes must be presumed to be in conformity with law, until the contrary is shown.

Palmer v. Boling, 8 Cal. 384.

202. An assessment of property for a tax to a name which is neither the true name of the owner, nor one by which he has been known, is void.

People v. Whipple, 47 Cal. 591.

203. Where property owned by **S. B. Whipple**, who had always been known by that name and no other, was assessed to **B. M. Whipple: Held**, that the assessment was void because there was no designation of the property-owner. *Id.*

204. Such **statement** of property furnished to an assessor is **binding on the corporation**, and justifies the assessor in adopting it as a correct statement of the property belonging to the company.

People v. S. & C. R. Co., 49 Cal. 414.

205. An assessor is not required to keep a book containing the original list and assessment of each man's property, and if he does keep such book, entries in it are not a record of his official action, and may be changed by him. *Id.*

206. The provision requiring that "all property in this state shall be taxed in proportion to its value, to be ascertained as directed by law," does not require the value to be found after the rate of taxation is fixed.

People v. Latham, 52 Cal. 598.

207. Under sections 3628, 3635, 3636, and 3650, political code, it is the duty of the assessor to ascertain the name of the owner of each piece or parcel of property, and to assess it to him; or, failing to ascertain the name of the owner, to assess it to "unknown owners." An assessment to "**D. B. M. and all owners and claimants, known or unknown**" is void.

Grotefend v. Ultz, 53 Cal. 606.

208. The assessment for the fiscal year 1872-3 was void.

Grimm v. O'Connell, 54 Cal. 522.

209. An assessment to "C. G., and all owners or claimants, known or unknown," is void. Id.

Of Land.

210. An assessment of land to "A. B., and all claimants, known and unknown," is valid and effectual as against the property, even if A. B. was neither the owner of, nor in the possession of the property at the time of the assessment.

O'Grady v. Barnhisel, 23 Cal. 287.

211. Under the revenue act of 1854, if lands were assessed to **unknown owners**, the assessor must have stated in his list that the land was so assessed, because it was unoccupied and the owner was unknown, or the assessment created no charge upon the land, and no legal obligation was imposed on any one to pay the taxes.

Moss v. Shea, 25 Cal. 38.

212. If the assessor, in assessing a city lot owned and occupied by the owner as a single lot, **arbitrarily divides the same**, and assesses one part to the owner and another part to unknown owners, the assessment to the unknown owners is illegal, and a tax deed under a sale of the same for non-payment of the tax is void.

Bidleman v. Brooks, 28 Cal. 72.

213. Under the revenue law of 1860, lands owned by several persons as **tenants in common** may be assessed to them jointly.

People v. McEwen, 23 Cal. 54.

214. An assessment of land for taxes to "Murphy and Dooley, and to all owners and claimants known or unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same," is good under the revenue act of 1854, as amended by the acts of 1857 and 1859.

Brunn v. Murphy, 29 Cal. 328.

215. The San Pablo rancho was assessed as an entirety to a large number of owners; some of the owners individually paid taxes upon thirteen thousand five hundred and ninety-eight acres, leaving four thousand three hundred and thirty-eight acres, owned by numerous persons, upon which the taxes were unpaid. Judgment was rendered against certain persons who were assessed, for delinquent taxes, **ordering the sale of a certain number of acres undivided**, without designating the interests of the judgment debtors in the land: *Hell*, to be erroneous.

People v. Shimmings, 42 Cal. 123.

216. Where land is assessed as an entirety to numerous persons, without designating the interest of any one of them, it is an assessment to them as copartners, joint

tenants, or tenants in common, and not as owners in severalty. Id.

217. If such an assessment be legal, it would be the duty of the court, in giving judgment for delinquent taxes upon the land, to ascertain by its judgment what particular undivided interests in the land were delinquent, and to exonerate from the lien for the delinquent tax the interests of those who had already paid their proportion of the general burden. Id.

218. It is the better practice to assess each particular person who claims an interest in a tract of land according to his interest or claim of title, and not to assess the whole tract *in solido* to all those who claim an interest in it. Id.

219. When a person holds an interest in a tract of land in severalty, he is entitled to be assessed for his particular tract only. Id.

220. Under the revenue act of 1857, several city lots can not be assessed in gross for taxes, and then sold together for the aggregate amount of the tax. A tax deed based on such sale is void. The intention of the act is that each lot shall be separately assessed and valued, so as to bear its own portion of the public burdens.

Terrill v. Groves, 18 Cal. 140.

221. Blocks of land in a city may be assessed for taxation by blocks, when they are assessed to the owner, even if they have been subdivided into lots.

People v. Culverwell, 44 Cal. 620.

222. An assessor may assess and place a valuation on a block in a city, as a whole, when one man owns it, without placing a separate valuation on the several lots into which it is divided.

People v. Morse, 43 Cal. 534.

223. In assessing land for taxation, the assessor can not deduct from its value the amount due on mortgages by which it is incumbered, and call the remainder its assessed value. Lick v. Austin, 43 Cal. 590.

224. An assessment of land as "balance of land on Rancho Arroyo de San Antonio, ten thousand and ninety acres, at four dollars per acre, forty thousand three hundred and sixty dollars," is sufficient, it appearing on the roll that the part of the ranch not assessed was comprehended within the plat of a town, certain lots in which were assessed on the same list to the same owner.

Patten v. Green, 13 Cal. 325.

225. An assessment stating: "House and lot north side of Commercial street, formerly owned by Belle Creole, also brick store north side of Commercial street and second from the corner of Pine and Commercial, including lot and all the appurtenances, seven thousand dollars," there being at the top of the page containing this description the words, "Nevada county, Nevada township,

Nevada City," is fatally defective in omitting "to give the metes and bounds, or describing the premises by lots or fractions of lots," according to the fourth section of the revenue act of 1857.

Kelsey v. Abbott, 13 Cal. 600.

226. Under the revenue act of 1857 the assessment of lands **outside of a city or incorporated town** need not describe the land by metes and bounds.

High v. Shoemaker, 22 Cal. 363.

227. Land outside of a city or incorporated town must be **described by metes and bounds**, the number of acres, as nearly as possible, and the locality and township must be given.

Lachman v. Clark, 14 Cal. 131.

228. Since the passage of the act of 1861, an assessor is only required to assess improvements on real estate and personal property, in **general terms**, and under a gross valuation, and a specific description of such property is unnecessary.

People v. Rains, 23 Cal. 127.

229. The object of a description of property in an assessment roll is to clearly identify the property assessed. An assessment roll which describes minutely each particular piece of improvement on land assessed, with the value of each, separately stated, in a column of item figures, so arranged that there can be no mistake as to the property intended to be assessed, and where, in addition, the aggregate value of the same is stated under the general head "value of improvements on lands," is clearly sufficient.

People v. Empire M. Co., 33 Cal. 171.

230. If the assessor, in assessing a tract of land which consists of a specific quantity granted by the Mexican government, to be selected within the exterior boundaries of a much larger tract, describes it as definitely as the nature of the case will admit of, the assessment is valid.

People v. Crockett, 33 Cal. 150.

231. A description of land in an assessment roll as follows: "Four hundred acres of land situated on the Volcano and Jackson road, in township No. 1 of the county of Amador and state of California, and commonly known as the 'New York rancho:'" *Held*, to be sufficient under the revenue act of 1857. High v. Shoemaker, 22 Cal. 363.

232. An assessment of property, as "a ranch, commonly known as 'Clark's ranch,' situated on the Auburn road, two miles south of Grass valley, in Nevada county, state of California," is insufficient, and a deed, on a sale under it, is void.

Lachman v. Clark, 14 Cal. 131.

233. An assessment of land is not void by reason of mistake in description, unless it contains such a falsity in the designation or description of the land assessed as might

probably mislead the owner and prevent him from ascertaining that his land had been assessed. Bosworth v. Danzien, 25 Cal. 296.

234. When **several parcels of land** are assessed to the same persons, they must be **separately valued**, and the value of each parcel must be placed in the column under "value of land." It is not sufficient to place the valuation of each parcel in the column under "description of property," and the total valuation in the column under "value of land." People v. Hollister, 47 Cal. 408.

235. An assessment of land for taxes, not made to **unknown owners**, but to the owner by his surname, leaving a blank for his given name, is void, and a deed executed to a purchaser of land at a sale for the tax is void also.

Crawford v. Schmidt, 47 Cal. 617.

236. When the assessor assesses an **entire tract of land** to a person, and the person assessed had **previously sold a part** of the same by metes and bounds, and the assessment contains nothing to show what valuation the assessor placed on the part not sold, the assessment is fraudulent and void, and the tax can not be collected.

People v. Hancock, 48 Cal. 631.

237. An assessment for a tax, in which fifteen thousand and eighty acres of land are assessed by quantity and boundaries, **excepting therefrom a portion** thereof before sold, without a description of the excepted portion, is void. People v. Hyde, 48 Cal. 431.

238. An assessment of a large tract of land for taxes, under the act of 1861, which describes the whole tract by metes and bounds, and then **excepts** from the tract **parcels** of the same which had **previously been conveyed**, but does not describe the excepted portions by metes and bounds, nor in any manner, except by a reference to recorded deeds, is void on its face.

People v. Cane, 48 Cal. 427.

239. A description sufficiently certain to convey land, between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree a specific execution, may not answer in a proceeding to enforce the collection of a tax. In the latter case the description must be certain of itself, and not such as to require evidence *aliunde* to render it certain: *Held*, accordingly, that an assessment, one of the calls of which was " * * * north by the lands of James Reagan and others," was void; and so *held*, also, with reference to an assessment, which described the land as "bounded * * * south by the lands of Felton and Patterson."

People v. Mahoney, 55 Cal. 286.

240. In an action to quiet title, in which the defendant claimed under a tax sale and deed, and the plaintiff under a deed from parties doing business under the name of

"the Blue Range mining company," it appeared that the property was assessed to **"the Blue Range mining company,"** by direction of the plaintiff's agent, and that the certificate of sale and tax deed each recited the assessment as made to **"the Blue Range mining company, and to all owners and claimants, known and unknown."** *Held*, first, that the assessment was void, because **"the Blue Range mining company"** was not the owner, and was not a person who could own; and, secondly, that the certificate and sale were void for the additional reason that they recited an assessment to the **"Blue Range mining company, and to all owners and claimants, known and unknown."**

Hearst v. Egglestone, 55 Cal. 365.

241. Under section 388, code of civil procedure, where two or more persons transact business under a common name, they may be sued by the common name; but this does not vary the terms of section 3623, political code, by which the assessor "must assess such property to the persons who own, claim, or have the control thereof." *Id.*

Of Personal Property.

242. Personal property may be assessed for taxes in bulk, without any statement of the character of the property.

People v. Sneath, 28 Cal. 612.

243. An assessment for taxes of the personal property of a former member of a firm made to the firm after its dissolution is void. Such assessment can not be legalized by legislative enactment. *Id.*

244. Personal property in this state belonging to non-resident may be assessed to such owner notwithstanding he is a non-resident.

People v. Home Ins. Co., 29 Cal. 533.

245. If personal property in this state belonging to a non-resident is in the possession of a trustee or agent, it may properly be assessed to the agent or trustee having it in possession. *Id.*

246. An error made by assessing personal property to the wrong owner or claimant, under the revenue act of 1857, and acts amendatory thereof, does not affect the validity of the assessment. *Id.*

247. Bonds of this state belonging to a foreign insurance company, but deposited in this state in accordance with law, when assessed for taxes, are sufficiently described by being designated **"money and bonds"** deposited as per statute. *Id.*

248. An assessment thus: **"Personal property—mortgages (Marysville), one hundred thousand dollars,"** is not good as an assessment of personal property independent of the term **"mortgages,"** on the ground that the act requires no description of personal property to be given, but its

value only. The whole statement must be taken together, and that shows **"mortgages"** to be taxed, and they are not subject to taxation as such. *Falkner v. Hunt*, 16 Cal. 167.

249. An assessment thus: **"Mortgages (Marysville), one hundred thousand dollars,"** is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that a mortgage is held for a given amount does not make the mortgage subject to taxation as for so much money. *Id.*

250. Under this act, a lumping assessment of **"personal property"** is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated—as goods, money loaned, gold dust, solvent debts. *Id.*

See secs. 268–271.

ASSESSMENT ROLL.

251. An assessment roll in which the columns are arranged in a different order, or under different headings, from the form given in section 20 of the revenue act of 1861, may, nevertheless, be a substantial compliance with all the requirements of that section, and valid.

People v. Sierra B. M. Co., 30 Cal. 511.

252. An assessment roll, in which the name appears in the proper place and column is not invalid because the name extends beyond the line of that column, nor because there is a slight discrepancy in the name, the name given being sufficiently accurate to indicate the person intended. *Id.*

253. Said act of April 2, 1866, so far as it provides for amendments of assessment rolls, is ineffectual for any purpose, because if the roll, without amendment, contains substance sufficient to make it valid as an assessment of property, the curative effect of the statute is not needed, and if it does not, no legislative enactment can either make the assessment, or empower any other officer except the assessor to make it. *Id.*

254. The only mode in which defective assessments may be authorized by the legislature to be corrected, is to empower the assessor who made the assessment, to make the needed corrections, or authorize it to be done by others in his presence, and upon his testimony showing what was intended by the defective matter requiring correction. *Id.*

255. A description of property in an assessment roll which is so vague, indefinite, and uncertain, as to render it impossible to determine whether the whole or a part, or if a part, what part, of the land was intended to be assessed to the person named therein, is insufficient. *People v. Flint*, 39 Cal. 670.

256. An assessment of personal property and improvements on real estate, assessed to a person other than the owner of the real estate, which does not separately value and set down in separate columns the values of the different parcels and descriptions of property, is not in compliance with the revenue laws, and is, therefore invalid.

People v. Sierra B. M. Co., 39 Cal. 511.

256a. An assessment is void if there be no valuation. Garwood v. Hastings, 38 Cal. 217.

257. Although, under the revenue act of 1861, the assessor need not place the value of the land and the improvements thereon in separate columns, where both are assessed to the same person, yet if he does so, the assessment is not radically defective, and does not show that the improvements were twice assessed.

People v. Culverwell, 44 Cal. 620.

Dollar Mark.

258. An assessment of town lots for taxation, which does not give their cash valuation either in gross or detail, is radically defective. Figures placed opposite town lots in an assessment roll, without any statement whether they stand for cents, dollars, or eagles, do not fix any valuation to the same.

Hurlbutt v. Butenop, 27 Cal. 50.

259. An assessment of real estate in which, for the value of the same, certain figures are written, with nothing in connection therewith to designate that they represent the quantity or sum of anything whatever, is void, and a tax deed based on the assessment is also void.

Brady v. Seaman, 30 Cal. 610.

260. If, in the original assessment roll of property, figures are placed by the assessor in the column headed "valuation," without anything to indicate whether the figures represent eagles, dollars, or cents, the assessment is void, and the people can not recover a judgment for the tax.

People v. S. F. S. U., 31 Cal. 132.

261. Independent of a statute authorizing such evidence, parol testimony of the assessor can not be received to show what the figures in the column of valuation were intended to represent.

Id.

262. Where the description of the property assessed is placed under the head "improvements on land," and the aggregate value of the same is carried out in figures, preceded by the dollar mark, under the general head of "value of improvements on lands," the assessment is correctly made.

People v. Empire M. Co., 33 Cal. 171.

263. Where the figures representing the aggregate value of the property assessed are placed in the column headed by "value of improvements on lands," and preceded by the dollar mark, such an assessment is not

void in consequence of the omission of the dollar mark preceding the figures in the column representing the separate values of the items, for if the aggregate figures represent dollars, so also the smaller sums, in figures, which go to make up those in the aggregate, must represent dollars.

Id.

264. Where, in an item column of figures, the dollar mark is prefixed to some, but not to all the items: *Held*, that all the figures standing in the same column and in the same relation to other similar items must be construed to be dollars, without a repetition of the mark before each.

Id.

265. The assessor of the city and county of San Francisco for the fiscal year 1865-6, assessed the property of the defendant for the purposes of state and municipal taxation, which assessment was entered in the proper assessment roll as follows: "Money" valuation "5,000," "money loaned" valuation "125,000," and over the column of valuation is the word "dollars." The only money loaned by defendant, and the only solvent debts due him during said fiscal year, consisted of the said one hundred and twenty-five thousand dollars, which was loaned by him to L., and secured to be paid by a deed of trust: *Held*, first, that said assessment was made under section 4 of the general revenue act of 1857, as amended by sections 1 and 2 of the act of March 6, 1863 (stats. 1864, p. 35); second, that said assessment to defendant was a sufficient compliance with said acts as to the classification and description of his property; and, third, if said assessments were deemed in said respects, or either of them, defective, such defect would be cured by the act of April 2, 1866. (Stats. 1865-6, p. 831.)

People v. McCreery, 34 Cal. 432.

266. Where, in an assessment roll, there was neither a dollar mark prefixed to the figures inserted in the column headed "Valuation of lands," nor at the head of such column, and nothing appeared elsewhere in the roll to explain the intended meaning of said figures: *Held*, that there was no assessed valuation of certain lands described for assessment in the roll, and such assessment was void. People v. Hastings, 34 Cal. 571.

267. In such case, the provisions of the curative act, passed April 2, 1866 (stats. 1865-6, p. 831), do not authorize the supplying of the defects in the duplicate assessment roll, so as to give it validity.

Id.

268. The assessment roll, when completed and certified by the assessor to the board of supervisors, is the only evidence of his acts and intentions.

People v. S. F. S. U., 31 Cal. 132.

269. The "tax list or assessment roll" which must be certified by the assessor and delivered to the clerk of the board of super-

visors, is the only record of his final judgment, as to the value of property.

People v. S. & C. R. Co., 40 Cal. 414.

270. The statute requiring the assessor to return the assessment roll to the clerk, prior to the first Monday in August, is directory merely; and the failure of the assessor to return it before that time is a matter of which the tax-payer can not complain.

People v. Ed. & T. C. Co., 48 Cal. 143.

271. The assessor may certify to the assessment roll after it has been returned to the clerk, and after the first Monday in August, for he does not lose control of the assessment roll until it has been both certified and returned to the clerk. Id.

BOARD OF EQUALIZATION.

272. The presumption of law is that a board of equalization perform their duty and correct any inequality in the assessment of taxes.

Guy v. Washburn, 23 Cal. 111.

273. The board of equalization has no power to raise the valuation of land as fixed by the assessor without notice to the owner. The general notice of the sitting of the board by publication, does not amount to the notice required.

Patten v. Green, 13 Cal. 325.

274. If the board raised the tax without proper notice to the owner, their action is void, and the assessment remains in full force. Id.

275. The board for the equalization of taxes can not, under the revenue act of 1861, diminish or increase the assessed value of property as fixed by the assessor, unless complaint has first been made to them, and reasonable notice has been given to the party assessed or interested, of the day when they will act in the case.

People v. Reynolds, 28 Cal. 107.

276. The board for the equalization of taxes can not, under the revenue act of 1861, add to the valuation of property as fixed by the assessor, without evidence authorizing them to do so. Id.

277. If the assessor fixes the assessed value of the property of a person or firm, and the board of equalization afterwards, instead of adding to the valuation of the property so assessed, makes a new assessment, this new assessment is void, even if the party interested receives notice and appears, and evidence is taken. Id.

278. An order of the board of equalization adding to the assessed valuation of a person's property, should show upon its face that it is merely increasing the valuation of the particular property placed on the assessment roll by the assessor. Id.

279. A complaint of a district attorney

filed with the board of equalization which "complains of the assessment set opposite each name on the assessment list, and prays the board to hear evidence in each and every case, and every name on said assessment list, as to the value of the property therein assessed, and to change the value as to them may seem just, and that the valuation may be reduced or raised as to them shall seem just and equitable," states no facts, and is nugatory and insufficient to give the board jurisdiction to increase the assessment. People v. Flint, 39 Cal. 670.

280. In order to give the board of equalization jurisdiction to increase the valuation of property beyond the amount at which it has been assessed, the filing of a complaint is necessary.

People v. Goldtree, 44 Cal. 323.

281. Where the board of equalization makes an order increasing an assessment without a complaint having been filed, and the party assessed appears and moves to set aside the order, such appearance does not confer jurisdiction by relation, and a refusal to set aside the order does not make it valid. Id.

282. The statute does not require the board of equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal. C. P. R. Co. v. Placer, 32 Cal. 582.

283. Where the statute provides that the board of equalization "shall meet on the first Monday in June in each year for the correction of errors in the assessment of personal property, and shall continue in session from time to time until such errors brought to their notice shall be corrected; provided, however, they shall not sit after the third Monday in June;" and where such board met and held sessions on the first and third Mondays of June only, but between said sessions a committee of the board received applications for the correction of assessments, and took testimony, all of which was on said last session, submitted to and acted on by the board, and when the board closed its session it did not appear that any valuation of personal property was erroneous: Held, that this was a proper and legal mode of action on the part of said board.

People v. McCreery, 34 Cal. 432.

284. The board of equalization in passing on the question whether an assessment is too high or too low, acts in a judicial capacity, and its decision is an adjudication.

People v. Goldtree, 44 Cal. 323.

285. The board of supervisors, sitting as a board of equalization, has no power to

cancel an assessment for taxes placed by the assessor upon the assessment roll.

People v. Supervisors, 44 Cal. 613.

286. The auditor, in making a duplicate of the assessment book for the tax collector, must observe and follow such alterations as have been made by the board of supervisors in the exercise of their power in equalizing the assessed value of property, but he must disregard an order of the board canceling an assessment, or any order of the board by which it assumes an authority not conferred upon it by law.

People v. Ashbury, 44 Cal. 616.

287. While the auditor, in making a copy of the assessment book for the tax collector, can not review or correct the errors of the board of supervisors while acting within the sphere of their authority, still he must disregard any order of the board which it had no jurisdiction to make. Id.

288. A board of supervisors has no authority to cancel an assessment of property made by the assessor and placed by him on the assessment book, and if the board make such order it is a nullity. Id.

289. The auditor will be compelled, by writ of mandate, to deliver to the tax collector a correct duplicate of the assessment book, as made by the assessor, with such alterations only as have been made by the board of supervisors while acting within the sphere of their authority. Id.

290. When any of the taxes of one fiscal year are returned as delinquent, it is the duty of the auditor to enter the same on the assessment roll of the next fiscal year, and then to enter the same upon the duplicate assessment book, unless they have been canceled by the board of supervisors under the affidavit of the collector required by section 3800 of the political code, Id., 46 Cal. 523.

291. The board of supervisors have no power to cancel any taxes, or the assessment for any taxes, except such as are contained in the list by the auditor and taken by him from the delinquent list, and as to which the collector has made affidavit that "he has not been able to discover any property belonging to or in the possession of the person liable to pay the same [taxes] whereof to collect them." Id.

292. Without such affidavit of the collector, that a delinquent tax can not be collected, and without the concurrence of the board of supervisors with the collector in the opinion that it is not collectible, said board can not cancel a tax. Id.

293. A resolution or order of a board of supervisors canceling a delinquent tax, because it is not collectible, ought properly to specify each particular tax which is canceled. Id.

294. A resolution of a board of supervisors canceling a tax, without the affidavit of the collector indorsed on the delinquent list, that it is not collectible, is void, and the auditor should proceed with his duty in regard to such tax, in entire disregard of such resolution. Id.

295. A refusal of a board of equalization to reduce the assessed value of property, made on a complaint by the party assessed, does not preclude the board from afterwards raising the assessed value of the same property, upon complaint made that it has been assessed too low.

C. P. R. Co. v. Placer, 46 Cal. 663.

296. The action of a board of equalization, on an application to change the assessed valuation of property, is not *res adjudicata*. Id.

297. The court is not prepared to say that a board of equalization is limited to one application, either to reduce or raise the assessed value of property. Id.

298. The board of supervisors, sitting as a board for the equalization of taxes, does not exceed its jurisdiction by refusing to accede to an application to reduce the assessed valuation of property.

Pacific Mail v. Supervisors, 50 Cal. 282.

299. Such board has no power to strike out from an assessment, made by the assessor, property assessed by him. Id.

DELINQUENT LIST.

300. The delinquent list of tax-payers, in a city incorporated under the act of 1830, is not *prima facie* evidence of the correctness of the prior proceedings by which the tax was levied and assessed.

Los Angeles v. L. A. W. Co., 49 Cal. 638.

301. When a statute requires that the delinquent tax list, together with the time and place of sale of the property for the delinquent tax, shall be published in a paper in the city or county, or in a supplement to such paper, such list, time, and place, if published in a supplement, must be published in one the circulation of which is co-extensive with that of the paper, both in and out of the city and county.

Tully v. Bauer, 52 Cal. 487.

302. The statute does not expressly prescribe the time at which the auditor shall enter the delinquent taxes on the next assessment roll, but the implication is that it should be done before the duplicate assessment book is delivered to the collector.

People v. Ashbury, 46 Cal. 523.

303. The provisions of the revenue act of 1857, which require the tax collector to publish the delinquent tax list, giving the name of the owner (when known) of all real estate, and the improvements, together with a condensed description of the property, etc., are

not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property-holder to the state, and these proceedings by publication, etc., are merely modes adopted by the legislature to collect them. If the property be omitted from the delinquent list, this does not discharge the property-holder, but the defect may be remedied by the legislature. *Moore v. Patch*, 12 Cal. 265.

COLLECTION OF TAXES.

304. The claimants are either the owners or they are not; if they are, they must pay the taxes on the land; if they are not, they have nothing to do with the matter, and can not enjoin the collection of taxes, having no authority to sue or defend for the United States. *Robinson v. Gaar*, 6 Cal. 273.

305. The taxes of 1855, after March, 1856, are not of the unfinished business of the out-going sheriff, for the reason that after the settlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. *Fremont v. Boling*, 11 Cal. 380.

306. Though a man can only be made to pay a tax according to law, that law may be made as well at one time as another, or by one series of acts as another, and as well after an informal assessment, or no assessment, as before. *People v. Seymour*, 16 Cal. 332.

307. The provisions of section 13 of the revenue act of 1857, that the tax collector shall add to the tax of a delinquent five per cent. and enforce the collection of the same, in connection with the tax, by sale of the property, is constitutional, and a sale made in pursuance thereof passes a valid title. *High v. Shoemaker*, 22 Cal. 363.

308. The five per cent. is not a substitute for the tax or a penalty for its non-payment, but one of the means prescribed for obtaining the tax itself by offering an inducement to pay it when due. *Id.*

309. The addition of five per cent. imposed by act of 1858, on the third Monday in October, upon the taxes of delinquents, may be recovered in the action, along with the unpaid taxes, as well as the cost of advertising. *People v. Todd*, 23 Cal. 181.

310. The tax law creates two remedies, one against the person and the other against the property, each having a distinct and separate existence; and a mistake in the name of the person to whom the property should have been assessed does not affect the validity of the tax against the property itself.

O'Grady v. Barnhisel, 23 Cal. 287.

311. The expense of filing certificate of sale in the recorder's office, is not a proper item of costs to be charged by the collector at the sale. *Id.*

311. A slight mistake made by the collector in computing the amount of taxes and costs, by which the property was sold for a small sum more than the amount actually due, does not invalidate the sale, particularly when it is not made to appear that the owner of the land suffered any injury by the mistake. *Id.*

By Action.

313. An action of debt for taxes will not lie when the predicate of the action is a mere assessment upon property. Much depends upon the language of the act creating the tax. If the act merely impose a tax upon property, and provide a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax. If a personal liability be imposed for the tax, and the act is silent as to the mode of enforcement, then an action would lie for the enforcement of the obligation; for the rule is general, that debt lies at common law to enforce a statutory duty, or penalty, or forfeiture.

State v. Poulterer, 16 Cal. 514.

314. When a statute casts upon a party an obligation to pay money to particular persons, without providing a remedy for its recovery, an action of debt will lie. *Id.*

315. If a tax has been duly assessed, the owner of the property becomes personally liable for it, and the remedy is not confined to a seizure and sale of it, nor to the enforcement of a lien on it by action.

Oakland v. Whipple, 39 Cal. 112.

316. District courts have jurisdiction of actions for collection of delinquent taxes, when the tax amounts to more than three hundred dollars, and also regardless of amount, when it is sought to enforce the lien of the tax. *People v. Olvera*, 43 Cal. 492.

317. The constitution of the state allows the legislature to pass a law directing the district attorney of a county to bring actions in the name of the people to recover delinquent taxes, and such law does not interfere with the constitutional duties of the tax collector. *People v. C. P. R.*, 43 Cal. 399.

Complaint.

318. In a suit for taxes on real estate, levied, as was alleged, in El Dorado county, the complaint failed to show that said property was within said county, or the revenue district thereof within which it was assessed, or that said revenue district was within said county: *Held*, that the complaint did not state facts sufficient to constitute a cause of action. *People v. Pearis*, 37 Cal. 259.

319. A complaint in a tax suit which

shows only that the property taxed was assessed as the estate of R., deceased, and that the defendants, at the time of the assessment, owned and possessed it, does not state facts sufficient to constitute a cause of action, because not showing that the property was assessed to any particular party whose duty it was to pay the taxes, or that it was made to unknown owners.

People v. De Carrillo, 35 Cal. 37.

320. The holding of such an election is a jurisdictional fact, and it is, therefore, necessary to aver it with precision, and in such manner as to admit of a direct issue upon the facts averred.

People v. Castro, 39 Cal. 65.

321. Where an act of the legislature provides that taxes which have been remitted by the board of supervisors shall be exempt from its provisions, it is not necessary to aver in the complaint that the taxes sued for have not been remitted; but that fact, if it exist, should be pleaded in bar of the action.

People v. Todd, 23 Cal. 181.

322. The fortieth section of the revenue act of 1861, which provides that a complaint in an action to recover a tax, need not follow the description of the property as found in the assessment, only permits a different description of the property in the complaint from that contained in the assessment, but does not obviate the necessity of showing on the trial a valid assessment of the same land described in the complaint.

People v. Cave, 48 Cal. 427.

Process.

323. In suits for the recovery of taxes, to obtain a valid judgment *in rem* against the real estate, it is necessary that the process should be served in the manner directed by the statute, viz., by posting a copy in some public place thereon.

Gillis v. Barnett, 38 Cal. 393.

324. If there be, however, sufficient service of process upon the owner, a personal judgment against him is valid under an execution upon which the land may be sold.

Id.

325. In an action to recover judgment for taxes, in which real estate is made a party, the summons on the real estate may be served by delivering a copy thereof to the person or persons in possession, or by posting a copy in some public place thereon, as provided in the revenue act of 1861, or by publishing the summons for eight weeks, as provided in the act of 1862.

Truman v. Robinson, 44 Cal. 623.

326. The provisions of the revenue acts of 1862 and 1864, as to service of summons on real estate in tax cases, do not repeal the provisions in the revenue act of 1861 upon the same subject, but are merely cumulative.

Id.

327. In an action to collect delinquent taxes, service by posting a copy of the summons on the real estate and improvements described therein, in compliance with section 41 of the revenue act of May 17, 1861, is sufficient to authorize a judgment against the land and improvements so served.

People v. Fox, 39 Cal. 621.

328. The statute under which such service was made is not superseded by the act of May 12, 1862.

Id.

329. When there is no appearance of the personal defendant, a judgment against him is erroneous, unless it is shown that he was personally served with the summons.

Id.

330. If the statute for the collection of a tax and the enforcement of its lien on real estate, provides that a summons may be served by delivering a copy to each defendant, but if the personal defendant can not be found, by posting a copy for twenty days at the court-house door, and that no personal judgment shall be rendered unless the person against whom it is rendered shall have been personally served, a personal judgment rendered on a service made by posting a copy at the court-house door is erroneous, and will be reversed if attacked by direct appeal.

People v. Bernal, 43 Cal. 385.

331. If in such case the statute requires the services of summons on the real estate to be made by delivering a copy to the person in possession thereof, and by posting a copy in some public place thereon, a return by the sheriff that he posted a copy on the premises, without stating that it was posted in a public place on the premises, will not support a judgment if attacked by direct appeal. In like manner, the judgment will be reversed, unless the return fails to show that a copy was delivered to a person in possession of the premises, or that there was no person in possession.

Id.

332. Under the act of April 4, 1864, which provides that in tax suits, upon default of the defendant, the court commissioner shall draft a decree, etc., the duties of the court commissioner do not commence until the summons is duly served, and if a case is referred to him, his first duty is to ascertain whether the summons has been served.

Martin v. Parsons, 50 Cal. 498.

Defenses.

333. Under the statute of 1863, which provides what a defendant may answer in a suit to recover a tax, an answer which avers that the tax was fraudulently levied for an amount in excess of that authorized by law is good.

People v. Nelson, 36 Cal. 375.

334. The general statute in relation to filing answers in cases for the collection of taxes applies to suits for the collection of taxes levied by school districts.

Id.

335. An answer to a sufficient complaint in a suit for taxes on real property, brought against the property and the alleged owner assessed therewith, **which denies only that the personal defendant was, at the time of the assessment, the owner of the property or any part thereof, without further denying in him all claim, title, or interest therein, is not such a denial as, by the revenue act (section 42), is permitted to be made, and it raises no issue as to the liability, as sought in the action, of either defendant.**

People v. Pearis, 37 Cal. 259.

336. When the answer denies that any election to authorize the tax was ever held, and upon the trial there was no attempt to prove the holding of an election, a nonsuit should be granted.

People v. Castro, 39 Cal. 65.

337. The payment of a tax can not be resisted on the ground that the property on which it was levied was not assessed at its true value. One whose property is not assessed according to its true value must apply to the board of equalization.

People v. Whyler, 41 Cal. 351.

Evidence.

338. Though the assessment roll may be *prima facie* evidence of its contents, it is not conclusive in a proceeding directly based upon its correction: *Held*, accordingly, in an action to recover a district school tax, that it was error to exclude evidence offered by defendant to show that the assessment roll was simply copied from the assessment roll of the county, and that no assessment was in fact made.

People v. Lansing, 55 Cal. 393.

339. In any case, the duplicate assessment roll can only be corrected from data contained in the original roll, as made by the assessor; and when not so furnished, *parol* evidence is not admissible to supply its place.

People v. Hastings, 34 Cal. 571.

340. If it be shown that the land on which the tax was assessed did not belong to the defendant, but to other persons in the actual occupation thereof, holding the title under recorded deeds, the fact establishes a legal fraud, which vitiates the entire assessment.

People v. Castro, 39 Cal. 65.

341. A defective assessment roll may be introduced in the trial of a tax suit, to show that the taxes were not legally assessed, but can not avail in a collateral attack on the judgment.

Eitel v. Foote, 39 Cal. 439.

342. In an action brought under the act of 1861, to recover a delinquent tax, if there is a defense interposed, it is necessary for the district attorney to show by the delinquent list or the original or duplicate assessment roll that a tax had been assessed and levied. The fact that the second section of the act provides that the defendant

shall not be allowed to set up or show any informality in the levy or assessment as a defense does not obviate the necessity for such proof.

People v. Waterman, 31 Cal. 412.

343. If, in an action to recover a tax brought against a railroad company, the company avers in its answer that its superintendent furnished the assessor with a **written statement of the real estate** belonging to the company, the company can not, on the trial, be heard to dispute the authority of its agent to give a list of its property, nor to deny that the property contained in the list belonged to the company.

People v. S. & C. R. Co., 49 Cal. 414.

Judgment and Decree.

344. In a tax suit, a recital in the decree "that all the owners and claimants of the property have been duly summoned to answer the complaint herein, and have made default in that behalf," there being nothing contradictory to it in the record, is conclusive, in a collateral proceeding, that the court acquired jurisdiction of the owner of the premises.

Eitel v. Foote, 39 Cal. 439.

345. A recital in a judgment rendered for a tax on real estate, that all owners and claimants of the property have been duly summoned to answer the complaint, and have made default, is proof of those facts.

Truman v. Robinson, 44 Cal. 623.

346. The validity of a judgment in a tax suit must be tested by the same rules, and is subject to attack in the same mode, and by the same means, as a judgment in an action of any other class.

Eitel v. Foote, 39 Cal. 439.

347. A judgment, regular on its face, enforcing a lien for a tax, and which the court had jurisdiction to render, **will not be set aside in equity** at the suit of the owner of the land taxed for irregularities in levying and assessing the tax of which the purchaser had no notice.

Stokes v. Geldes, 46 Cal. 17.

348. The same rule applies to the sheriff's certificate of sale made under a sale for the tax.

Id.

349. Although the statute does not require the assessed value of property to be alleged in the complaint in an action to recover taxes; yet, if it is alleged, and the record shows that a judgment was rendered for a greater sum than the total amount of county and state taxes authorized to be levied by law, the judgment will be reversed.

People v. Hastings, 26 Cal. 668.

350. Where an action is commenced against a person alleged to be the owner of real estate, and the real estate, to recover judgment for taxes assessed on the same, and the court finds as a fact that the person sued is not the owner of the real estate, and renders judgment in his favor, but against the

real estate, and an appeal is taken by the person made defendant from the judgment in his favor, but not from the judgment against the real estate, he can not assign as error any proceedings which affect the real estate, and as the judgment does not injuriously affect him, it will be affirmed.

People v. Wilson, 26 Cal. 127.

351. In suit against two on a joint assessment for taxes judgment may be rendered against one only of the defendants, if the other be not liable.

People v. Frisbie, 18 Cal. 402.

Injunction.

352. In all cases involving simply the question of taxation the issue is strictly one at common law, and courts of equity can take no cognizance thereof; and in such case, to grant an injunction, is error.

Minturn v. Hays, 2 Cal. 590.

Peralta v. Adams, Id. 594.

353. The fact that the assessment for state and county taxes for 1855-6 in San Francisco county was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of taxes, as the party could have applied to the board of equalization if aggrieved.

Merrill v. Gorham, 6 Cal. 41.

354. An injunction will not lie to restrain the collection of taxes due on property unless it be shown that the injury resulting from the collection, to the owner, would be irreparable. An averment of this character must appear in the bill, and if denied, must be sustained at the hearing.

Ritter v. Patch, 12 Cal. 298.

355. A bill in equity will lie to restrain a sale of property for illegal taxes since a tax deed is made *prima facie* evidence of title.

Palmer v. Boling, 8 Cal. 388.

Fremont v. Boling, 11 Id. 387.

Overruling De Witt v. Hays, 2 Cal. 463, and Robinson v. Gaar, 6 Id. 275.

356. Where an assessment and sale for taxes would be void, and the matters making them void do not appear on the face of the tax collector's deed, but must be shown by intrinsic proof, and the deed upon its face would be *prima facie* valid, injunction lies to restrain the sale.

Id.

357. Assuming that the revenue act of May 15, 1854, was repealed by the revenue act of April 29, 1857, then injunction does not lie to restrain a sale in 1860, for taxes assessed under the act of 1854, for the year 1857, because the title of the property to be sold would not be clouded by proceedings under a repealed law of which every citizen is presumed to have knowledge.

Id.

358. A tax-payer can not enjoin the col-

lection of the tax due the county on the ground that he has, in former years, paid into the county treasury taxes assessed on his property which were illegally assessed and collected. Fremont v. Early, 11 Cal. 361.

359. A party seeking to enjoin the collection of tax assessed upon his property, upon the ground that the law provides for the meeting of the board of equalization for the correction of the tax list, and that the board did not meet as required, must show in his bill that there was error to be corrected in his list.

Cowell v. Doub, 12 Cal. 273.

360. Nor can such party enjoin the collection of the tax upon the ground that notice was not given of the meeting of the board, as required by law, unless he shows that there was error in the assessed value of his property to his prejudice.

Id.

361. There is no irreconcilable conflict between the amendatory act of 1853 and the revenue acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired was intended to provide for the period intervening between October and March, the time of his settlement.

Fremont v. Boling, 11 Cal. 380.

362. In such case the party who is about to be injured by the sale of his property has a right to an injunction against the person offering to sell, to prevent the sale.

Id.

363. A court will not restrain a sale for taxes when it is apparent upon the face of the proceedings upon which the purchaser must rely to make out a *prima facie* case to enable him to recover under the sale, that the sale would be void.

Bucknall v. Story, 36 Cal. 67.

364. Courts of equity will not interfere by injunction to restrain the sale of property for delinquent taxes, unless it appears that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, and the sale casts a cloud upon the title of the complainant.

S. & L. Soc. v. Austin, 46 Cal. 415.

365. An injunction will not be granted to restrain the collection of a tax by a sale of the property of the tax-payer. Before a court of equity will lend its aid in such case it must be made to appear that, after a sale, a deed is about to be executed which will cast a cloud on the title.

Houghton v. Austin, 47 Cal. 646.

366. An injunction will not be granted to restrain the collection of a tax by a sale of the real estate of the tax-payer.

C. P. R. Co. v. Corcoran, 48 Cal. 65.

PAYMENT UNDER PROTEST.

See Meek v. McClure, 49 Cal. 623.

367. If the items of a person's property

are assessed and valued separately, and some of the items are not liable to taxation, the tax collector can separate the legal from the illegal portion of the tax; he should receive the legal portion of the tax if tendered to him; and if he refuses to do so, and the whole tax is paid under protest, the person taxed can recover from the collector that portion which is illegal.

Bk. of Mendocino v. Chalfant, 51 Cal. 369.

368. A tax collector is bound to know the limits of the district for which he was elected, and if he enforces the payment of a tax on property outside of said limits, a general protest against the payment of the same is sufficient to enable the party paying to recover it back.

Mason v. Johnson, 51 Cal. 612.

369. Proof that a tax was paid under a written protest before it became delinquent, and before threats were made to sell property for its collection, is not proof that it was paid under duress.

Bk. of Woodland v. Webber, 52 Cal. 73.

370. It is not necessary for a person paying a tax under protest to state facts in the protest of which the tax collector has notice.

Smith v. Farrelly, 52 Cal. 77.

371. A tax paid under protest, after the delinquent list comes into the hands of the tax collector for collection, by sale of property, and after the publication of the delinquent list, is paid under duress. Id.

372. To enable one to recover back a tax illegally assessed, and paid under protest, it must appear that the tax was delinquent, and that the officer to whom it was paid was armed with authority, real or pretended, to seize property, and threatened to do so.

Bk. of Santa Rosa v. Chalfant, 52 Cal. 170.

373. Where taxes have been illegally assessed, and the tax collector is about to sell the property for the taxes thus assessed, the tax can be paid under protest, and the money recovered back by action.

Guy v. Washburn, 23 Cal. 111.

374. Taxes, not justly due, and paid under protest, may be recovered back by suit against the tax collector.

Falkner v. Hunt, 16 Cal. 167.

375. Assumpsit, when it will lie.

McCarthy v. Pope, 52 Cal. 561.

376. In case of a payment of the whole tax a protest is not sufficient unless it specifies such illegal item among the grounds of illegality of the tax.

De Fremery v. Austin, 50 Cal. 380.

TAX SALE AND DEED.

377. Property must at the time be liable for all the taxes for which it is sold; and where property was sold at one sale for both state and county taxes, added

together in a single sum, and the county taxes were illegally levied, the entire sale was void. Hardenburgh v. Kidd, 10 Cal. 402.

378. All the provisions of the statutes for the assessment of taxes, and for the sale of property for their non-payment, must, in their substance, be strictly pursued in order that a title acquired at such a sale shall be valid. Russell v. Mann, 22 Cal. 131.

379. One of the prerequisites to the validity of a tax sale is the authority under which the taxes are assessed.

Norris v. Russell, 5 Cal. 249.

380. Proceedings on tax sales are strictissimi juris. Ferris v. Coover, 10 Cal. 632, affirmed.

Kelsey v. Abbott, 13 Cal. 609.

381. The principles applicable in other judicial sales are applicable to sales under judgments enforcing liens for taxes.

Jones v. Gillis, 45 Cal. 541.

382. When the assessment is not of an undivided interest in, but of an entire tract or parcel of land, the tax collector has no power or authority to sell an undivided interest therein for the non-payment of taxes. Roberts v. Chan Tin Pen, 23 Cal. 259.

383. The owner of the property assessed, and in default of his doing so, the tax collector, has a right to designate at or before the time of sale any portion less than the whole tract which will be sold; but when this designation is made, the parcel sold must be particularly located by metes and bounds in the general tract, so that the purchaser may know its exact boundaries and what part of the tract remains unsold. Id.

384. If the description of the tract sold at the time of the sale is general, as "fourteen feet" in a certain lot, the sale is void for uncertainty, and the defect can not be cured by inserting a proper description in the certificate of purchase or collector's deed. Id.

385. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should, in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay.

Kelsey v. Abbott, 13 Cal. 609.

386. If, in such case, such party fails to pay the tax, permits the premises to be sold, and buys them in, he can derive no benefit from the sale; except that, in equity, the amount paid would probably be considered an advance to the judgment debtor. And this, though the premises were bid in by one of two partners, while the possession, under the sheriff's sale, was by both partners. The duty to pay the tax was several, as well as joint. Id.

387. One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made or when the land was sold.

Moss v. Shear, 25 Cal. 38.

388. One whose duty it was to pay the taxes upon real property can not gain an advantage in respect to the title by allowing the same to be sold for taxes and buying it in himself, or buying it from a stranger who bought it at the sale.

Moss v. Shear, 25 Cal. 45.

Coppenger v. Rice, 33 Id. 408.

389. At a sale of land under execution of a judgment for taxes, it is competent for the sheriff to sell the same to the purchaser who will take the smallest quantity to pay the judgment and costs.

Gillis v. Barnett, 38 Cal. 393.

390. If a person is in possession of land, claiming the same as his own, it is his duty to pay the taxes, although he has no paper title, and is a trespasser; and under such circumstances, he can not acquire an outstanding title by neglecting to pay the taxes and allowing the land to be sold for the same, and purchasing at the sale. The rule is the same if the possession is such that it would give the possessor title by the statute of limitations.

Barrett v. Amerein, 36 Cal. 322.

391. A party against whom a tax is levied can not obtain any title to property by purchase of it at a sale for the payment of the taxes which he should have discharged.

Garwood v. Hastings, 38 Cal. 217.

392. A party in possession, whose duty it is to pay the tax, can derive no advantage from a sale for the tax which he ought to have paid without a sale.

Reily v. Lancaster, 39 Cal. 354.

393. A purchase of land at a sale of the same for taxes, by the agent of one who was in possession thereof, either by himself or his tenants, does not pass or otherwise affect the title to such land.

Bernal v. Lynch, 36 Cal. 135.

394. When the tax is valid, but the sale irregular, equity will not cancel the tax deed at the suit of the owner of the land, without a tender of the taxes to the purchaser. *Hibernia Bk. v. Ordway*, 38 Cal. 679.

395. But where the purchaser of the tax title has made the purchase by collusion with the owner, with the view of defrauding a mortgage creditor of the owner, a tender of the amount of the taxes is not necessary.

Id.

396. Such deed is not void because the purchase money at the tax sale was not paid to the sheriff until some time after the sale, provided the sheriff accepted of it.

Anderson v. Rider, 46 Cal. 135.

397. A title acquired by a sheriff's deed, in pursuance of a sale for a delinquent tax, will prevail over a title acquired by a similar deed for the tax of the previous year, even if the sale for the oldest tax was made after the sale for the later tax.

Id.

398. A sheriff's deed made under a sale for a tax, in pursuance of a judgment enforcing the lien of the tax, is not void because the property sold, being several lots in the city, was assessed in *soldo*, and not each lot separately.

Id.

399. A purchaser of land at a tax sale, made under a judgment enforcing a lien for a tax, which judgment is regular on its face, is not affected by any matters outside the judgment of which he had no actual notice.

Stokes v. Geddes, 46 Cal. 17.

400. If land be sold for taxes, a part of which are valid and a part illegal, the whole sale and the tax deed will be void.

Wills v. Austin, 53 Cal. 152.

401. *Houghton v. Austin*, 47 Cal. 646; and *Wills v. Austin*, 53 Id. 152, affirmed.

Harper v. Rowe, 53 Cal. 233.

402. If a sale of land for a delinquent tax is made for a sum in excess of the tax and legal costs, the sale is void, unless the excess is less than the smallest fractional coin authorized by law.

Treadwell v. Patterson, 51 Cal. 637.

403. A sale of land for taxes to the highest bidder in one parcel, and not to the person who would take the smallest or least quantity of the land and pay the tax due, is illegal, and a deed given in pursuance of it is absolutely void.

Hewell v. Lane, 53 Cal. 213.

404. A sale of land for a sum in excess of that authorized by law is void.

Harper v. Rowe, 53 Cal. 233.

405. Section 3803 of the political code, authorizing the tax collector to include interest on the delinquent tax at the rate of two per cent. per month, does not apply to a sale made by the tax collector to collect a delinquent tax in the first instance.

Id.

406. The acts of March 28th and 30th, 1874, did not have the effect to validate tax sales void under the law as it existed when the sales were made, for the reason that property can not be taken "without due process of law."

Id.

407. If a tax sale is absolutely void, the payment of the tax by the purchaser stands on the footing of a voluntary payment, not made at the request of the owner of the land, and which a court of equity will not require him to refund.

Id.

408. Where an action had been commenced in due time to enforce the collection of a street assessment in San Francisco, and a third party subsequently procured a tax deed to the premises: *Held*, that under the

revenue law, as amended in 1850, the deed **extinguished the lien for the street assessment.** *Dougherty v. Henario*, 47 Cal. 9.

409. As a general rule, a sale and conveyance in due form for taxes **extinguishes all prior liens**, whether for taxes or otherwise. *Id.*

410. The title acquired by the later sale for taxes must prevail over that acquired by a sale for taxes of a prior year.

Chandler v. Dunn, 50 Cal. 15.

411. A deed of land executed by an officer under a sale made on a judgment enforcing a lien for a tax can not be held to have an effect, which the statute under which the judgment was rendered says it shall not have. Such deed **is not**, therefore, **conclusive** evidence of title against one who paid the tax and was not a party to the judgment. *Mayo v. Haynie*, 50 Cal. 70.

412. A judgment in an action in rem to enforce a lien on land for a tax can not be held to enlarge the operation of the deed given by a sheriff under a sale on the judgment, beyond the limitations of the statute by force of which the judgment was rendered. *Id.*

413. If a sheriff sells land on a judgment enforcing the lien of a tax, and the purchaser **does not pay the price bid** by him, **until five months** after, and the sheriff then gives him a certificate of sale bearing date the date the sale was made, and at the end of six months from the day of sale gives him a deed, and there was no stipulation for a credit between the sheriff and the purchaser, the **deed is not void**, but passes the legal title. *Maine v. Elliott*, 51 Cal. 8.

414. If the statute directs the officer who sells land under a judgment for delinquent taxes to **sell the smallest quantity** that any purchaser will take and pay the judgment for the tax and costs, a deed of the officer who made the sale, which recites that he has sold the premises to the grantee who was the highest bidder therefor, is void and conveys no title.

Carpentier v. Gaun, 51 Cal. 193.

415. A deed of land under a tax sale is **only prima facie evidence** that no redemption had been effected; and the party who makes the redemption may, in ejectment on the title acquired by the deed, prove that a redemption was effected.

Cooper v. Shepardson, 51 Cal. 298.

416. In the absence of a statute declaring that the recitals in a tax deed shall convey the title to the land therein described, and shall be *prima facie* evidence of title, the burden is cast on the party claiming under the deed of proving that the recitals are true.

Pierce v. Low, 51 Cal. 580.

417. If a **delinquent tax list**, and time and place of sale of property for the delin-

quent taxes, **are not published** as required by the statute of 1859, the defendant may, under said statute, avail himself of the same as a defense in an action of ejectment brought against him by one claiming under a tax deed. *Tully v. Bauer*, 52 Cal. 487.

418. It is the general rule that a grantee under a tax deed, valid on its face, is not affected in any of his rights by recitals in the **sheriff's return** of the tax sale contradicting the recitals in the deed.

Hewell v. Lane, 53 Cal. 213.

419. Where the statute prescribes the particular form of a tax deed, the form becomes **substance**, and must be strictly pursued, or the deed will be void.

Grimm v. O'Connell, 54 Cal. 522.

420. If a tax deed **recites a void assessment**, it is void, and it can not be shown that there was in fact a valid assessment. The plaintiff must recover, if at all, on his tax deed, supported by evidence of the regularity of the prior proceedings, if the same are attacked. He can not recover on the tax roll or delinquent list. *Id.*

421. Under a judgment in a tax suit, in favor of the people against an undivided interest, equal to fifty-five thousand three hundred and forty-four acres, in certain real estate, the sheriff sold an undivided interest, equal to five thousand acres, for the amount of the judgment and costs, including in the latter **fifty cents for filing** with the recorder a duplicate certificate of sale, the interest sold being the smallest undivided interest that any purchaser would take and pay the amount demanded. In an action to quiet title, brought by the original owner of the land against defendants holding under the sale: *Held*, first, that the provision of section 8 of the act of May 12, 1862 (Hitt., art. 6479), that no more of the property should be sold than was necessary to pay the judgment and costs, authorized the sheriff to include the accruing costs in the amount for which the sale was made, and that the fifty cents for filing the duplicate certificate of sale was rightly charged; and, second, that the property assessed and directed to be sold, being an undivided interest, a specific tract could not be sold, and the sheriff was therefore authorized to sell an undivided interest; *h/d*, further, objection being made to certain recitals in the sheriff's deed, that, as the statute did not provide for the form of the deed in such cases, the objectionable matter was mere surplusage, and did not affect the validity of the deed.

Harper v. Rowe, 55 Cal. 132.

422. A void tax deed can not be made valid by proof of a valid assessment.

Hearst v. Egglestone, 55 Cal. 365.

423. A tax deed for state taxes purporting to have been levied for the fiscal year 1872-3, when, under the decisions of the

supreme court, there was **no valid law authorizing a state tax to be levied** for that year, would be void on its face, so far as it related to the state tax.

Wills v. Austin, 53 Cal. 152.

424. The defendant can not, in ejectment, for the purpose of defeating title acquired by a sheriff's deed executed under a sale made on a judgment foreclosing a lien for taxes, avail himself of **defects in the assessment roll, of which the purchaser had no notice** when he purchased, and which, if they had been shown in the tax suit, would have defeated a recovery.

Jones v. Gillis, 45 Cal. 541.

TAX DEED.

Generally.

425. Public land of the United States can not be sold for taxes; and plaintiff in ejectment for such land can not recover on a tax deed. If the tax was for improvements on the land, and if such tax was proper, then the deed should show this, and not a sale of the fee, or a taxing of the land itself.

Hall v. Dowling, 18 Cal. 619.

426. The sheriff's deed, executed under a judicial sale for taxes, is not *prima facie* or conclusive evidence of his power to sell; but his **power to sell, to recite a sale in his deed, and to make the deed, must be proved** by the judgment and execution.

People v. Doe, 31 Cal. 220.

427. To sustain a title by virtue of a tax collector's deed, it has, by the best authorities, been held that **every prerequisite to the exercise of the power of sale by the officer must be shown** to have been accomplished.

Norris v. Russell, 5 Cal. 249.

428. By the doctrine of the common law, a party claiming under a tax deed must show **that all the requirements of the law, from the first to the last, have been complied with.** Though the statute has altered the rule, and made the deed *prima facie* evidence of the conveyance of all the title of the delinquent, it does not dispense with the necessity of the officer reciting in the deed the authority under which he acted. The deed has no validity as an independent conveyance. It depends upon the statute, and if, by any of its recitals, it appears that any material requisition of the law has been omitted, the deed is void.

Ferris v. Coover, 10 Cal. 589.

429. The tax collector's deed, under the act of 1854, would show the fact that taxes were assessed, and the time and the amount of the assessment. And if it appeared that property was sold in 1860, for taxes assessed under the act of 1854, and due in 1857, the nullity of the sale would be shown on the face of the deed. Burr v. Hunt, 13 Cal. 303.

430. A tax deed depends for its validity upon a lawful assessment.

Braly v. Scaman, 30 Cal. 610.

431. The *prima facie* evidence of title furnished by the recitals of the tax deed is overthrown by showing that the assessment was illegal. Bidleman v. Brooks, 28 Cal. 72.

432. A tax collector's deed, to be evidence of title, **must be made in pursuance of a law giving it that effect; and where lands were sold for taxes assessed under the act of 1854, and the deed was not made until after the passage of the act of 1857, repealing the act of 1854, assuming that it does so repeal, the deed is not evidence of title.**

Burr v. Hunt, 13 Cal. 303.

433. Our statute makes tax collectors' deeds *prima facie* evidence of title.

Norris v. Russell, 5 Cal. 249.

434. A deed executed by a collector of taxes for property sold for non-payment of taxes, which **recites generally that the property was duly assessed, and that the taxes were levied upon it according to law, is *prima facie* evidence of title in the grantee, and is entitled to be received in evidence as such without any further proofs.**

O'Grady v. Barnhisel, 23 Cal. 287.

435. A tax deed properly acknowledged is admissible in evidence without further proof. Wetherbee v. Dunn, 32 Cal. 106.

436. The fact that a tax deed is *prima facie* evidence of certain facts makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof. Kelsey v. Abbott, 13 Cal. 609.

437. The statute which makes a tax deed *prima facie* evidence of the transfer of the title of the delinquent, **applies only to deeds executed upon a sale for taxes levied subsequent to its passage.** A tax deed executed previous to the passage of the statute is not admissible as evidence of title without proof that all the requirements of the law authorizing its execution had been complied with.

Keane v. Cannovan, 21 Cal. 291.

438. If the certificate of sale of property for taxes is made to "Michael Dundon," and the deed under the certificate is made to "Patrick Michael Dundon, Jr.," and it appears in proof that there were two persons, Michael and Patrick Michael, and there is no evidence that Patrick Michael acquired the right of Michael by assignment, the deed is not admissible in evidence without proof that the two names are for the same person.

McMinn v. Whelan, 27 Cal. 300.

439. A tax deed executed by a sheriff as tax collector, **by his under sheriff, is not admissible in evidence, and vests no title in the grantee.** Lathrop v. Brittain, 30 Cal. 680.

440. One who is under any legal or moral obligation to pay taxes can not, by neglect-

ing to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title either by purchasing at the sale himself or by suffering a stranger to buy and then purchasing from him. *Moss v. Shear*, 25 Cal. 38.

441. One who is in possession of land, claiming it as his, when it is assessed for taxes, can not, by failing to pay the tax and allowing the land to be sold for the same, and becoming the purchaser, and obtaining a sheriff's deed, acquire a title to it. *McMinn v. Whelan*, 27 Cal. 300.

Recitals in.

442. The description of property in a tax deed must be certain of itself, and not such as to require evidence *aliunde* to make it certain. *Keane v. Cannovan*, 21 Cal. 291.

443. A tax deed in which the property is described as follows: "A lot on Dupont street, one hundred and thirty-seven feet and six inches from the north-west corner of Washington street, with the improvements thereon, 12x100," is void for uncertainty of the description. *Id.*

444. Neither an assessment for taxes nor a tax deed is necessarily void because, in describing the land assessed, a false call has been inserted in the description in the assessment roll or tax deed.

Bosworth v. Danzien, 25 Cal. 296.

445. If the description of the land assessed is definite and accurate in the assessment, and is inserted in the tax deed, and the purchaser at the sale buys a portion of it for the taxes and costs, such description in the tax deed of the portion sold as will enable its boundaries to be determined by extrinsic evidence, applying the description in the deed to the land, is sufficient. *Brunn v. Murphy*, 29 Cal. 326.

446. A tax deed which describes the property conveyed as "Block No. 25, less a lot belonging to Bryant, 70 by 137, in the south-easterly corner," is not void on the ground that the description of the premises is insufficient, nor because it was assessed by that description.

Wetherbee v. Dunn, 32 Cal. 106.

447. It is not necessary in the recitals in a tax deed, given for land sold for the taxes of 1857-8, to state in what manner the tax had been levied or the rate of taxation, nor for what amount the land was assessed by the assessor, nor that a certificate of sale was filed with the county recorder. *Id.*

448. It was not necessary under the revenue act of 1854, to recite in a tax deed the various acts showing a compliance on the part of the revenue officers with the several conditions of the statute. These acts, if inserted in the deed, are *prima facie* evi-

dence; but if not inserted may be proved *aliunde*. *Moss v. Shear*, 25 Cal. 38.

449. It is not necessary that a deed for taxes recite each act of the officers in making the assessment and levying the tax, etc., but a general recitation of the conclusions resulting from those acts is sufficient. *O'Grady v. Barnhisel*, 23 Cal. 287.

450. Such a deed is *prima facie* evidence that all the proceedings in relation to the tax were regular and in accordance with law, and the burden of showing that any irregularity occurred is thrown upon the one asserting its invalidity. *Id.*

When Void.

451. A tax deed executed in 1860, for land sold for taxes, is void if the assessment shows that there was not any cash valuation of the lot which the deed purports to convey. *Hurlbutt v. Butenop*, 27 Cal. 50.

452. If the property is not listed and assessed for the purpose of taxation, the tax deed conveys no title. *People v. Hastings*, 29 Cal. 449.

REDEMPTION.

453. After a sale of lands under a judgment recovered for taxes a redemption can not be made by paying a portion of the bid equal to the interest of the redemption in the parcel sold.

People v. McEwen, 23 Cal. 54.

454. If the land is sold in separate parcels by the officer, a redemption of distinct parcels can only be made by paying the whole sum bid on any distinct piece sold separately. *Id.*

455. Third persons have no right to inquire from what source a redemptioner gets the money he proposes to use to effect a redemption he is entitled to make. *Scale v. Doane*, 17 Cal. 476.

456. Where a party purchased property at sheriff's sale, and on an attempt by the owner to redeem from him, he objects that the amount tendered for redemption is not enough, because not including certain taxes he has paid on the property: *Held*, that he must show that the taxes were legally assessed and paid, and were a charge on the property before or at the time of the redemption; and the tax collector's receipts are not sufficient proof. *Id.*

457. Where an entire tract of land has been sold on a judgment recovered against the same, or the owner thereof for taxes, the owner of an undivided interest in the land can not redeem his undivided portion from the sale, by a payment of his proportion of the judgment and costs. *Mayo v. Marshall*, 23 Cal. 594.

458. The purchaser at sheriff's sale of land

sold on execution issued on a judgment recovered for taxes is **not entitled to receive the rents and profits** during the period allowed for redemption.

Mayo v. Woods, 31 Cal. 269.

459. Where lands are thus assessed to several persons jointly by the revenue law of 1860, the **owner** of an undivided portion **may pay his proportion** of the tax and thus release his portion of the land from the lien of the tax; but unless he makes this payment before a sale is made of the land under a judgment recovered for the tax this right is gone, and a redemption can only be effected by a payment of the entire judgment and all charges.

People v. McEwen, 23 Cal. 54.

460. Section 3779 of the political code, requiring the purchaser at a tax sale to reconvey upon "payment of the purchase money and fifty per cent. added thereon," does not apply to a void sale.

Harper v. Rowe, 53 Cal. 233.

461. A judgment debtor may redeem by paying the purchaser the amount of his purchase, with twelve per cent. thereon, together with the amount of taxes, etc., paid by the judgment creditor. He is not obliged to pay other liens which the purchaser may have on the property.

Sharp v. Miller, 47 Cal. 82.

462. A person redeeming from a tax sale made by the collector of taxes, under a judgment recovered for the tax, **must pay the whole amount of the judgment**, even if he own only an undivided interest in the land; but the payment does not redeem any land other than that which the redemptioner owned at the time of the tax sale.

Quinn v. Kenney, 47 Cal. 147.

463. If a purchaser of land at a sale made by a sheriff for delinquent taxes does not pay the price bid until five months after the sale, and then receives a sheriff's deed at the expiration of six months from the time of sale; although the sheriff's deed conveys the legal title, yet a court of equity will recognize the right of the owner to redeem at any time **within six months from the day the purchase money was paid**, and will compel the sheriff's grantee to convey the legal title.

Maina v. Elliott, 51 Cal. 8.

464. If sufficient money is paid to the county treasurer to redeem land sold for taxes, and the payment is made for the purpose of effecting a redemption, and a receipt is taken, the **redemption is effected**, even if the receipt is not filed with the recorder, and recorded by him.

Cooper v. Shepardson, 51 Cal. 298.

465. If land sold for taxes is redeemed, the redemption has the effect of defeating a deed afterwards given to the purchaser. *Id.*

466. In an action by a minor to redeem

from a tax sale, brought after the deed has been executed by the tax collector, the proper decree, if the purchaser at the tax sale has not conveyed or incumbered the property, is, that he convey the same to the plaintiff, and if such purchaser bring into court and tender to the plaintiff such deed, the court may decree that the plaintiff accept it, and recover costs.

Quinn v. Kenney, 47 Cal. 147.

LOCAL TAXATION.

467. The act of 1860, authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859 in the city and county of Sacramento, and **prohibiting the defendants from setting up in defense, any formality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional.**

People v. Seymour, 16 Cal. 332.

468. Such a law making the assessment *prima facie* proof, merely affects the remedy, and is not therefore liable to any constitutional objection. *Id.*

469. Nor is the act unconstitutional because it compels the delinquent, if sued, to pay costs and a percentage by way of attorney fees in addition to the tax assessed. *Id.*

470. Nor is it any constitutional objection to the act that the delinquent tax list for 1859 was not properly published. The liability to pay the tax assessed preceded the publication of the delinquent list, and suit, under the act of 1860, is based upon that liability. *Id.*

471. An assessment made by an **assessor elected by the qualified electors** of the city and county of Sacramento is not a sufficient basis for the levy of a tax in the city of Sacramento for city purposes.

People v. Hastings, 29 Cal. 449.

472. It was unnecessary that the ordinance levying the tax in this case should provide for adding to or modifying the assessment of 1860, the act itself having provided for the correction of the list.

Kelsey v. Nevada, 18 Cal. 627.

473. *Held, further*, that if a party objects to the tax on the ground that notice was not given, as required by law, for the **meeting of the board of equalization**, he must show error in the assessed value of his property to his prejudice. *Id.*

474. The charter of the city of Marysville contains this clause: "The common council shall have power within the city to construct a **bridge across the Yuba river** at the southern extremity of the public plaza, or to authorize the construction upon such terms

as to a division of the proceeds from the tolls as may be just, and to regulate the rates of toll." Under this clause, an ordinance was passed granting Eaton & Smith the franchise of constructing a bridge, the grant to last twenty-five years, they paying the city five per cent. of the gross tolls. They constructed the bridge, and subsequently assigned all their interest in it and the franchise to plaintiff, who has regularly paid over the five per cent. The city now assesses a tax on the bridge as the property of plaintiff: *Held*, that plaintiff has a taxable estate in the bridge, and that the tax is valid; that the city is not the present owner of the bridge, but has only a reversionary interest.

Fall v. Marysville, 19 Cal. 391.

475. *Held, further*, that the objection that the bridge has been assessed at its full value does not affect plaintiff's right to maintain this suit to enjoin the collection of this tax, but only goes to the amount of the tax, and not to its validity; and that the only remedy of plaintiff was to apply for a reduction of the tax. *Id.*

476. The property was not taxable beyond plaintiff's interest in it; and, in legal effect, the tax assessed amounted to nothing more than a tax upon such interest. *Id.*

477. The revenue act of 1860 repealed the act of April, 1858, concerning the collection of poll taxes, etc., in the county of Sierra; and under the provisions of the revenue act of 1861, the sheriff of that county is the collector of poll and license taxes, as well as the tax on property.

People v. Grippen, 20 Cal. 677.

478. The thirty-seventh section of the act of April 6, 1863, authorizing a special tax for school purposes to be levied in any school district in this state, is not repealed as to the county of San Mateo by section 9 of an "act to define and limit the compensation of officers and reduce public expenses in the county of San Mateo," passed February 6, 1864, nor by section 12 of an "act to provide for the continuance and election of a board of supervisors in the county of San Mateo," etc., approved March 24, 1864.

People v. S. F. & S. J. R. Co., 23 Cal. 254.

479. Under the act of April 3, 1860, "providing for the collection of delinquent taxes in the city and county of Sacramento," where several lots are assessed to unknown owners by fictitious names, and suits are instituted for the collection of the several taxes, there is no valid objection to having one affidavit for, and one order of publication of summons, apply to the several cases. In such case, the publication of one summons gives the court jurisdiction in each case. *Moss v. Mayo*, 23 Cal. 421.

480. In such case a judgment rendered becomes a lien only on the property of the

person against whom it is rendered; and where no judgment is rendered either against the real owner by name or the fictitious person representing such real owner, a court of equity will enjoin the purchaser from dispossessing the real owner by a writ of assistance obtained under the tax deed. *Id.*

481. A special tax for school purposes can only be levied after the question has been submitted to the qualified electors of the district in the manner pointed out by the statute. *People v. Castro*, 39 Cal. 65.

482. A tax levied on the property of a given district, to pay for a local improvement, which is assessed upon the parcels of property in the district, in proportion to the benefits each parcel derives from the work, is unconstitutional. Such tax must be levied on all property according to its value.

People v. Whyler, 41 Cal. 351.

483. Property sold for taxes must at the time of sale be liable for the entire amount of tax for which it is sold, or the sale will be void.

Bucknall v. Story, 36 Cal. 67.

484. A purchaser under a tax sale for widening Kearny street, in San Francisco, in order to recover the land, must introduce in evidence, not only his deed, but the assessment, and must show the regularity of all the proceedings. *Id.*

485. The twenty-second section of the act incorporating the city of Oakland does not abridge the ordinary remedy by suit for the collection of delinquent taxes, but was intended to afford an additional, summary, and effectual remedy for its collection. *Id.*

486. If the property of a district is taxed to build levees to protect it from overflow, the fact that land which is injured by the levee is assessed at its former value, and land benefited by the levee is also assessed at its former value, does not render the tax liable to the objection of want of equality and uniformity. *People v. Whyler*, 41 Cal. 351.

487. A charge imposed on all the property of a district, to be used in constructing levees to protect the district from overflow, is a tax, and not an assessment. *Id.*

488. The fact that levees built to protect the land of a district from overflow injure some of the land instead of benefiting it does not render the tax unequal or void for want of uniformity. *Id.*

489. A tax on the property in a township for a township road fund, must be assessed by an assessor elected by the electors of the township.

People v. Sargent, 44 Cal. 430.

490. A county assessor can not assess the property of a township for a tax levied on the township property, to raise a fund for township purposes. *Id.*

491. The act incorporating the city of

Placerville granted to the common council the right to levy and collect certain taxes, and constituted the city **marshal ex officio collector of taxes**, and made it his duty to receive and collect all taxes due the city, authorized the sale of the property of delinquents for taxes due the city, and further enacted that the manner of assessing and collecting taxes, and proceedings for the sale of property in cases of delinquency, should be regulated by ordinance. The common council enacted by ordinance a mode of collecting delinquent taxes remaining unpaid after a certain date, whereby the entire duty was devolved upon the city attorney, and the services of the city marshal dispensed with: *Held*, that the ordinance prescribing such mode was void, because in conflict with said incorporation act.

Placerville v. Wilcox, 35 Cal. 21.

492. An assessment for a special school tax must be made by an **assessor** elected by the qualified electors of the school district.

People v. White, 47 Cal. 616.

493. A tax for school purposes must be based upon an assessment made by an assessor elected by the qualified electors of the school district.

People v. S. & C. R. Co., 49 Cal. 414.

494. If an ordinance of a city council, incorporated under the act of 1850, requires a **complaint to be filed**, and personal notice in writing to be given to a tax-payer **before the board of equalization** can raise the assessed value of his property, such complaint must be filed and notice given before such value can be raised.

Los Angeles v. L. A. W. Co., 49 Cal. 638.

495. If a board of equalization raises the assessed value of the property of a tax-payer without having acquired jurisdiction to do so, the tax-payer must still pay a tax upon the value of his property as assessed. *Id.*

496. **School district taxes** can not be imposed unless the provisions of the political code relating to the same are substantially complied with. *People v. Seale*, 52 Cal. 71.

497. If an **act creates a district** within a county, and authorizes the supervisors to levy a tax upon the property therein for the purpose of building a bridge, the property within the district can not be assessed for the tax by an **assessor** elected by the county, nor can the tax be collected by a collector elected by the county.

Smith v. Farrelly, 52 Cal. 77.

498. A tax for local improvement levied upon the property within a district created by an act of the legislature, is **not an assessment** within the meaning of that term as employed in article XI, section 18, of the constitution. *Id.*

499. Section 3666 of the political code is

unconstitutional, in so far as it delegates to the state board of equalization the right to fix the rate of taxation, "after allowing for delinquency in the collection of taxes," because it is a delegation of legislative power to said board.

Houghton v. Austin, 47 Cal. 646.

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TAX COLLECTOR.

1. It is not necessary, before introducing a tax deed in evidence, to prove that the person by whom it was executed held the office of tax collector at the time when the sale was made. *Wetherbee v. Dunn*, 32 Cal. 106.

2. The constitution affixes no period of **tenure to the office of tax collector**, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The legislature may direct how it shall be filled, and how its duties shall be discharged.

Attorney-general v. Squires, 14 Cal. 12.

3. A tax collector has **power to contract for publishing the delinquent list of tax-payers**, so as to bind the county for payment of the price. He is the agent of the county in this respect, and, for any reasonable exercise of that agency, the county is responsible.

Randall v. Yuba Co., 14 Cal. 219.

4. And where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax collector had assented to a contract previously made, or attempted to be made, by the supervisors with another party, for publishing the list, is not enough to affect plaintiffs, if they had no notice of it; and evidence of such assent was properly ruled out. *Id.*

5. No provision is to be found in the con-

stitution under which the **sheriff**, as sheriff, may perform the duties of tax collector.

Lathrop v. Brittain, 30 Cal. 680.

6. The **sheriff acquires his authority to act as tax collector**, in those counties where he so acts, **under the revenue act of 1857**, which invests the person elected to the office of sheriff with another distinct office—that of tax collector; and though he is elected, *eo nomine*, sheriff, he is, in fact, also elected to the office of tax collector, and the two offices are distinct. Id.

7. The law authorizing sheriffs to act as tax collectors does not authorize the sheriff as tax collector to appoint an under tax collector, wherefore the **under sheriff can not perform the duties of tax collector**. Id.

8. The legislature has the power to enact a law directing the collector of taxes for a county to pay one-half of the **compensation** allowed him by law for the collection of the same into the county treasury for the benefit of the general fund.

Solano Co. v. Neville, 27 Cal. 465.

9. If the statute allows a collector of taxes, for his own use, a percentage for collections of state tax, and also a percentage on the amount of county tax collected, and provides that he shall pay the **percentage** allowed him on the county tax into the county salary fund, and that it shall become a part of said fund, the collector can not claim the percentage to be paid into the salary fund as his own fees or property.

Donahue v. El Dorado Co., 49 Cal. 248.

10. If a **tax** is not illegal and void, the facts that the person taxed **paid it to the tax collector under protest** and to avoid a threatened sale of his property for the same, and that such person has commenced, or is about to commence, a suit against the tax collector to recover it back, are not sufficient reasons why the tax collector should fail to **pay the money into the public treasury** at the time required by law.

People v. Austin, 46 Cal. 521.

11. So long as the tax collector retains taxes and assessments (outside land taxes and assessments) it is his duty to **pay the same to the unsuccessful litigant**, and he will not be allowed to set up as a defense that the city and county of San Francisco is the proper party to be sued.

Randall v. Austin, 46 Cal. 54.

12. It is the duty of a tax collector, under the code, on the first Monday in each month, to **pay to the county treasurer all money collected by him as taxes for the state and county, even if the tax is illegal and the money is paid to the collector under protest**.

San Francisco v. Ford, 52 Cal. 198.

13. A **tax collector elected for a city can not collect the taxes of an adjoining town**, even if it has, after his election, and

after the levy of the tax, been annexed to the city. Mason v. Johnson, 51 Cal. 612.

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LANDLORD AND TENANT.

TENANTS IN COMMON.

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WHO ARE TENANTS IN COMMON.

1. The books do not afford any instance in which the right to hold land as tenants in common, either with themselves or with natural persons, is denied to corporations.

De Witt v. San Francisco, 2 Cal. 289.

2. No one of the reasons which work a want of capacity in corporations to hold as joint tenants would prevent them holding as tenants in common.

Id.

3. Land held by a husband with his wife and child, as tenants in common, is not subject to homestead rights under the laws of this state.

Giblin v. Jordan, 8 Cal. 416.

4. The parties in such case are as much tenants in common as though they were entire strangers to each other.

Id.

But see Laws 1867-8, p. 116.

5. Where V., an owner of land, makes a verbal agreement with B., which they term a lease, by which B. is to have the land for three years; V. to furnish the farming implements, wagons, horses and his share of sacks; B. to work the land, and give V. for the use of it one third of the grain raised, after it is put in sacks, free from the expense of threshing; *Held*, that this agreement is not a lease, but a contract for working the farm upon shares; and that the parties are tenants in common of the grain, until a division be made; *held, further*, that a sheriff having an attachment against V. may levy on his interest in the grain; and to effect this may take and detain possession of the entire quantity of grain; but he can sell under the execution on the judgment that may be recovered in the action only the undivided one third interest of V., the purchaser at the sale becoming tenant in common with B.

Bernal v. Hovious, 17 Cal. 541.

6. The grantee of a specific quantity in a larger tract, thereafter to be segregated, becomes a tenant in common with his grantor of the entire tract, and may maintain ejectment against his co-tenants.

Lawrence v. Ballou, 37 Cal. 518.

7. The purchaser, under execution sale, of the interest of one partner in the real estate of a partnership, acquires the legal title, and not a mere equity, and is entitled to be let into possession as a tenant in common with the other owners.

McCauley v. Fulton, 44 Cal. 356.

8. A tenancy in common results from a rule of law by which it is controlled and governed, and each co-tenant sells out or incumbers his interest at pleasure, regardless of the knowledge or consent or wishes of co-proprietors, without affecting the legal relation existing between them, beyond the going out of one and coming in of another.

Bradley v. Harkness, 26 Cal. 69.

9. The joint proprietors of water ditches

in the mining districts, in the absence of any special facts constituting them something else, are tenants in common of real estate, and their rights in the ditches and sales of water are governed by the law of tenancy in common.

Id.

10. If two persons own a tract of land as tenants in common, and one of them conveys to a third person a ditch crossing the same, and the other afterwards conveys to another third person the same ditch, the deeds are valid conveyances as between the parties, and the persons to whom the conveyances are made become tenants in common in the property.

Reed v. Spicer, 27 Cal. 57.

11. If an undivided portion of land is common property, and the remaining undivided part is the separate property of the wife, the grantee of the husband becomes a tenant in common with the wife or those claiming under her.

Ewald v. Corbett, 32 Cal. 493.

12. If the owner of sheep lets them for a year to another, with an agreement that he is to take care of and pasture and shear them, and sack the wool, and deliver the same to the owner of the sheep to be sold, or at a port to be shipped to a commission merchant, and that when the wool is sold the proceeds shall be equally divided, the parties become tenants in common of the wool, and the delivery of the wool is merely a step looking to a division to be had between them.

Hewlett v. Owens, 50 Cal. 474.

RELATIONS WITH EACH OTHER.

13. Tenants in common, or partners, have a right to acquire their co-tenants' or co-partners' interest, by purchasing under an execution sale, there being nothing in their relations to forbid it.

Gunter v. Laffan, 7 Cal. 588.

14. Where the tenant in common, or partner, goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay, or delay in paying the expenses of the business, or the assessments, create of itself a forfeiture.

Waring v. Crow, 11 Cal. 366.

15. The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, can not confer any upon the vendee.

Id.

16. At common law, one tenant in common has no remedy against the other, who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession, when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. The occupation by him, so long as he does not exclude his

co-tenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk; if they result in loss he can not call upon his co-tenant for contribution; and if they produce a profit his co-tenant is not entitled to a share in them. The co-tenant can at any moment enter into equal enjoyment of his possession; his neglect to do so may be regarded as an assent to the sole occupation of the other.

Pico v. Columbet, 12 Cal. 414.

17. There is no equity in the claim asserted by the tenant to share in profits resulting from the labor and money of his co-tenant, when he has expended neither, and has never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to a tenant, who would neither work himself nor subject himself to any expenditures or risks, a share in the fruits of another's labor, investments, and risks. Id.

18. From rents received, the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps, and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. Goodenow v. Ewer, 16 Cal. 461.

19. A party put in possession or allowed to occupy a portion of premises by one tenant in common, can not be sued as a trespasser by another tenant in common, without notice to quit or other act showing a termination of this license or tenancy. Ord v. Chester, 18 Cal. 77.

20. H., as assignee of the purchaser at sheriff's sale of a three fifths' interest in a water ditch, owned by the South Fork canal company, was in possession of this interest after the time allowed for redemption, and received the rents and profits thereof from the day of sale. The affairs of the company were managed by superintendents, agents employed and paid by the company. Afterwards, the judgment under which the three fifths' interest was sold, was reversed and the sale set aside, and H. ordered to account for the rents and profits received. While he was so in possession he

gave considerable personal attention to the affairs of the company, and during this time the company, with the consent and advice of its members, made various reasonable and judicious improvements, and also bought another ditch, which enhanced the value and profits of the South Fork canal: Held, that H. was not entitled, in the account, to compensation for his personal services, being at most but a tenant in common, one of several owners, and the company having employed competent agents to manage the property. Raun v. Reynolds, 18 Cal. 275.

21. Held, further, that for the improvements made by the company, and for the ditch purchased, allowance should be made in taking the account. Id.

22. No action of a portion of several tenants in common can impair the rights of their co-tenants.

Mahoney v. Van Winkle, 21 Cal. 552.

23. As a general rule, neither a tenant in common nor a mortgagee, can acquire a tax title and set it up as against his co-tenant or mortgagor, but this rule rests upon the doctrine of constructive frauds, and is not applicable in a case where, by statute, the deed can only be attacked for actual fraud. Mills v. Tukey, 22 Cal. 373.

24. Several persons owning a tract of mining claims, as tenants in common, and acting under a company name, have not the capacity to take or hold, in the name of the company, the interest of any one or more of the tenants in common, by forfeiture.

Wiseman v. McNulty, 25 Cal. 230.

25. Where husband and wife are divorced, and the decree also directs an equal division of the common property, and both afterwards die, the former husband leaving a will, and the former wife intestate, the executors of the last will of the former husband can not exclude from the lands formerly held in community the heirs of the former wife. McLeran v. Benton, 31 Cal. 29.

RELATIONS WITH THIRD PERSONS.

26. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. Collier v. Corbett, 15 Cal. 183.

27. One tenant in common can recover possession of the entire premises, as against a mere trespasser, without joining his co-tenants as plaintiffs.

Treat v. Reilly, 35 Cal. 129.

28. One joint tenant, or tenant in common of land, may convey his interest in a particular portion of the land described by specific metes and bounds, but the grantee takes subject to the co-tenant's right of partition of the whole tract. The grantee's title is good against his grantor and all persons except the co-tenant.

Stark v. Barrett, 15 Cal. 361.

29. The right of partition existing in the co-tenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him. *Id.*

30. Such grantee, though seised in fee of only an undivided interest in the particular parcel of land, may recover in ejectment the whole of that parcel, as against all persons except the original co-tenant and his grantees. He is entitled to the possession of the entire premises as against all other parties. *Id.*

31. A tenant in common of an undivided portion of a tract of land is entitled to the possession of the whole tract as against all persons except his co-tenants, and as a consequence may, against all others than they, maintain ejectment for the entire premises.

Fouchard v. Crow, 20 Cal. 150.

Mahoney v. Van Winkle, 21 *Id.* 552.

32. A tenant in common, although he may, as against a stranger, recover in ejectment the entire premises, can not in such action recover the whole of the mesne profits or damages for the detention, but only a proportionable part corresponding to his interest. *Clark v. Huber*, 20 Cal. 196.

Muller v. Boggs, 25 *Id.* 175.

33. One tenant in common is entitled to the possession of the entire tract held in common against all persons but his co-tenants and parties claiming under them, and as a consequence can maintain against them an action for its recovery.

Hart v. Robertson, 21 Cal. 346.

34. If several persons are the owners of a tract of mining claims as tenants in common, and are known by a company name, and an action is commenced against all of them as individuals composing the company on a money demand, and a judgment is rendered against all as the persons composing the company, and the claims are sold by virtue of an execution issued on the judgment, and a deed executed to the purchaser, and if one or more of the defendants were not served with process and did not appear in the action, the purchaser does not acquire any title as against the persons not served with process and who did not appear.

Wiseman v. McNulty, 25 Cal. 230.

35. Where Woods, being the owner of a lot in San Francisco, conveyed an undivided quarter which passed to Williams, and a quarter to Hastings, and a quarter to Haskell; and afterwards Sutton, claiming title under a Colton grant, brought trespass *quare clauum fregit* against Woods, Hastings, and Haskell for alleged interference with his possession, and recovered judgment, and also obtained an injunction against their interference with his possession: *Held*, in ejectment by Williams against Sutton, that the effect of the judgment was merely to estop Woods, Hastings, and Haskell from asserting title as against Sutton, not to transfer

their title to him or make him a tenant in common with Williams; and that such judgment could not prevent Williams from recovering the whole property.

Williams v. Sutton, 43 Cal. 65.

36. A tenant in common is seised *per mi et per tout*, and has an interest in the whole, which entitles him to the enjoyment of the entire estate as against every one except his co-tenant. *Id.*

37. A conveyance by one tenant in common, or any number of them less than the whole, of a specific portion of the common lands, is not void, but can not be made to the prejudice of the tenants not uniting in the conveyance. *Gates v. Salmon*, 35 Cal. 576.

38. The grantee at such sale acquires all the interest of his grantor in such special tract, which interest is a tenancy in the special tract with the co-tenants of his grantor. *Id.*

39. A conveyance by one or more of several tenants in common, less than all, of a specific parcel described by metes and bounds of the land owned in common, makes the grantee a tenant in common to the extent of the interest of his grantors in the specific parcel of land described in the conveyance. *Id.*, 46 Cal. 362.

40. Such grantee occupies the precise position, so far as title is concerned, which his grantor or grantors held in the land described in the deed, and becomes a tenant in common, so far as the land conveyed is concerned, with those tenants in common who did not unite in the deed. *Id.*

41. Such conveyance does not sever the special tract from the general tract of which it is a part, so far as the co-tenants of the grantor are concerned, and the whole tract is subject to partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made. *Id.*, 35 Cal. 576.

42. A confirmation by the Van Ness ordinance of the title to a lot granted by an alcalde, inures alike to the benefit of all the tenants in common of the lot.

Broad v. Broad, 40 Cal. 493.

43. Equity does not deny to one tenant in common, the right to purchase in an outstanding or an adverse title to the common property; but it will not permit him to acquire such a title solely for his own benefit, or to the absolute exclusion of the other.

Mandeville v. Solomon, 39 Cal. 125.

44. But the co-tenant must exercise reasonable diligence in making his election to participate in the benefit of the new acquisition. *Id.*

45. Unless he make his election to participate in a reasonable time, and contribute, or offer to contribute, his proportion of the consideration actually paid, he will be

deemed to have repudiated the transaction and abandoned its benefits. *Id.*

46. A tenant in common, entering and remaining in possession of such, can not, as against his co-tenant, **assail the common title**, or call its validity in question.

Bornheimer v. Baldwin, 42 Cal. 27.

ACTIONS BETWEEN.

47. One tenant in common can not sustain an action of forcible entry and detainer against another, for holding over. He must first resort to a court of equity for a partition of the land in dispute.

Lick v. O'Donnell, 3 Cal. 59.

48. If the parties were tenants in common, and the defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in **trover**, or by an action for **money had and received**; and an action for goods, wares, and merchandise, sold and delivered, will not entitle him to a judgment.

Williams v. Chadbourne, 6 Cal. 550.

49. One of several tenants in common has a right to sue alone for his moiety.

Covillaud v. Tanner, 7 Cal. 38.

50. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, **compel his co-tenant in possession to account for rents and profits** received by him from tenants of the premises.

Goodenow v. Ewer, 16 Cal. 461.

51. One tenant in common can not have **partition** of a part only of the entire common property, and have his entire interest located in this part.

Sutter v. San Francisco, 36 Cal. 112.

52. A tenant in common of a **water ditch** can maintain action to recover his share of the rents and profits of his co-tenant in possession and collecting the same.

Abel v. Love, 17 Cal. 233.

53. *Pico v. Columbet*, 12 Cal. 420, has no application to the case of money received by one tenant in common from **sales of water**, or profits derived from the business of a ditch or mine. These operations may be regarded as partnerships in this respect, the shareholders as partners being entitled to participate in the profits. *Id.*

54. In trespass for driving cattle upon land alleged in the complaint to be "in the quiet and peaceable possession" of plaintiffs, "claiming the same as in fee simple," plaintiffs proved their possession and actual occupancy. Defendants then offered deeds from I. to M., and from M. to plaintiffs, and from M. to defendants, of an undivided half interest in the land, to show that plaintiffs and defendants were tenants in common, deriving title from the same source, and hence that the action did not lie. Plaintiffs ob-

jected on the ground that they relied solely on possession. Objection sustained, and deeds ruled out: *Held*, that the ruling was right, there having been no deraignment of title from its source, nor any proof to connect the holding of the parties with the deeds, or to show that possession was taken and claimed under them.

Woodbeck v. Wilders, 18 Cal. 131.

55. If the plaintiff and defendant, at the commencement of a suit in ejectment, are tenants in common in the premises, the plaintiff **can not recover** possession of the **entire premises** to the exclusion of the defendants, nor can he recover his undivided part without proof of an ouster.

Ewald v. Corbett, 32 Cal. 493.

56. Tenants in common, in possession as such, **can not assail the common title**, or call its validity in question: *Held*, accordingly, in an action by one tenant in common against others, to be let into possession, that the defendants **could not justify** an ouster of the plaintiff, **by setting up an outstanding title** (though it might be the true title), purchased by them while in possession under the common title; though they might assert their new title in an appropriate action, after letting the plaintiff into possession.

Olney v. Sawyer, 54 Cal. 379.

57. If several persons are the owners, as tenants in common, of a **mining claim**, and one of them is also a tenant in common with several other persons in the ownership of an adjoining claim, and the first-named owners lease their claim to the second-named owners, to be mined for a given term, and the one of the lessees who is a tenant in common in both claims, and superintendent of the lessees' claim, after the term of the lease has expired, as superintendent of the lessees and a member of their company, sells the tailings of the claim leased, and accounts to the lessees for the proceeds, the other lessors can not maintain an action against him as a tenant in common in their company for their proportion of the proceeds.

Clark v. Jones, 49 Cal. 618.

58. If the possession of one, as a tenant in common, is not disturbed by his co-tenants, and there have been no acts of exclusion equivalent to an ouster by his co-tenants, they can not claim the benefit of the **statute of limitations** as against his right or title.

McCauley v. Harvey, 49 Cal. 497.

POSSESSION OF ONE POSSESSION OF ALL.

59. Possession of one partner or tenant in common of a mining claim is the possession of all.

Waring v. Crow, 11 Cal. 386.

60. Where two persons enter into a contract to work a farm on shares, the one to furnish the land, teams, and seed, the other

to sow and harvest the grain and cut the hay, the hay and grain, when harvested, to be equally divided between them, they become **tenants in common of the grain and hay**, until a division is made. Each is entitled to possession of the whole as against all persons except his co-tenant, and can maintain an action for its recovery.

Knox v. Marshall, 19 Cal. 617.

61. Where, in such case, one of the tenants in common gave to his creditor an order on his co-tenant, who furnished the land, teams, and seed, for the possession of all the right, title, and interest of the drawer in the hay and grain then on the farm: *Held*, that the order to deliver possession to the creditor only authorized a possession in connection with the co-tenant; but that the latter having consented to a delivery of the sole possession to the creditor, and he having taken such sole possession, the creditor was entitled to hold possession of the whole crop to the exclusion of third parties; and that other creditors of the drawer of the order can not complain that the drawee has not sufficient title or interest in the hay and grain to maintain an action for its possession. *Id.*

62. The possession of one tenant in common is presumed to be the **possession** of all, and in order to rebut this presumption and make the presumption **adverse**, it must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the co-tenant.

Colman v. Clements, 23 Cal. 245.

Owen v. Morton, 24 Id. 373.

63. Tenants in common hold their lands by **unity of possession**, and each and every one of them has the right to enter and occupy the whole of the common lands, and every part thereof.

Tevis v. Hicks, 38 Cal. 234.

Carpentier v. Webster, 27 Id. 524.

64. One tenant in common has no share, except that which is undivided, and has no right to exclude his co-tenant from any portion of the lands. *Id.*

65. If one who takes possession of land unlawfully afterwards becomes a tenant in common in the ownership of the same, **the moment he becomes such tenant in common, his possession loses its hostile character**, and the presumption is that it remains amicable until the contrary is made to appear.

Carpentier v. Mendenhall, 28 Cal. 484.

66. The tenant in common out of possession has a right to assume that the possession of his co-tenant is his possession, until informed to the contrary, either by express notice or by acts and declarations, which may possibly be equivalent to notice.

Miller v. Meyers, 46 Cal. 535.

OUSTER OF A TENANT IN COMMON BY HIS CO-TENANT.

What Amounts to.

57. Any act of the co-tenant in the exclusive possession, which manifests an intention on his part to hold exclusively for himself, is equivalent in law to an actual ouster. Owen v. Morton, 24 Cal. 373.

58. If one tenant in common incloses and enters into the exclusive possession of a portion of the common lands, not exceeding in quantity the number of acres which he would be entitled to have allotted to him on a partition of the whole, and **refuses to allow a co-tenant to occupy this portion with him**, it is an ouster of the co-tenant, and he may maintain ejectment and be let into the possession of the part from which he is thus excluded.

Carpentier v. Webster, 27 Cal. 524.

59. If several are tenants in common, in a grant of land made by Mexico, of a given quantity, to be located within the exterior boundary lines of a much larger quantity, and no survey or location of the quantity granted has been made, the exclusive possession by one of the tenants in common of a portion less than the whole of the land within the exterior boundary lines of the larger quantity, and his refusal to let a co-tenant into possession of the same, is an ouster. *Id.*

60. One tenant in common may be guilty of an ouster of a co-tenant by excluding him from a portion less than the whole of the property held in common. *Id.*

61. If one tenant in common is in the exclusive possession of a portion less than the whole of the common lands, and his co-tenant demands of him to be let into possession of the same on the ground of his joint ownership, and the other, while admitting the several title of the co-tenant, refuses to let him into possession, this refusal is an ouster. *Id.*

62. If a tenant in common denies the several title of a co-tenant, but lets him into possession, it is not an ouster; but **if he admits the several title of a co-tenant and refuses to let him into possession**, it is an ouster. *Id.*

63. A demand made by the tenant in common, of a co-tenant in possession, to be let into possession of every part of the common lands, is not a notice to the co-tenant in possession to quit. *Id.*

64. If a tenant in common demand of his co-tenant, who is in the occupancy of the common property, to be let into possession, and the co-tenant refuses and does not give any explanation of his refusal, the court would be justified in directing or advising the jury to infer an ouster.

Carpentier v. Mendenhall, 28 Cal. 484.

65. A denial of the title of a co-tenant by a tenant in common, in the possession of land owned by the two as tenants in common, is evidence of an ouster of the co-tenant. *Carpentier v. Gardiner*, 29 Cal. 160. *Spect v. Gregg*, 51 Id. 198. *Rickard v. Johnson*, 51 Id. 545.

What does not Amount to.

66. Proof that the co-tenant is in the exclusive possession, and that he does not claim by deed or lease from his co-tenant out of possession, is not sufficient to show an ouster or adverse possession.

Owen v. Morton, 24 Cal. 373.

67. Taking actual possession of land under a deed which purports to convey the whole thereof, under a belief that it does convey the whole, when in fact it gives title to an undivided portion only, is not an ouster of the tenant in common who owns the other undivided part. *Seaton v. Son*, 32 Cal. 481.

Ouster must be Proved.

68. To enable the tenant out of possession to maintain ejectment against the co-tenant in the exclusive possession of the land, it is not necessary to prove an actual ouster; but proof that the tenant in possession appropriates the entire use or profits of the land, under a claim of exclusive right, or with a manifest intent to possess the whole exclusively, is sufficient.

Owen v. Morton, 24 Cal. 373.

69. If the plaintiff and defendants are tenants in common in a mine, and the plaintiff brings ejectment to recover an undivided interest, and avers that defendant has entered into possession of said undivided interest, it is requisite for the plaintiff to prove not only his title, but a demand to be let into possession, and a refusal of the demand; or more generally to prove an ouster.

Hebrard v. Jefferson M. Co., 33 Cal. 290.

Ouster must be Found.

70. A finding, in a special verdict, in an action of ejectment brought by a tenant in common against a co-tenant who is in the occupancy of the land held in common, that the plaintiff demanded of his co-tenant to be let into the immediate possession of the same, and that the co-tenant refused, is not a finding of an ouster, either in terms or by legal conclusions.

Carpentier v. Mendenhall, 28 Cal. 484.

71. The law will not presume from acts of ownership by one tenant in common, nor from his refusal to allow a co-tenant to enter, nor from both combined, that there was an intent to oust, but the intent to oust must be established as a fact by the finding of the jury.

Id.

Damages for an Ouster.

72. A tenant in common when ousted by his co-tenant may recover the damages resulting from the ouster, as well as when ousted by an entire stranger to the land.

Carpentier v. Mitchell, 29 Cal. 330.

73. In an action to recover the possession of land by a tenant in common against a co-tenant, the plaintiff can recover damages only from the time of the actual ouster proved.

Id.

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TION, 16.

TENANT AT SUFFERANCE

1. By the common law, a tenant who holds over after the expiration of his lease, was regarded as a tenant at sufferance; but this estate was destroyed whenever the true owner made an actual entry on the lands and ousted the tenant.

Uridias v. Morrell, 25 Cal. 31.

2. A tenancy by sufferance is not by the consent, but by the laches of the owner, and where the owner has been guilty of no laches there can be no tenancy by sufferance.

Moore v. Morrow, 28 Cal. 551.

3. A tenant under a lease for a term does not become a tenant by sufferance upon the expiration of his lease, and is only made such by the laches of the landlord in not re-entering, or in not giving him notice to quit.

Id.

4. Conceding the land in controversy to be public land, as claimed by defendant, and that Fremont so represented it, and thus induced defendant to enter, occupy and improve, yet he was not prohibited from subsequently acquiring the title from the government. The pre-emption laws not extending to mineral lands, defendant was a mere tenant at sufferance; by mere occupation it could acquire no rights which could control the action of the government, as the superior

proprietor; and if that proprietor saw proper to give the land to Fremont or to any other person, the defendant could interpose no objection. *Boggs v. Merced M. Co.*, 14 Cal. 279.

EJECTMENT, 26.

TENANT AT WILL

1. An agent or servant having the care of real estate can not be considered as a tenant at will of his principal or master. The adoption of such a principle would lead to very inconvenient results, and would give to servants and agents novel and embarrassing powers over employers and their property.

Mitchell v. Davis, 20 Cal. 45.

2. A tenancy at will can not exist without express grant or contract, and when it does exist, the tenant is entitled to a reasonable notice of his landlord's intention to terminate the estate before an action can be maintained against him for the possession.

Blum v. Robertson, 24 Cal. 127.

3. If the owner of land permits another to occupy land without any lease or agreement to pay rent, and such other merely takes care of it for the owner, he is a tenant at will.

Jones v. Shay, 50 Cal. 508.

TENDER

1. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for execution.

Goodale v. West, 5 Cal. 339.

2. Where B. sells and delivers to C. certain personal property, with an agreement then made that C. is to resell and redeliver upon B.'s executing and delivering to C. certain notes, and B. subsequently tenders these notes and demands the property, and C. refuses to take the notes or surrender the property, and the whole transaction on the part of C. was a fraud, his intention being to get hold of and keep the property: *Held*, that the tender of the notes did not vest the ownership thereof in C., and that he can not sue on them; that the fraud takes the case out of the rule that a tender of specific personal property vests the title thereto in the tendor. *Lamott v. Butler*, 18 Cal. 32.

3. Where a tender is made of the full amount due, before suit is brought, and the tender is kept good and brought into court, the judgment should be for plaintiff for the amount tendered, and for defendant for his costs.

Curiae v. Abadic, 25 Cal. 502.

4. A tender of legal tender notes in payment of a note payable in gold coin is not a discharge of the debt.

Vilhac v. Biven, 28 Cal. 409.

5. Where by an agreement for the sale or purchase of land, the price is payable in installments, for which the purchaser executes his notes, payable at certain times, and the vendor agrees to convey on payment of the last installment, the suit is brought on the notes after the installments have become due; the tender of a conveyance by the vendor is a condition precedent to the right to sue, and the purchaser may insist on the want of such tender against an indorser after maturity.

Folsom v. Bartlett, 2 Cal. 163.

6. In an action of damages for violation of a contract to grind wheat and deliver the flour on demand, upon payment of the price agreed on for grinding, tender of the price is necessary to maintain the action.

Vance v. Dingley, 14 Cal. 53.

7. Where a party contracts for a quantity of wheat to be delivered on demand, and paid for on delivery, in an action for non-delivery it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit.

Crosby v. Watkins, 12 Cal. 85.

8. A payment to the sheriff for the redemption of land sold can not be tendered in certified checks.

People v. Hays, 4 Cal. 127.

9. A tender of the money due on a bond and mortgage after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage.

Perre v. Castro, 14 Cal. 519.

10. The tenders made by plaintiff were a sufficient assignment to McE. of Z.'s covenants to plaintiff, that when McE. got a deed from plaintiff, and also an assignment of the deed from Z. to plaintiff, he would stand in the same position as if the contract between Z. and K. had been literally performed.

Gaven v. Hagen, 15 Cal. 203.

11. To make a valid tender so as to give the vendee a right of possession, under such contract, the money should be offered to Z., and a deed demanded of him, with an offer to execute the mortgage, if the party was unwilling to take the deed of McE. *Id.*

12. A party having no interest in the mortgaged premises or in the tender made, has no right to make a tender on his own behalf of the amount due on the mortgage.

Mahler v. Newbauer, 32 Cal. 168.

13. When the tender of the amount due on a mortgage is made by a stranger, and not the party in interest, the creditor must be informed on whose behalf it is made, and if not so informed, the tender is invalid. *Id.*

14. Where A. had contracted verbally

to convey to B. a certain lot of land for five thousand dollars, of which sum one thousand dollars was to be paid down, and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the four thousand dollars had elapsed long before the commencement of the suit: *Held*, the plaintiff not having paid or tendered four thousand dollars with interest, that a **specific performance** ought not to be decreed.

Hoen v. Simmons, 1 Cal. 121.

15. A tender of the unpaid purchase money must be proved, as it is of the essence of the contract. *Goodale v. West*, 5 Cal. 339.

16. In a suit by a vendor for specific performance of a contract of sale, the **avertment** of tender of payment was in **general terms**, as that the tender had been repeatedly made, and that the plaintiff has been at all times and still is willing and ready to pay: *Held*, that the tender should have been stated with greater particularity as to time, but that the objections in this respect can not be taken for the first time in the supreme court.

Duff v. Fisher, 15 Cal. 375.

17. Where plaintiff has **two mortgages on the same property**—the property being indivisible—and one of the mortgages is not due, he may, nevertheless, file his bill and have a decree for the foreclosure of both. And if the second mortgage becomes due before the decree, then the defendant can not defeat the action as to this mortgage by tendering the money due on the first mortgage after the maturity of the second. The jurisdiction of the court over the subject-matter having attached, the court should close the controversy by settling all things involved in the litigation. *Hawkins v. Hill*, 15 Cal. 499.

18. A. agreed to convey to B. a certain vessel, called the *Mariposa*, and B. gave his promissory note for the consideration money, payable at a future day: *Held*, that A. being still the holder of the note, could not bring an action thereon, without showing that he had conveyed the vessel to B., or had **tendered a conveyance**; and *held*, further, that the tender of a bill of sale executed by A., as attorney for C., the real owner, was neither performance nor an offer to perform.

Osborne v. Elliott, 1 Cal. 337.

19. A tender, though sufficient to enable a party to maintain an action upon a dependent covenant, condition, or agreement, is **not equivalent to performance**; and when suit is brought the plaintiff must show a continuous readiness to perform after the tender.

Redington v. Chase, 34 Cal. 666.

20. A tender **does not satisfy** or extinguish the obligation, nor does the offer to comply with the commands of a judgment amount to a satisfaction. *Id.*

21. A tender, as far as the computation of

interest is concerned, must be considered as a payment. *Hidden v. Jordan*, 39 Cal. 61.

22. A tender of the principal sum due, with the stipulated **interest** up to the time of the tender, puts a stop to the accruing of interest from the date of the tender.

Patterson v. Sharp, 41 Cal. 133.

23. To constitute a valid tender, the party **must have the money at hand**, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party, on the performance by him of the requisite condition. *Englander v. Rogers*, 41 Cal. 420.

24. If the passenger is ready and willing, and offered to pay the **legal fare** when demanded by the conductor of the train, the railroad company is bound to carry him, provided there is room in the cars and the passenger is a fit person to be admitted.

Tarbell v. C. P. R. Co., 34 Cal. 616.

25. If the judgment creditor agrees with the judgment debtor, that the judgment shall be satisfied upon the performance of certain conditions, by the judgment debtor, and the judgment is satisfied, and the judgment creditor afterwards sues to cancel the satisfaction, on the alleged ground that it was fraudulently obtained, before all the conditions were performed, he is **not obliged**, before bringing the action, to **return money** paid him in performance of the conditions, nor to place the debtor in *statu quo*.

Gilson M. Co. v. Gilson, 47 Cal. 597.

26. In such case, the judgment creditor is entitled to retain the money paid him, in any event. *Id.*

27. The plaintiff, before bringing such action, is not obliged to return or tender to a third person, **property** given by such third person to the judgment creditor, as one of the considerations for the cancellation of the judgment. *Id.*

28. Evidence of a tender made after the commencement of the action, of the amount of the purchase money then due, is not admissible **unless** it is pleaded.

Hegler v. Eldy, 53 Cal. 597.

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1. Where the rights of parties are concerned a **day will not be considered a unit**, but inquiry may be made as to the very point of time when an act was done.

Craig v. Godfrey, 1 Cal. 415.

2. It is always within the **power of a court**, when exercising proper discretion, to **extend the time fixed by law** whenever the ends of justice would seem to demand such an extension.

Wood v. Fobes, 5 Cal. 62.

3. Where it is necessary to give effect to contracts and carry out the intention of parties, the **first day is**, by the courts, **included or excluded, as the case requires**, there appearing to be no uniform rule on the subject; but when a time for deliberation is allowed, the exclusive rule should be adopted.

Price v. Whitman, 8 Cal. 412.

4. When time is important courts will inquire into a day or fractional portion of a day.

People v. Beatty, 14 Cal. 566.

5. The rule is that when time is prescribed to a public body, in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision.

Jacobs v. Murray, 15 Cal. 221.

6. In a contest concerning an election to an office, the three days' notice, which a party who relies on illegal votes given for his adversary must give of the illegal votes he expects to prove, are to be computed by in-

cluding the first day and excluding the last.

Misch v. Mayhew, 51 Cal. 514.

7. Although the code does not require an **order extending time** to answer to be filed or served, yet the more correct practice is to file and serve it.

Swift v. Canovan, 47 Cal. 86.

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TITLE.

1. The owner of property is justified in relying upon his title, and he is under no obligations to proceed against all persons who may assert a hostile title, although another person might be deceived by the apparent genuineness of such hostile title.

Meley v. Collins, 41 Cal. 663.

2. Claiming or taking one title is no abandonment of the other. And possession, if not to be referred to the good title, would not be referred exclusively to the bad.

Morrison v. Wilson, 13 Cal. 494.

3. Where the defendant, in an action of ejectment, relies upon an abandonment by plaintiff, of a title once held by him, and a subsequent taking of possession by himself, the rules of law relating to adverse possession have no relevancy, whatever may have been the relation of defendant to the title claimed to have been abandoned.

Gluckauf v. Reed, 22 Cal. 468.

4. A title presumptively held by a person who entered under a deed into the actual possession of land within the boundaries of the former pueblo of San Francisco, and to which the city held the title as the successor to the pueblo, at the time of the entry of the grantor in the deed, may be lost by abandonment.

Judson v. Malloy, 40 Cal. 299.

5. A party holding the legal title to land as the vendee of a mortgagor can not divest himself of the title by abandonment, nor by any mere parol disclaimer.

Davenport v. Turpin, 43 Cal. 591.

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TOWN GOVERNMENT.

1. The legislature of this state has not established a system of town governments, as required to do by section 4, article XI of the constitution.

Ex parte Wall, 48 Cal. 279.

2. The constitution is not self-executing. Town governments must be created by statute. Id.

3. The words "system of town governments," used in the constitution, were used with reference to town organizations in their general features like those of other states where town governments had been established when the constitution was adopted. Id.

4. When a system of town governments shall have been established by the legislature, and when local town legislatures shall have been organized under that system, the legislature may confide to such local legislatures the right to make local rules, but it can not delegate to the people living within certain territorial limits, but who have no distinctive political character or governmental organization, the power to make laws. Id.

5. The power to make laws must be exercised by the legislature; that to make by-laws for a town, by the local legislature. Id.

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TOWN LOTS.

1. Where the complaint in the county court, under the act of 1856, alleges that plaintiffs claim title to the lots under the original occupants and locators of the town, and on the trial plaintiffs proved that one Wilson was one of such original occupants and locators, and that he took up and occupied a tract of public land, at the time unoccupied, containing about one hundred and sixty acres, embracing the lot in controversy, and then traced title, by deed, from Wilson to one Crosier, in December, 1850, and from Crosier to themselves in May, 1853; and defendant then offered in evidence a contract entered into in May, 1850, between two companies styling themselves respectively "the Mendocino exploring company," and "the Union company," by which the members of the first-named company agreed to locate and secure three quarter sections of land opposite to the same number of sections selected by the latter company, and that the six quarter sections when surveyed should form a site for the town of Eureka, and that the town when laid out should be allotted to each member of both companies in equal proportions, and offered to prove that Wilson, the plaintiffs' grantor, was a member of the Union company, and in pursuance of the contract in question, and in trust for the equal benefit of the parties thereto, located the land described in his conveyance to Crosier, and that at the date of this conveyance, Ricks, one of the plaintiffs, knew of the existence of the contract, and the fiduciary capacity in which Wilson acted: *Held*, that such contract and the evidence offered in connection with it, were properly excluded on the objection of plaintiffs; that if Wilson sold the claim located in violation of the trust reposed in him by the companies, it was matter for them to complain of; and as defendant did not claim under or in privity with them, he was not in a position to call in question the good faith of the acts of their agent. Ricks v. Reed, 19 Cal. 551.

2. *Held, further*, that as there is no evidence that Crosier, when he took the conveyance from Wilson, had any knowledge of the relation of the latter to the companies, he was, so far as appears from the record, a *bona fide* purchaser for a valuable consideration, and therefore took the claim freed from any secret trusts. Id.

3. *Held, further*, that defendant can not object to the deeds from Wilson to Crosier and from Crosier to plaintiffs, that they were not properly acknowledged or recorded, because he does not claim under Wilson, there being no question as to the due execution of the deeds. Id.

4. When the act says that in case any claimant shall feel aggrieved by the decision of the trustees he may take an appeal to the

county court, and requires the proceedings there to be by complaint, answer or demurrer, and in conformity with the rules applicable to actions in courts of record, it only means that if the claimant be dissatisfied with the decision of the trustees he may have his right investigated and determined in an action brought against the successful claimant in the county court. Id.

5. The action authorized before the county court, is only a mode provided for testing, before one of the regularly constituted tribunals of the country, the conflicting rights of adverse claimants to the town lots under the acts of congress and the legislation of the state. Id.

6. The mere use of the word appeal in the act does not make the jurisdiction of the county court appellate. The substance and intent of the whole proceeding authorized by the statute must be looked to in determining the nature of the jurisdiction in such cases. Id.

7. The proceeding before the corporate authorities of the town, under the act of 1860, is a "special case," within article VI, section 9, of the constitution. It is a purely statutory proceeding, commenced and prosecuted for the ascertainment of a particular fact to guide the corporate authorities in the execution of the trust devolved upon them under the act, and not an ordinary action at law or equity, nor conducted according to the forms of such action. Id.

8. The proceeding in the county court, on appeal from the action of the corporate authorities, by complaint, answer or demurrer, takes the form of a regular action; but still this proceeding also is a "special case" within the constitution, because marked by one peculiarity which distinguishes it from ordinary actions at law or equity, to wit, that the parties—the corporate authorities, or board of trustees in the present case—who are to be governed by the judgment of the court, are not parties litigant before it, or parties to the record. They do not appear at all, and yet must obey and carry into effect the decision of the court. The proceeding is in effect only an inquisition through the form of a regular action, like the proceeding before the corporate authorities for the ascertainment of a particular fact, upon which, when once judicially ascertained, the corporate authorities must act independently of any volition on their part. Id.

9. The acts of congress authorizing the county judge or corporate authorities to make entry of the public lands occupied as town sites "in trust for the several use and benefit of the occupants thereof, according to their respective interests," did not intend to give the benefits of the entry to mere temporary occupants of particular tracts at

the date of the entry, without reference to the character of their occupancy, and thereby, in many instances, deprive the original *bona fide* settlers of their premises and improvements in favor of those who had by force or otherwise intruded upon their settlement; but the intention was that the original and *bona fide* occupants should be the recipients of the benefits of the entry to the extent, at least, of their interests, that is, of their actual occupancy and improvements. Id.

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TRADE-MARKS.

1. The name established for a hotel is a trade-mark, in which the proprietor has a valuable interest, which a court of equity will protect against infringement.

Woodward v. Lasar, 21 Cal. 448.

2. W. leased a lot of land, on which he erected a building, in San Francisco, and used it as a hotel, to which he gave the name of "What Cheer House." Before the lease expired, he purchased an adjoining lot, upon which he erected a larger building, and for a time occupied both buildings as the "What Cheer House," the principal sign being removed to the one last built. He soon after surrendered the leased lot, with the building which was on it, and continued the business, under the same name, entirely in the building which he had erected on the lot he had purchased. Two months afterwards, the defendants, having purchased the first-mentioned lot and building, opened there a hotel, under the name of "the Original What Cheer House," the word "original" being painted on the sign in small letters, and in a manner calculated to deceive the public into the supposition that it was the same name. In an action by W. against defendants, to restrain them from using the name of "What Cheer House" for their hotel: *Held*, that plaintiff was entitled to the relief sought, and that defendants should be enjoined from the use of the name. Id.

3. The right or property in a trade-mark is recognized by the common law, and does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute.

Derringer v. Platt, 29 Cal. 292.

4. The right of property in a trade-mark is not limited in its enjoyment by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may properly be made concerning the use and enjoyment of other property. Id.

5. The statute of 1863 concerning trade-marks does not take away the common law remedy for the protection of the same from those who do not register their trade-mark according to the provisions of the act. Id.

6. By the the common law, the manufacturer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his own and be distinguished from other like goods manufactured or sold by other persons; and when original with him, the owner of such mark will be protected by the courts in its exclusive use, but only so far as it serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of such symbols, figures, and combination of words which may be interblended with it, indicating their name, kind, or quality.

Falkenburg v. Lucy, 35 Cal. 52.

7. By the terms, "peculiar name, letters, marks, devices, figures, or other trade-mark or name," as used in the statute concerning trade-marks (Hittell's Laws, art. 7134), is not meant the established and proper means by which the "articles" to which they are attached and by which they are known in the market; nor something indicating their actual kind, character, or quality; but by them is meant, as the subject of protection against infringement, something new, not before in use; something of the manufacturer's own invention, or first put to use by him; something peculiar to him, and not common to him and others; something which is intrinsically foreign to the "articles" themselves, and only serves to designate them because it has been fancifully put to that use, in disregard of all natural relations. Id.

8. The statute does not vest in the manufacturer or vendor, as the case may be, any exclusive property in the "articles" manufactured or sold, nor in their names or the words which most aptly and properly describe them; and even if such were the proper construction of the statute, it would be void for want of power in the legislature to enact it. Id.

9. If the statute goes beyond the common law, and embraces within its protection matter which relates to kind, character, or quality of "articles," it is not perceived why it

does not trench upon the law of copy and patent rights, and is therefore void. Id.

10. It is suggested, but not decided, that the terms used in the statute, to wit, "to designate it as an article of peculiar kind, character, or quality," were inadvertently incorporated in it under a mistaken notion of the functions of a trade-mark, and that in respect of those terms the statute can have no intelligible operation. Id.

11. In an action to recover damages for an alleged invasion, by imitation, of the plaintiff's trade-mark for the sale of a certain washing powder, which consisted of a highly-colored picture representing a wash-room, with tubs, baskets, clothes-lines, etc., also the following legend interblended with it: "Standard soap company, erasive washing powder," followed by directions for the use of the "washing powder," and the place of manufacture, the alleged imitation by defendants consisted of a picture and label which were the same as in plaintiff's alleged trade-mark, only in the use of the words "washing powder," the directions for the use of the powders, and in use of paper of the same color as that used by plaintiff: Held, that this did not constitute an infringement of plaintiff's trade-mark. Id.

12. A trade-mark is a word or device adopted or devised and used by the manufacturer or vendor of goods, to designate the origin or ownership of his goods.

Burke v. Cassin, 45 Cal. 467.

13. A label, at common law, is not a trade-mark, but when a manufacturer or seller of goods adopts a label to distinguish his goods from those of another, he is entitled to be protected in its use, and others will be enjoined from using the same, or a colorable imitation thereof. Id.

14. An imitation of a label used on goods is such a colorable representation thereof as is calculated to produce in the mind of the purchaser of goods the impression that they were manufactured or sold by the person whose label has been imitated. Id.

15. A word, figure, etc., in common use, which indicates the name, nature, kind, quality, or character of the article, can not be appropriated as a trade-mark. Id.

16. Terms in common use to designate a trade or occupation in connection with other words indicating that a particular class of merchandise of the same general description is specially dealt in, can not be exclusively appropriated by any one as a trade-mark.

Choynski v. Cohen, 39 Cal. 501.

17. The word "aromatic," when employed to express one of the qualities of liquor, can not be protected as a trade-mark.

Burke v. Cassin, 45 Cal. 467.

18. The word "scheildam" can not be

adopted as a trade-mark, because it has long been used to denote quality or kind. *Id.*

19. The word "**schnappa**," which has long been in use to designate gin manufactured at Scheidam, can not be appropriated as a trade-mark for gin in the United States, even if its former use had been confined to Europe. *Id.*

20. The name of the manufacturer or seller of goods may be used as a trade-mark, and the adoption of the same name as a trade-mark for goods of the same kind, by a person of a different name, is "**piracy** of a trade-mark." *Id.*

21. A slight change in the name, such as cutting off the final letter, or prefixing "Von" or "Van" to it, so long as it is an evident imitation, does not prevent its use from being piracy of the trade-mark. *Id.*

22. In an action to recover damages for a violation of plaintiff's trade-mark, the profit actually realized by defendants from the sales of the spurious article under the simulated trade-mark is a proper measure of damages, but the recovery of the plaintiff is not limited to the amount of such profits. *Graham v. Plate*, 40 Cal. 593.

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TREATY.

1. Treaties made by the United States, removing the disability of aliens to inherit, are valid, and within the intent of the constitution of the United States.

People v. Gerke, 5 Cal. 381.

2. The treaty between the United States and the Hanseatic towns has not enlarged the rights of natives of those towns in this respect, as the treaty only gives them the right to dispose of land which they are prevented from inheriting by their character as aliens.

Siemssen v. Bofer, 6 Cal. 250.

3. Under the treaty of **Queretaro** all Mexicans established in California on the thirtieth day of May, 1848, who had not on or before the thirtieth day of May, 1849, declared their intention to become Mexican citizens, are to be deemed American citizens, and laws applicable to aliens will not apply to them.

People v. Naglee, 1 Cal. 332.

4. The treaty of **Guadalupe Hidalgo** had the effect, directly and of itself, to fix the status of the inhabitants of the ceded territories, in their relation as citizens to the respective governments of Mexico and the United States.

People v. De la Guerra, 40 Cal. 311.

5. The only way in which it was possible for congress to admit the Mexicans in the territory ceded by the treaty of **Guadalupe Hidalgo** to the enjoyment of all the rights of citizens of the United States, was by incorporating the ceded territory into the union as states. *Id.*

6. After admission into the union, no act of congress was necessary to define the rights of the inhabitants who were recognized as members of the community organized into a state. *Id.*

7. It was no violation of the ninth article of the treaty of **Guadalupe Hidalgo**, that the qualifications of electors, as prescribed in the constitution of California, were such as to exclude some of the inhabitants from certain political rights. *Id.*

8. A grant by a Mexican officer, duly authorized, and made in accordance with the Mexican laws applicable to California, and before the acquisition of the country by the Americans, is a title protected by the laws of nations, as well as by the treaty of **Queretaro**, and can not be disturbed.

Reynolds v. West, 1 Cal. 322.

9. Under the treaty between the United States and **China**, of July 3, 1844, and the act of congress carrying it into effect, the United States commissioner and consul constitute a judiciary for the government of the citizens of the United States in China, and are governed by the law of nations, the laws of the United States, the common law, and the "decrees and regulations" of the commissioner, until modified and amended

by congress; and such a judicial system is constitutional.

Forbes v. Scannell, 13 Cal. 242.

10. The power of **taxation** over aliens, and the conditions on which they shall be determined to enjoy the protection of the state in a particular place or occupation, can not be taken away or impaired by acts of congress, or treaties with foreign nations, and the justice or expediency of the tax must be left to the states, subject to the restrictions which may be imposed by their organic law.

People v. Naglee, 1 Cal. 232.

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TREES AND TIMBER.

1. The right to the use of growing wood and timber upon the public **mineral lands**, as between the claims of miners on the one hand and agriculturists on the other, is governed by the rule of priority of appropriation.

Rogers v. Soggs, 22 Cal. 444.

2. The possession of public land in the **mineral districts** of this state, acquired and held in accordance with the possessory act for agricultural purposes, carries with it the right to the wood and timber growing thereon, and this right is superior to that of subsequent locators of mining claims who need, and seek to use the wood and timber for carrying on their mining operations. Id.

3. In an action between occupants of the public lands neither party can claim a right to the growing timber thereon under the laws of the United States. The cutting or destruction of the timber by any occupant is expressly prohibited by act of congress of March 2, 1831. Id.

4. An action of trover may be maintained against a trespasser who is cutting timber, as soon as the tree is cut.

Sampson v. Hammond, 4 Cal. 184.

5. An injunction will not be dissolved, restraining defendants from felling trees where the **question of boundary** is in dispute, especially when the plaintiff's bond will fully protect the defendants for any delay, if it should turn out that they have the right.

Bucklelew v. Estell, 5 Cal. 108.

6. Where the defendant conveyed by deed to plaintiff a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subsequently made an agreement fixing the line: *Held*, that in an

action for trespass by the plaintiff against the defendant for cutting timber upon the land previous to such agreement, the defendant was not estopped by the agreement in showing title in himself previous thereto. It was competent for the defendant to show that the deed did not embrace the *locus in quo*, and it was error for the court to instruct the jury that the delivery of the deed and the cutting of firewood on the tract was sufficient evidence of possession. The cutting of timber by itself was neither possession nor title as against the owner.

Stockton v. Garfrias, 12 Cal. 315.

7. In an action for cutting down growing trees, the **measure of damages** is not the value of the trees as firewood, but the injury done to the land by destroying them.

Chipman v. Hibbard, 6 Cal. 162.

8. The damages should be estimated by all the circumstances, and the purpose for which such trees were used or designed, and not according to the speculative or fancied ideas of jury. Id.

9. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of the title, an **injunction** will not be granted on the application of a party claiming title to the land to prevent the defendant from cutting timber thereon.

Smith v. Wilson, 10 Cal. 523.

10. **Against the cutting** of timber, the owner of real property is entitled to the preventive remedy of an **injunction**. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of **waste**, the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he can not find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale.

Halleck v. Mixer, 16 Cal. 574.

11. A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon, to the amount of about.

three hundred cords; that the defendant afterwards also entered upon the premises without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of one thousand one hundred dollars, the alleged value of the wood, sufficiently shows plaintiff's ownership of the wood. Id.

12. The averments, in such complaint, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. Id.

13. In suits for damages for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession can not sue for the property severed from the freehold, when the defendant was in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title; in other words, the personal action can not be made the means of litigating and determining the title to the real property as between conflicting claimants. Id.

14. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. Id.

TRESPASS.

1. IN GENERAL.
8. AS TO REAL ESTATE.
21. AS TO PERSONAL PROPERTY AND RIGHTS.
27. REMEDIES.
52. EVIDENCE IN.

IN GENERAL.

1. A mere trespasser, or one occupying under a mere permission, without consideration, and which has been revoked, is not entitled to notice to quit, or demand of possession before suit.

Godwin v. Stebbins, 2 Cal. 103.

2. A trespass dies with the trespasser.

O'Connor v. Corbitt, 3 Cal. 370.

3. An action of trespass may be maintained

against a trespasser who is cutting timber, as soon as the timber is cut.

Sampson v. Hammond, 4 Cal. 184.

4. According to common law rules, a plaintiff can not, by mere notice, bring in parties not sued in an action for trespass, when there is no pretense that they were trespassers.

Pico v. Webster, 14 Cal. 202.

5. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespass. Mitchell v. Hagood, 6 Cal. 148.

6. The statute making possessory rights of settlers on public lands for agricultural or grazing purposes yield to the rights of miners has legalized what would otherwise be a trespass, and the act can not be extended, by implication, to a class of cases not especially provided for.

Weimer v. Lowery, 11 Cal. 104.

7. One who claims public lands in this state, for raising fruit trees or crops, can not enjoin miners from digging up the same for mining purposes, unless he can show that his fruit trees were planted or crops sown before the land was located for mining.

Ensminger v. McIntire, 23 Cal. 593.

AS TO REAL ESTATE.

8. A person has no right to construct a ditch through the inclosure of another without his consent.

Weimer v. Lowrey, 11 Cal. 104.

9. Where plaintiff and defendant hold under a common source of title, it is not necessary, upon a question of title, for either to go beyond that source; but the mere production of a deed from a stranger to plaintiff, without other proof, is not sufficient to show either that such stranger had title, or that his grantee entered under, or holds in subordination to the deed.

Woodbeck v. Wilders, 18 Cal. 131.

10. The owner of real estate has a right to remove a trespasser from his premises, using, however, only so much force as may be necessary for that purpose.

McCarty v. Fremont, 23 Cal. 196.

11. In consequence of the stable and permanent nature of real estate, the rule of the common law, which is in force in this state, is, that an injury to it is not indictable, and therefore to steal anything adhering to the soil is not indictable.

People v. Williams, 35 Cal. 671.

12. In replevin for hogs distrained under the act of March 26, 1857, the court found that the "defendant had caught the said hogs in traps on his land, and had hauled them in wagons to the pen," and that certain persons, selected by the constable without notice to the plaintiff, and in his absence, and who were not sworn nor acting on the testimony of sworn witnesses, ap-

praised the damages "committed by said hogs in destroying fifteen acres of grain, which defendant claimed was destroyed by said hogs." *Held*, that such facts do not tend to prove the trespass.

Kusel v. Sharkey, 46 Cal. 3.

13. One who enters wrongfully upon the land of another is a trespasser, and he does not cease to be such, so that an action will not lie against him for a trespass, because he is allowed for one month after his entry to remain in the undisturbed possession. *Meyers v. Farquharson*, 46 Cal. 191.

14. An action can not be maintained for a trespass committed on land when the plaintiff is totally disseised, and the defendant is in the adverse possession thereof.

Raffetto v. Fiori, 50 Cal. 363.

15. In an action to recover damages for a trespass alleged to have been committed by destroying the plaintiff's fences, and by trampling and destroying the grain and herbage growing on his land, the plaintiff can not recover for injury done to the grain by the cattle of a third person, for any period of time after the original entry and trespass.

Berry v. S. F. & N. P. Co., 50 Cal. 435.

16. In trespass, *quare clausum fregit*, it is incumbent on the plaintiff to show that he was in the actual possession of the premises at the time of the alleged trespass, and the defendant may prove, under a general denial, that a tenant of the plaintiff was in the actual possession.

Uttendorfer v. Saegers, 50 Cal. 496.

17. An action for forcibly entering upon land owned and possessed by the plaintiff, and tearing down a dwelling-house and out-buildings, and carrying away the materials of which they were built, and for digging up and carrying away fruit trees, is *quare clausum fregit*. *Id.*

18. If the plaintiff, in a complaint for cutting down trees on his land, does not aver that the defendant cut them down knowingly, willfully, or maliciously, he can not recover the treble damages given in the two hundred and fifty-first section of the old practice act. *Barnes v. Jones*, 51 Cal. 303.

19. If the complaint contains such averment, and it is found that the timber was cut down through a mistake as to where the boundary line was, the plaintiff can not recover treble damages. *Id.*

20. Without such averment, the plaintiff may recover simple damages. *Id.*

AS TO PERSONAL PROPERTY AND RIGHTS.

21. The owner of property, in the possession of the same, has a right to use so much force as is necessary to prevent a forcible trespass. *People v. Payne*, 8 Cal. 341.

22. Where a trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force. *Id.*

23. An officer, when he puts a receiver in possession of the property of another, against whom he has no process, or asserts through himself or another an unlawful dominion over such property, is a trespasser.

Rowe v. Bradley, 12 Cal. 226.

24. No ouster is necessary to maintain an action of trespass; any unlawful entry is enough. *Id.*

25. L. recovered judgment against R. Co., from which R. Co. appealed to the supreme court, where the judgment was modified by reducing the rate of interest and striking out the requirement for its payment in gold coin. No stay of proceedings, pending said appeal, having been obtained, L. caused the mining claims of R. Co. to be sold under execution, issued on said judgment before said reversal, and became the purchaser for the amount of his judgment, he paying to the sheriff his legal fees, and giving receipt on his judgment for the amount of his bid. Within six months thereafter L. received from the working of said claims seven thousand dollars over the expenses for said work: *Held*, first, on the assumption that said modification of judgment *per se* rendered said sale void; that the working of said claims by L. was a trespass, and he a tortfeasor, and not a debtor of R. Co. in the sense of the statute in relation to attachments (practice act, sec. 126); second, that while R. Co., at their option, could hold L. responsible as tortfeasor, or by waiving the tort, treat him as their debtor, yet until the tort should be so waived by R. Co., neither they nor their creditors could treat L. as a debtor for said amount realized by him from working said claims. *Johnson v. Lamping*, 34 Cal. 293.

26. Where, in such a case, R. Co. had ceased to work said claims before said sale, and immediately after it had been made, entered into a contract with L., by which it was stipulated that R. Co. should work the claims during the time allowed for redemption, and pay the gross proceeds to L., who should pay the expenses of said working, and pay wages to R. Co. for said working, whether the claims should yield a profit or not, and under said contract L. received from R. Co. gold dust of the value of said seven thousand dollars over the expenses of such work: *Held*, that such contract was valid, and said gold dust became the property of L., and thereby he became neither debtor nor tortfeasor. *Id.*

REMEDIES.

27. An action can not be maintained

against A. to recover damages for a trespass to real estate committed by B.

Stevenson v. Lick, 1 Cal. 128.

28. Possession in the plaintiff is sufficient to enable him to maintain trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarron v. O'Connell*, 7 Cal. 152.

29. In an action for nuisance or trespass, the defendant has no right to inquire into the good faith of the plaintiff's possession.

Eberhard v. Tuolumne W. Co., 4 Cal. 308.

30. The lines of a quarter section of government land which are distinctly marked by natural boundaries, and by stakes placed at convenient distances, so that the lines can be readily traced, are sufficient to authorize the occupant to maintain an action for a trespass thereon, under the provisions of the act of April 11, 1850.

Taylor v. Woodward, 10 Cal. 90.

31. It does not matter that such lines were marked out before the passage of the act, any more than it does that the possession was anterior to its passage. *Id.*

32. Nor does it make any difference when the act has been repealed, if the plaintiff's right accrued and the trespass of the defendant occurred prior to such repeal. The right of action being complete, the repeal of the act would not divest such right. *Id.*

33. In suits for damages for timber cut and removed, as in this case, the true rule, as far as the title to the land is concerned, is this: The plaintiff out of possession can not sue for the property severed from the freehold, when the defendant is in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title; in other words, the personal action can not be made the means of litigating and determining the title to the real property as between conflicting claimants.

Halleck v. Mixer, 16 Cal. 574.

34. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. *Id.*

35. An action can be maintained by the mortgagee of real estate to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which the security of the mortgage has been impaired.

Robinson v. Russell, 24 Cal. 467.

36. A party can not recover for injuries done by cattle of defendant breaking into plaintiff's close, unless the land entered be inclosed by a fence of the character described by statute, or at least by an inclosure equivalent, in its capacity to exclude cattle, to the statutory fence.

Comerford v. Dupuy, 17 Cal. 308.

37. Plaintiffs sue defendants for damages for their alleged trespasses upon a certain portion of quartz mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted, the complaint averring the insolvency of defendants. The defendants deny all the allegations of the complaint, and claim ownership. The jury found generally "for defendants," and judgment was rendered in their favor for costs. Defendants then moved to amend the judgment by adding thereto the words "and that the injunction heretofore granted be, and the same is hereby dissolved," which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer: *Held*, that the action amounted to an action of trespass, with an injunction as ancillary thereto; and that the action itself having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved.

Brennan v. Gaston, 17 Cal. 372.

38. This conclusion does not trench upon the positions, first, that a judgment in trespass does not necessarily determine the title to the real estate alleged to be trespassed on; and, second, that upon a proper state of facts, an injunction may be a proper remedy upon an original bill in equity, to enjoin trespass and waste where the injury is irreparable and goes to the destruction of the inheritance. *Id.*

39. Action for damages for trespass alleged to have been committed by defendants upon certain quartz-mining claims; and also for a perpetual injunction against future trespasses; which was granted. Defendants deny all the allegations of the complaint, and set up ownership of certain mining ground. Verdict generally "for defendants," and judgment in their favor for costs. Defendants move to amend the judgment by dissolving the injunction; motion denied, but the judgment modified so as to permit defendants to work the ground set up in their answer. After the term had expired, defendants appeal from this order refusing to dissolve the injunction, and subsequently, upon defendants giving bond, the judge, in chambers, made an ex parte order directing plaintiffs to yield possession of the ground described in the answer to defendants, which order plaintiffs refused to obey; and then followed an order to show cause why they should not be punished for con-

tempt: *Held*, that the court had no power to make the *ex parte* order for the restitution of possession or the induction of defendants into possession of the premises, as this was in effect to decide the whole controversy *in limine*, and to execute the judgment by an *ex parte* order; that the possession by plaintiffs of the premises was property, and could not be disposed of except in due course of law; and that all the subsequent orders, for contempt, etc., being dependent on this, fall with it. *Id.*

40. In an action for a trespass upon a mining claim, where the complaint avers that defendants are working upon and extracting the mineral from the claim, and prays for a **perpetual injunction**, and the answer admits the entry and work and takes issue upon the title; if a jury to whom the issue of title is submitted, find in favor of the plaintiffs, it is the duty of the court to decree the equitable relief sought, and enjoin the defendants from future trespasses.

McLaughlin v. Kelly, 22 Cal. 211.

41. The complaint charged that defendants had wrongfully entered upon a tract of mining ground (described by metes and bounds) owned by the plaintiffs, and had extracted therefrom gold-bearing earth of the value of one thousand dollars, and that they threatened to continue their wrongful acts, and prayed for damages in the sum of one thousand dollars, and for a perpetual injunction. The answer set up title in defendants to a specific portion of the tract claimed by plaintiffs, and denied that they had worked upon any other portion than that to which they thus asserted title. *Id.*

42. The plaintiff is not entitled to recover damages for a trespass *quare clausum fregit*, alleged in his complaint to have been committed on his own land, when in fact the trespass was committed upon another piece of land. *Doherty v. Thayer*, 31 Cal. 140.

43. If the complaint in an action to recover damages for an alleged trespass, avers that the defendant unlawfully entered on plaintiff's land and **tore down a gate**, the gist of the action is the entry, and the removal of the gate is mere matter of aggravation; and if the plaintiff fail to prove the gist he can not recover for the matter of aggravation.

Pico v. Colimas, 32 Cal. 578.

44. Where a **sheriff** under an execution against McGrane, and at the direction of the judgment creditor, Williston, seized upon certain property, including wheat and barley, in possession of Goodyear, who had purchased in good faith and for value of McGrane, after the crop was cut and stacked; and at the same time, the sheriff, having in his hands a mortgage given by McGrane to Williston upon the crop while growing, took possession of the wheat and barley, also under such mortgage, and placed all the prop-

erty seized in possession of Casey, as his keeper, as agent of Williston: *Held*, that these facts established a joint taking by the sheriff and judgment creditor, which, if wrongful, would sustain an action against them jointly as trespassers.

Goodyear v. Williston, 42 Cal. 11.

45. Although a person gets upon a railroad car wrongfully and as a trespasser, for the purpose of riding without paying his fare, yet the conductor, if he resolves to exercise his right to remove him, must do so prudently, and in such a manner as not to endanger his personal safety. If he do not exercise this prudence, and injury result, the company can not absolve itself from liability on the ground that the wrong was mutual.

Kline v. C. P. R. Co., 37 Cal. 400.

46. The court will not interfere, by **injunction**, to restrain the commission of **naked trespasses**, where there is no waste committed.

N. C. & S. C. Co. v. Kidd, 37 Cal. 282.

47. The plaintiff in an action *quare clausum fregit*, may prove several distinct trespasses committed at various times, if in his complaint he alleges the time of one trespass and that others were afterwards committed.

Brady v. Bronson, 45 Cal. 640.

48. A plaintiff, who recovers in trespass *quare clausum fregit* does not thereby become vested with the title, or succeed to the interest, which the defendant in such action may have had in the property.

Williams v. Sutton, 43 Cal. 65.

49. Where a trespass is **continuous**, as in the trespass of cattle upon land day after day, the party injured is not authorized to divide it up into several causes of action, either with respect to the means by which the trespass was committed or the time of its commission, so as to maintain separate actions or proceedings for each cause of action. *De la Guerra v. Newhall*, 53 Cal. 141.

50. The eighth section of the act of February 4, 1874, "to protect agriculture, and to prevent the trespassing of animals upon private property in certain counties," does not contemplate a recovery of a part of the damages for the trespass by proceeding under the act, and another part of the damages for a portion of the same trespass by means of an action at law. *Id.*

51. In an action for damages caused by the trespassing of cattle upon grain, whether the action be in the nature of trespass, or founded upon an express promise to pay such damages, it is error to instruct the jury that if one man's stock trespasses upon another's grain, the law implies a promise on the part of the owner of the stock to pay all damages done.

Van Valkenburg v. McCauley, 53 Cal. 706.

EVIDENCE IN.

52. Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *Aliter*, if a joint trespass has been proved.

McCarron v. O'Connell, 7 Cal. 152.

53. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted, on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon.

Smith v. Wilson, 10 Cal. 528.

54. A defendant who has not been served with process is not a competent witness for his co-defendant in an action of trespass.

Gates v. Nash, 6 Cal. 194.

55. The lessor of plaintiff is a competent witness in an action of trespass to the leased premises, where the lease does not bind him to protect plaintiff against trespassers.

McCormick v. Bailey, 10 Cal. 232.

56. In an action of trespass against a sheriff where he is declared against personally, and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass.

Poinsett v. Taylor, 6 Cal. 79.

57. In an action against a sheriff for seizing and selling certain personal property alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to Teal: *Held*, that evidence tending to prove that it was partnership property of Teal and plaintiff was proper, and that if they were partners, and as such owned the property, plaintiff could not recover.

Hughes v. Boring, 16 Cal. 82.

58. In an action of trespass for entering upon the mining ground of plaintiff, and digging the same up and converting the gold-bearing earth, the vendor of plaintiff is a competent witness, although a part of the purchase money is still due him.

Rowe v. Bradley, 12 Cal. 230.

59. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners of the ditch was taken by plaintiff, and subsequently and before the trial the witness conveyed, by deed, his interest in the ditch to plaintiff: *Held*, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness.

Kimball v. Gearhart, 12 Cal. 27.

60. In trespass for driving cattle upon plaintiff's land, and by means thereof tramp-

ling on, consuming and destroying the grass and herbage, and tearing up, subverting and spoiling the soil: *Held*, that plaintiff could ask a witness: "What would have been the injury to the land by turning in two hundred head of cattle on the twelfth, thirteenth, and fourteenth of April, and letting them remain in six or seven days?" and "What would it be worth to turn in two hundred or three hundred cattle, and pasture them for six or seven days in the field spoken of?" that the questions, as put and answered, amounted to little, if anything, more than an estimate of the value of the pasturage or grass.

Woodbeck v. Wilders, 18 Cal. 131.

61. Plaintiffs own mining claims called the "Columbus claims." Defendants own claims, called the "Dayton claims," on the west of plaintiffs' claims. The boundary line between the claims is the point of dispute. Plaintiffs aver that defendants are working ground over the line and on plaintiffs' claims, and bring trespass. Defendants deny, the pleadings being verified, that they are working on plaintiffs' ground, and claim to own it; they also set up that they are owners of certain claims known as the "Eureka claims," lying on the east of the Dayton claims. Defendants on the trial offered to show that at the time of the alleged trespass the "Eureka company" owned the ground said to have been trespassed on, and that defendants had purchased it from the "Eureka company" before this suit: *Held*, that defendants were entitled to prove their title from the "Eureka company,"—plaintiffs objecting for irrelevancy, and that the title had not been pleaded.

Columbus v. Dayton, 18 Cal. 615.

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TRIAL.

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TRIAL, DEFINED.

1. A trial is the examination before a competent tribunal, according to the law of the land, of the facts, or a question of law put in issue in a cause, for the purpose of determining such issue.

Anderson v. Pennie, 32 Cal. 265.

2. Until a decision of the court has been entered in the minutes, or reduced to writing by the judge, and signed by him and filed by the clerk, a case has not been tried.

Hastings v. Hastings, 31 Cal. 95.

TRIAL, GENERALLY.

3. Causes may be removed from one district or county to another county or district, in the manner provided by statute.

Reyes v. Sanford, 5 Cal. 117.

4. If the complaint avers that the defendant brought a false charge against the plaintiff, and threatened to publish the same and injure his credit unless he paid a false account, and that by reason of the false charge and threats he paid the same without other consideration, and prays judgment for the money thus paid, the payment of the money without consideration is the gist of the plaintiff's cause of action, and upon that issue he holds the affirmative. If he fails to offer any evidence of the facts tending to show a want of consideration, a nonsuit should be granted.

Kohler v. Wells, 26 Cal. 606.

5. The power of opening up a case after it has been once submitted, rests in the sound discretion of the court hearing the cause, and as a general rule will not be revised.

Pinkham v. McFarland, 5 Cal. 137.

6. A plaintiff must be confined to the allegations in his complaint.

Branger v. Chevalier, 9 Cal. 353.

7. Where the facts stated in the complaint are proved on the trial, and found to constitute a good cause of action, the plaintiff is entitled to judgment thereupon.

Crosby v. McDermitt, 7 Cal. 146.

8. During the progress of a case on trial, parties can not be heard otherwise than

through the attorneys of record. If a release or other paper has been executed by one of the parties, it should be pleaded.

Turner v. Caruthers, 17 Cal. 431.

9. When a case, involving questions of law and of equity, is brought before the court for trial without a jury, the more regular and orderly practice is, first, to dispose of the equitable branch of the case.

Martin v. Zellerbach, 38 Cal. 300.

10. In such case, it should distinctly appear from the record that the issues on the equity side of the court were first tried and disposed of; or, if the whole action and all the issues were tried and submitted together, that fact should appear. Id.

11. In an action for recovery of land, brought against many defendants holding separate portions thereof, and having no common interest, and who rely upon different sources of title, it is the duty of the court, on the motion of defendants, to order separate trials. It is likewise the duty of the court, without any motion therefor, to order separate trials, whenever, to the satisfaction of the court, it appears that the parcels of land in controversy are separate and distinct, and the several classes of defendants rely on different sources of title.

Judson v. Malloy, 40 Cal. 299.

12. The responsibility of an erroneous order or decision, made on motion, or at the request of one of many defendants, will attach alike to all the defendants, unless it appears that the order or decision was clearly restricted, or would necessarily apply only to particular defendants or parcels of property. Id.

13. The position of a cause on the calendar will not be changed to a different day from that on which it is set by the clerk, whether upon stipulation or motion, except for good cause shown.

Wetmore v. San Francisco, 43 Cal. 37.

14. When two actions are pending at the same time, and between the same parties, to recover possession of the same tract of land, and in the absence of the plaintiff, one is tried and judgment rendered for the defendant, and the defendant then pleads the judgment as a bar in the other action, the plaintiff is still entitled to have the other action tried.

People v. De la Guerra, 43 Cal. 225.

JURY TRIAL.

In Law Cases.

15. In chancery cases the parties have no right to demand a trial by jury, but in all cases at law, it is a right which can be insisted upon and enforced.

Cahoon v. Levy, 5 Cal. 294.

16. Our statute as to referring cases applies solely to equity causes. The right of

trial by jury in all common law actions is secured by the constitution of this state.

Grim v. Norris, 19 Cal. 140.

17. The language of the constitution as to the right of trial by jury was used with reference to the right as it exists at common law. This right of trial by jury can not be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court.

Koppikus v. State Cap. Com., 16 Cal. 248.

18. After judgment by default, in ejectment, a jury trial can not be awarded, there being no issue. Smith v. Billett, 15 Cal. 23.

19. Failure of defendant in ejectment to appear when the cause is called for trial, an answer being in, authorizes the court to try it without a jury.

Doll v. Feller, 16 Cal. 432.

20. The right of trial by jury can not be waived by implication.

Smith v. Pollock, 2 Cal. 92.

21. The right of trial by jury may be waived in the mode prescribed by law.

Russell v. Elliott, 2 Cal. 245.

22. The failure of the defendant to appear on the trial of an action of replevin, when the cause is called, is a waiver of a jury, under the one hundred and seventy-ninth section of the practice act.

Waltham v. Carson, 10 Cal. 178.

23. The legislature alone can determine in what cases the right of trial by jury may be waived.

Exline v. Smith, 5 Cal. 112.

24. The failure of either party to appear on the trial of a civil case operates as a consent on his part that the issue be tried by the court without a jury. But such failure to appear does not authorize the trial to be had by a jury of less than twelve persons.

Gillespie v. Benson, 18 Cal. 409.

25. A jury may be waived by the parties by a failure to file with the clerk, at least six days before the commencement of the term at which the action may be tried, a notice that a jury will be required.

Doll v. Anderson, 27 Cal. 248.

26. The court has a right to direct an issue of fact to be tried by a jury, notwithstanding the parties have waived the same by a failure to give notice at least six days before the commencement of the term that one will be required. Id.

27. In an application for a mandamus to compel a district judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the district judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by him is not a true bill: *Held*, that the relator is not entitled to a jury to try the issue, under section 472 of the practice act.

People v. Judge Tenth Dist., 9 Cal. 19.

In Equity Cases.

28. Parties to a suit in chancery are not entitled to a trial by jury.

Walker v. Sedgwick, 5 Cal. 192.

29. Special issues, framed by the court according to the established rules of chancery practice, may be tried by a jury in equity cases.

Brewster v. Bours, 8 Cal. 501.

30. Where the answer contains both a legal and equitable defense, the court may first try the equitable defense, and refuse the plaintiff a jury trial, and, if the facts warrant it, grant the equitable relief prayed for.

Bodley v. Ferguson, 30 Cal. 511.

FORMATION OF JURY.

Generally.

31. The statute vests the ordering of a trial jury in the discretion of the court.

Pacheco v. Hunsacker, 14 Cal. 120.

32. The time provided by the statute, in which a jury shall be returned by the sheriff, is directory, and not mandatory.

Mowry v. Starbuck, 4 Cal. 274.

33. That a jury has just tried a case involving the liability of defendant for a similar cause of action, depending on the same general considerations, does not render the jury incompetent to sit in the subsequent case. So with regard to an individual juror.

Algier v. Steamer Maria, 14 Cal. 167.

34. A less number than twelve persons does not constitute a legal jury, without the consent of the adverse party; and such consent must be express, and entered at the time in the minutes of the court, and can not be inferred from the mere absence of the party.

Gillespie v. Benson, 18 Cal. 409.

35. If the trial jurors, although legally drawn, have not been legally summoned, the court may, by an order, direct additional jurors to be summoned.

People v. Devine, 46 Cal. 46.

36. If, on the trial of an issue in ejectment, as whether the demanded premises were swamp or dry land on the twenty-eighth of September, 1850, the jurors are sent by the court to view the premises in controversy, they can not take into consideration the result of the examination in determining the character of the land, as swamp or dry, but must render their verdict on the testimony of witnesses given on the stand, and use the inspection of the land only as a means of enabling them to understand and apply the evidence. Wright v. Carpenter, 49 Cal. 607.

Qualifications of Juror.

37. To render a person competent to act as a juror, he must be an elector of the county in which he is returned, and have resided in the county thirty days.

Sampson v. Schaffer, 3 Cal. 107.

38. Under the jury act (Laws 1863, p. 630, sec. 1, subd. 3), a person otherwise qualified is not a competent juror unless he has been "assessed on the last assessment roll of his township or county, on real or personal property, or both, belonging to him, if a resident at the time of the assessment."

People v. Thompson, 34 Cal. 671.

39. In an action of ejectment, a juror who has formed an opinion adverse to the validity of the title under which defendants claimed, is an incompetent juror.

White v. Moses, 11 Cal. 68.

40. The proviso to the act concerning jurors from the provisions of the act requiring jurors to understand the language in which the proceedings are had, can have effect by construing it to mean that a want of sufficient knowledge of the language in which the proceedings of the courts are had is not a legal disqualification of a juror, but that the court may require in its discretion all the jurors on the same panel to understand the same language.

People v. Arceo, 32 Cal. 40.

41. One who declares that he knows the defendants, and, if the testimony was evenly balanced, he would incline to their side, but would decide against them if the testimony was against them, and that he would do his duty as a juror, under the instructions of the court, is a competent juror.

McFadden v. Wallace, 38 Cal. 51.

Peremptory Challenge to Juror.

42. In a civil action, a party is not bound to exercise his right of peremptory challenge to jurors, until there are in the jury-box twelve persons whom the court has adjudged to be competent jurors.

Taylor v. W. P. R. Co., 45 Cal. 323.

Challenges for Cause.

43. In impaneling a jury, each party has a right to put questions to a juror to show not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge.

Watson v. Whitney, 23 Cal. 375.

44. A general challenge of a juror for cause, without specification of the particular grounds, is insufficient. The statute enumerates several different grounds for which such challenges may be taken, and a designation of the one upon which any particular challenge rests, is essential to its consideration by the court. It is not sufficient to say, "I challenge the juror for cause," and then stop.

Paige v. O'Neal, 12 Cal. 483.

Want of Qualification.

45. The objection to the qualification of a juror, that his name was not on the venire

returned by the sheriff, comes too late after verdict. The objection, if it had any validity, should have been urged at the trial.

Thrall v. Smiley, 9 Cal. 530.

46. The object of the law is to secure honest and intelligent men for the trial, and it is of no practical consequence in what order, or at what time during the term, they are summoned. Id.

47. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. Id.

48. The plaintiff's attorney made an affidavit, that since the trial he had discovered one of the jurors to be incompetent, because a resident of the state only three months. The juror also made an affidavit to the same effect: *Held*, that the juror was competent.

Thompson v. Paige, 16 Cal. 78.

Having Previously Served in Same Cause.

49. Where, in a civil case, Taylor, a juror, had been accepted by both parties, and subsequently, during the examination of another juror, the fact came out that there had been a former trial of forcible entry and detainer for the same ground now in dispute, and Taylor then of his own accord stated that the title to the ground had been spoken of in the forcible entry case, and that his mind was made up as to the title; and the plaintiffs thereupon challenged Taylor for cause, and the court excused him, defendants resisting on the ground that it was too late: *Held*, that there is no error; that where the court below exercised its discretion in excusing a juror to attain justice, this court would interfere with great reluctance.

Grady v. Early, 18 Cal. 108.

Unqualified Opinion.

50. In an action of ejectment a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is an incompetent juror.

White v. Moses, 11 Cal. 68.

51. Under the jury act (stats. 1863, p. 630, sec. 1, subd. 3), a person otherwise qualified is not a competent juror unless he has been "assessed on the last assessment roll of his township or county, on real or personal property, or both, belonging to him, if a resident at the time of the assessment."

People v. Thompson, 34 Cal. 671.

52. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject-matter of the suit, where no objection to him was made until after the verdict was rendered, and it not appearing that he had formed or

expressed an opinion before the trial, or was in any way biased in favor of the plaintiff.

Lawrence v. Collier, 1 Cal. 37.

Bias.

53. The law contemplates that every juror who sits in a cause shall have a mind free from all bias or prejudice of any kind, and if a juror is prejudiced in any manner, he is not a proper person to sit in the jury-box.

People v. Reyes, 5 Cal. 347.

54. Prejudice is a state of mind, which, in the eye of the law, has no degrees. Id.

55. Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and if the answer be affirmative, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is probably the only sure method of fathoming his thoughts and feelings. Id.

56. The mere formation of hypothetical opinions as to the guilt or innocence of the prisoner, founded on hearsay or information, and unaccompanied with malice or ill-will, is not sufficient to support a challenge for implied bias. People v. Murphy, 45 Cal. 137.

57. The decision of the court upon the challenge of a juror for actual bias, if erroneous, is not an error of law, but an erroneous finding of fact.

Trenor v. C. P. R. Co., 50 Cal. 222.

58. Such decision, if not final, and if subject to review, can only be reviewed on the ground that the evidence is insufficient to sustain it, and the court will not, except in the clearest case, interfere with it. Id.

Duty and Powers of Jury.

59. After the jury have once retired, it is error to allow them to come into court and receive instructions in the absence of the parties or their counsel.

Redman v. Yontz, 5 Cal. 148.

60. Such instructions will be considered important, if the contrary is not shown, from the very fact that the jury have asked for them. Id.

61. The province of the jury is to determine from the evidence the issues of fact presented by the parties; and their decision is final in all cases where there is a conflict of testimony.

McCauley v. Weller, 12 Cal. 500.

Polling the Jury.

62. There is no right to poll a jury in a civil case, after the verdict has been recorded, nor before, unless there are circumstances of

suspicion attending the delivery of the verdict.

Blum v. Pate, 20 Cal. 69.

63. But in all cases it rests with the discretion of the court. Id.

64. In a civil action it is not a matter of right, which either party may claim, to have a jury polled. Before the verdict is recorded, it is a matter resting in the discretion of the court to allow the proceeding; it will generally be allowed where circumstances of suspicion attend the delivery of the verdict. After the verdict is recorded, the proceeding is never allowed. With the assent of the jury to the verdict as recorded, their functions with respect to the case cease, and the trial is closed. Id.

65. The jury, acting as a body, speak through their foreman, and his assent is conclusive upon all, unless a disagreement with the record be expressed at the time. Id.

66. Before a verdict is recorded, it should be declared by the foreman of the jury, or, if sealed, read by the clerk, so that the parties may be distinctly informed of its purport. It is irregular to record the verdict before it is thus announced, but the irregularity must be objected to at the time, or it will not be noticed on appeal. Id.

67. Assent to a recorded verdict, expressed by the foreman, is conclusive upon all the jury, unless a disagreement is expressed at the time. Id.

68. Although a juror may, at the last moment, dissent from a verdict rendered, yet that dissent must be founded on the question of fact presented by the verdict, and not upon information received from the court, as to what is the legal effect of the verdict as found.

Fitzpatrick v. Himmelmann, 48 Cal. 588.

Discharge of Jury.

69. If, when a cause is on trial before a jury, the court continues the hearing to a day which carries the court into the next term, and then, before the day arrives, adjourns the court for the term, the jury is discharged, and the court can not proceed with the hearing before the jury when the day arrives. Johnson v. Pacific C. Co., 50 Cal. 648.

70. If, in such case, the court does not adjourn for the term, it may proceed with the hearing notwithstanding the close of the term. Id.

Impeaching Verdict.

71. An affidavit of a juror can not be received to impeach his own verdict, unless the verdict was arrived at by "a resort to the determination of chance."

Hoare v. Hindley, 49 Cal. 274.

72. An affidavit of a party to an action, stating what took place in a jury-room, while the jury were considering their verdict, with-

out any statement therein, or proof that such party was present in the jury-room, will not be received to impeach the verdict of a jury, for it can not be presumed that such party was present in the jury-room. *Id.*

CONDUCT OF THE TRIAL.

Special Issues.

73. Where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate to only one fact.

Phoenix W. Co. v. Fletcher, 23 Cal. 481.

74. When, in a chancery case, the court directed that special issues of material facts in the case should be framed or settled, and stated in writing, before proceeding to trial: *Held*, not to be error.

Smith v. Rowe, 4 Cal. 6.

75. Where special issues are submitted to a jury, and they announce that they can not agree upon the special issues, but can agree upon a general verdict, and by consent of counsel on both sides the special issues are withdrawn and a general verdict received by the court, no error is committed.

Mitchell v. Hockett, 25 Cal. 538.

Questions of Law.

76. The admissibility of evidence is not a question for the jury.

People v. Glenn, 10 Cal. 32.

77. When, in the progress of a trial, evidence is reserved, subject to further consideration and future decision as to its admissibility, it is the duty of the judge, when the decision is made, to distinctly and expressly rule upon it, one way or the other. Such reservations should not be made without the consent of parties, in cases where the consequences of the ruling might be obviated by other evidence by the party against whom the ruling is finally made.

Sharp v. Lumley, 34 Cal. 611.

78. It is the duty of the court to decide upon the admissibility of a witness objected to for interest. *Taber v. Staniels*, 2 Cal. 240.

79. The question whether a judgment entered in the court below is entered in accordance with the mandate of the appellate court, is one of law, and not of fact.

Leese v. Clark, 28 Cal. 26.

80. It is for the court to determine whether letters, which have passed between parties constitute an agreement between them.

Luckhart v. Ogden, 30 Cal. 547.

81. When a contract is to be performed within a reasonable time, the question, What is a reasonable time? is one of law, to be determined by the court from the facts established. *Id.*

82. Whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and if so, what time, are questions of law for the court, and not of fact for a jury. *Id.*

83. Mining laws, when introduced in evidence, are to be construed by the court, and the question whether, by virtue of such laws a forfeiture had accrued, is a question of law, and can not, therefore, be properly submitted to a jury.

Fairbanks v. Woodhouse, 6 Cal. 433.

84. Questions arising on a trial as to proper parties plaintiffs, as to the validity and effect of a Mexican grant from which plaintiff deraigned title, as to its loss and contents, and as to the validity and effect of the mesne conveyances through which plaintiff claimed, and as to whether the proceedings in the probate court showed jurisdiction in said court to make orders, by virtue of which sales were had, resulting in deeds through which plaintiff in part claimed, were matters for the court alone, and not for the jury.

Seaward v. Malotte, 15 Cal. 304.

85. Case where court below instructed the jury that the facts showed no valid sale of personal property for want of such change of possession as the statute of frauds requires; and the supreme court sustained the instructions.

Ford v. Chambers, 19 Cal. 143.

86. It is error for the court to submit to a jury the question of the legal effect of written documents offered in evidence during the trial. *Carpentier v. Thirston*, 24 Cal. 268.

87. The question of the boundary lines of the pueblo should not be left to the jury, to be determined by parol proof.

Payne v. Treadwell, 16 Cal. 220.

88. Whether one claiming a discharge under the insolvent act has strictly complied with its provisions is a question of law for the court, and not one of fact for the jury.

Schloss v. His Creditors, 31 Cal. 201.

89. What facts and circumstances constitute evidence of carelessness is a question of law for the court to determine. But what particular weight the jury should give to these facts and circumstances is a matter for the jury.

Gerke v. Cal. S. N. Co., 9 Cal. 251.

90. Where there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. The court, in such case, may direct the jury how to find, or set aside the verdict, if they find to the contrary.

Chenery v. Palmer, 6 Cal. 119.

91. When the facts are agreed upon or ascertained, it is a question of law whether the case is brought within the bar of the statute of limitations; and in such case it is error

to submit to the jury the question whether a demand is barred by the statute.

Reed v. Swift, 45 Cal. 255.

92. The question as to what facts are admitted by the pleadings is one for the court and not for the jury; and the court should not submit such a question to a jury.

Tevis v. Hicks, 41 Cal. 123.

Questions of Fact.

93. To weigh the evidence and find the facts is, in this state, the exclusive province of the jury.

People v. Dick, 34 Cal. 641.

94. It is the province of the jury to determine whether the letters were written and received by the respective parties, and the terms of the contract therein contained complied with, and of the court to determine the construction and legal effect of such contract. Ellis v. Crawford, 39 Cal. 523.

95. The question whether the collision by which the injury was caused could have been avoided by proper care is a question of fact for the jury. Siegel v. Eisen, 41 Cal. 109.

96. Whether or not the overflowing of sewage is injurious to health or otherwise offensive is a question of fact.

Requena v. Los Angeles, 45 Cal. 55.

97. The amount of damages in actions for detention of personal property is simply a question of fact within the province of the jury. This court will not undertake to examine the proofs, or declare that the evidence was insufficient to justify the verdict.

Bartlett v. Hogden, 3 Cal. 55.

98. In an action of trespass, the question of damages is a question particularly for the determination of a jury.

Drake v. Palmer, 4 Cal. 11.

99. When in ejectment on prior possession, abandonment is pleaded, and evidence on it is introduced, the case should be left to the jury.

Roberts v. Unger, 30 Cal. 676.

100. The question of fraudulent intent is a question of fact.

Ford v. Chambers, 19 Cal. 143.

Billings v. Billings, 2 Id. 107.

101. Such a question is one of fraudulent intent, to be left to the jury upon the facts, and is not one of those cases which the court is authorized to pronounce to be fraudulent as matters of law.

Wellington v. Sedgwick, 12 Cal. 469.

102. It is for the jury to say whether the grantee had knowledge of the execution of the deed, or had given his assent thereto.

Bensley v. Atwill, 12 Cal. 231.

103. Whether due diligence and care, or negligence, exist in a particular case, is a fact for the jury.

Richmond v. S. V. R. Co., 18 Cal. 351.

104. The fact of the dedication of the premises in question as a homestead was properly submitted to the jury.

Cook v. McChristian, 4 Cal. 23.

105. If the complaint aver that certain instructions placed in a highway are an obstruction to the free use and enjoyment of the plaintiff's private property, the question whether such obstructions amount to a nuisance or not is one of fact for the jury.

Blanc v. Klumpke, 29 Cal. 156.

106. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after, and was paid, together with costs of protest of the second, and two months after suit was commenced on the protested bill: Held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in the suit on said bill knew that the bill was in fact paid at the time when they commenced suit, was a question for the jury.

Weaver v. Page, 6 Cal. 681.

107. The existence of the conditions making one a pre-emptioner, and the performance of the acts necessary to give a right of pre-emption, are facts for the jury to find from the evidence, and not for the court to determine.

Megerle v. Ashe, 33 Cal. 74.

108. It is error for the court to charge the jury as to a question of fact, or as to the weight of the evidence.

Battersby v. Abbott, 9 Cal. 565.

Treadwell v. Wells, 4 Id. 260.

109. The constitutional right of the court "to state the testimony" to the jury would hardly authorize a judge to express his opinion as to its effect.

Seligman v. Kalkman, 8 Cal. 216.

110. It is the province of the jury, unaided by the court, to say whether a fact is proved or otherwise.

People v. Dick, 32 Cal. 213.

34 Id. 663.

111. The question of malice is one for the jury to decide.

Porter v. Seale, 8 Cal. 217.

112. Whether driving piles in Front street, in the city of San Francisco (the street being laid out over the waters of the bay), is an obstruction to the free use of the street by the public, is a question of fact for the jury; and where that question was not so submitted, a new trial was granted.

San Francisco v. Clark, 1 Cal. 356.

Mixed Questions of Law and Fact.

113. If the description of the demanded premises does not appear upon the face of the complaint to be insufficient, it is a question of fact for the court or jury whether

the description in the same will apply to the land sought to be recovered.

Moss v. Shear, 30 Cal. 467.

114. Probable cause is a mixed question of law and fact. *Potter v. Seale*, 8 Cal. 217.

115. In an action for malicious prosecution, the want of probable cause is a mixed question of law and fact.

Grant v. Moore, 29 Cal. 644.

116. The question of delivery and change of possession under the fifteenth section is a mixed question of law and fact; but as to what shall constitute a delivery is a question of law alone.

Vance v. Boynton, 8 Cal. 554.

Miscellaneous.

117. Where the counsel of a party, at the conclusion of the trial, handed to the court fifty-eight written instructions, occupying twelve pages: *Held*, that it was not incumbent upon the judge to stop the progress of trial for their examination, and that they were properly refused.

Anderson v. Parker, 6 Cal. 197.

118. Where the court below charged the jury, among other things, that if they found for plaintiff, he was entitled to recover the value of the use and occupation from October, 1853—a period long anterior to the commencement of the action, the complaint not containing any averment as to the time when plaintiff's title accrued or existed, etc.—and the defendant excepted generally to all the charge, and followed this general exception up by a specification of certain portions of the charge to which his exception was particularly directed: *Held*, that this general exception did not cover the charge as to damages. *Payne v. Treadwell*, 16 Cal. 248.

119. Where there is in the transcript a stipulation by the parties that "the plaintiff duly excepted" to the "charges and each part thereof," it will be construed as a stipulation that the exceptions were sufficiently specified to render them available.

Bowman v. Cudworth, 31 Cal. 148.

120. Instructions given by the court to the jury must be excepted to, in order to enable the appellant to take advantage of errors in them if such exist.

Wilkinson v. Parrott, 32 Cal. 102.

121. If a case is submitted upon stipulated facts, without reserving the question of the competency, relevancy, or admissibility of evidence to prove such facts, the question can not be raised that such facts are not properly before the court.

Brewster v. Hartley, 37 Cal. 15.

122. When a demurrer to the complaint, on the ground of a misjoinder of parties plaintiff (or other ground which would be waived if not taken in time), has been overruled, the objection can not be again

taken on the trial, but the case must proceed on its merits, so far as such objection is concerned.

Tennant v. Pfister, 45 Cal. 270.

123. On the trial no objection to the complaint is open to inquiry, except the want of jurisdiction, or that it does not state facts sufficient to constitute a cause of action. *Id.*

124. After a cause has been submitted in the court, it is not error to hear argument at chambers, and thereupon to decide the case. *San Jose v. Shaw*, 45 Cal. 178.

125. After trial by the court, when it has filed its findings and rendered judgment, it is irregular for it, upon motion of one of the parties, to re-examine the evidence and reverse its former action, or substitute different findings of facts.

Prince v. Lynch, 38 Cal. 528.

126. The only regular way for the court to review its former action is on a motion for a new trial. *Id.*

127. It would seem that a party can not try his cause before a judge without objection, and, after losing it, complain that the case was not tried by a jury.

Smith v. Brannan, 13 Cal. 107.

128. Error in law occurring at a trial may be reviewed upon a bill of exceptions as well as upon a motion for a new trial.

Walls v. Preston, 25 Cal. 61.

129. Where plaintiffs, having excepted to the ruling of the court excluding certain evidence, take, in consequence of such ruling, a nonsuit with leave to move to set aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence confined on appeal to the grounds taken below.

Natoma Co. v. Clarkin, 14 Cal. 549.

130. The ruling of a court, during a trial, in excluding testimony, will be sustained, if its introduction was improper, although counsel do not state the correct grounds of objection, provided the correct grounds, if stated, could not have been obviated.

Miller v. Van Tassel, 24 Cal. 458.

131. Where the transcript contained, together with the judgment roll, a copy of an order certified to by the clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions: *Held*, that the appellate court could not review the action of the court below upon the demurrer.

Bostwick v. McCorkle, 22 Cal. 669.

TROVER AND CONVERSION.

1. To render the defendant liable to the action, he must have converted the property to his own use; and if not, then any other

act, to amount to a conversion, must be done with a **wrongful intent**, either expressed or implied. *Rogers v. Huie*, 2 Cal. 571.

2. The conversion is the **gist** of the action of trover, and without conversion neither possession of the property, negligence or misfortune will enable the action to be maintained. *Id.*

3. An action of trover may be maintained against a trespasser, who is cutting timber, as soon as the timber is cut.

Sampson v. Hammond, 4 Cal. 184.

4. If the parties were **tenants in common**, and the defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and an action for goods, wares, and merchandise, sold and delivered will not entitle him to a judgment.

Williams v. Chadbourne, 6 Cal. 559.

5. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement.

Whitney v. Stark, 8 Cal. 514.

6. Where M. made a bill of sale to G. of forty-two barrels of vinegar, then in possession of G., as keeper of the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt, or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant, to recover the same: *Held*, that M. had no title to the property upon which he could recover in such an action, as the mere handing back the bill of sale of M. did not revert the title in him.

Middleworth v. Sedgwick, 10 Cal. 392.

7. In trover, the plaintiffs must either have the **possession**, or the immediate right to the possession of the property, to entitle them to recover. *Id.*

8. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention; defendants paid the damages, but the property was not restored. Plaintiff then brought an action of trover to recover the value; defendants pleaded the former recovery as a bar: *Held*, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not being satisfied.

Nickerson v. Cal. Stage Co., 10 Cal. 520.

9. Where the defendant contracted with a factor, who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful as-

sumption of ownership, and a conversion of the property. *Scriber v. Masten*, 11 Cal. 330.

10. In a suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof, as to the right, or title, or possession, of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion.

Beckman v. McKay, 14 Cal. 250.

11. Where, in such case the defendants, warehousemen, deliver the wheat to third persons, who bought from the broker for his own debt, on the ground that they held the storage receipts of defendants to one S., who had loaned money to E. & H. on the wheat as collateral, and had indorsed the receipt, "deliver to bearer, or E. & H.," the defendants knowing at the time of said delivery that E. & H. claimed the wheat as their property, they are liable to E. & H. for a conversion. *Hanna v. Flint*, 14 Cal. 73.

12. If one is intrusted with goods by the owner, with power to sell the same at retail for the owner as his agent or clerk, and if he then sells the goods, in payment of his private debt, to one who has full knowledge of the owner's title and the agent's relation to the goods, the purchase made with this knowledge amounts to a conversion of the goods by the purchaser.

Herron v. Hughes, 25 Cal. 555.

13. In case of a chattel mortgage, the mortgagee could formerly maintain trover against the mortgagor for a refusal to deliver or a conversion of the chattel, but the mortgagor could not maintain trover against the mortgagee for refusing to deliver or selling the mortgaged property, unless the mortgage has been paid or a tender has been made before condition broken.

Heyland v. Badger, 35 Cal. 404.

14. The action of trover depends on legal title, general or special, to support it, and the mortgagor, as against the mortgagee, has no title. *Id.*

15. The owner of personal property which has been wrongfully converted is ordinarily entitled to recover his specific property, or its value, and can not be compelled to accept other property of the same kind and equal value in lieu of that which was converted.

Atkins v. Gamble, 42 Cal. 86.

16. The mere fact that the pledgee of mining stocks sells the particular certificates pledged does not render him liable as for a conversion of the pledge, provided the pledgee, upon a redemption, restores similar certificates, and has been at all times ready to do so. *Thompson v. Toland*, 48 Cal. 93.

17. The pledgee, as against a stranger to the pledgor and wrong-doer, who has converted the pledge, may recover its full value; for he is answerable over to the pledgor for any surplus in his hands; and if he recovers in such action, and the wrong-doer satisfies the judgment, he thereby acquires a title to the pledge. *Id.*

18. If, in an action of trover, the complaint, in addition to alleging a taking and carrying away of the goods, avers a detention of the same, and it appears on the trial that the defendant had sold the goods before the suit was brought, and the plaintiff recovers judgment only for the value of the goods, the defendant is not injured by the allegation of a detention.

Hutchings v. Castle, 48 Cal. 152.

19. An administrator may bring an action of trover in his own name to recover the value of personal property belonging to the estate, tortiously taken after the death of the intestate and before letters were issued. *Ham v. Henderson*, 50 Cal. 367.

20. If the taking of personal property is tortious, no demand is necessary before bringing suit. *Id.*

21. An administrator has a special property in the personalty of the estate, which enables him to bring trover to recover its value when converted. *Id.*

22. If a special administrator of an estate, as such, and without authority, sells stock of a corporation, which had been pledged to the deceased in his lifetime, as security for a loan of money, and receives the proceeds, which he pays over to executors subsequently appointed, this does not constitute a conversion by the estate, so as to enable the pledgor to recover the enhanced value of the stock in an action of trover against the executors.

Von Schmidt v. Bourn, 50 Cal. 616.

23. One tenant in common can not maintain trover against his co-tenant, for a sale of the common property which he is authorized by contract to make, nor will it lie against the person to whom the co-tenant sold the property.

Hewlett v. Owens, 51 Cal. 570.

24. An order of the president of a corporation, drawn upon himself as president, to transfer to a person a certain number of shares of stock of the corporation, followed by the refusal of himself and the secretary to deliver the stock, does not amount to a conversion of the stock by the corporation.

Morrison v. Gold Mt. Co., 52 Cal. 306.

25. The expression of section 3336, "the detriment caused by the wrongful conversion of personal property is presumed to be," indicates that it was intended to establish a legal presumption to operate, and which could only operate at the trial of the cause.

Tully v. Tranor, 53 Cal. 274.

26. The amendment of section 3336 of the civil code, which took effect July 1, 1874, operated upon the trial of an action brought for the conversion of personal property which took place after the amendment took effect, although the conversion had occurred prior to the amendment. *Id.*

27. L., as tenant of B., placed certain fixtures upon the real estate of B., and B. subsequently sued out an injunction to prevent L. from removing the fixtures. Upon a showing by L., the injunction was dissolved, and thereafter L. sued B. for damages caused by the injunction. At the trial the court instructed the jury that the mere issuance and service of the injunction was a conversion of the fixtures by B.: *Held*, that the instruction was erroneous.

Lacey v. Beaudry, 53 Cal. 693.

28. To maintain trover, or trespass *de bonis asportatis*, evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action: *Held*, accordingly, in an action by a mortgagee of personal property against a sheriff, for taking the same under attachments against the mortgagor, that a levy upon a part of the property in the possession of the mortgagor, and the appointment of a keeper, was a taking, although the property was not moved or otherwise disturbed, and though it was released before any demand from the plaintiff.

Rider v. Edgar, 54 Cal. 127.

CLAIM AND DELIV- ERY, 5.	PARTIES, 236.
CORPORATION, 198.	PLEADING, 939-942.
DEFENSES, 68.	TENANT IN COMMON, 48.

TRUSTS AND TRUSTEES.

1. GENERALLY.
30. EXPRESS TRUST.
42. IMPLIED TRUST.
104. TRUSTEE.
148. CESTUI QUE TRUST.
152. ENFORCEMENT OF TRUST.
173. BREACH OF TRUST.

IN GENERAL.

1. Money in the hands of an executor is held by him in trust, not as a debt.

Ex parte Smith, 53 Cal. 204.

2. If an administrator becomes a purchaser, through another person, of the land of the estate sold by him, the heirs of the intestate may have him declared a trustee, and compel him to convey the land to them.

Guerrero v. Ballerino, 48 Cal. 118.

3. Case stated where the evidence shows that an administrator, through another person, was the purchaser at the sale of the intestate's land, made by himself, and where the finding of the court below, that the administrator was not the real purchaser, is set aside as being not sustained by the evidence. Id.

4. If the payee of a note receives from the payor a note and mortgage of a third person as collateral security for the payor's note, and upon the death of the payor receives from the administrator payment of the note and mortgage, he holds the balance of the money above what extinguishes the payor's and assignor's note in trust for the payor and assignor.

Ponce v. McElvy, 47 Cal. 155.

5. If, in such case, the assignee of the note and mortgage, instead of receiving the money from the administrator, has the note and mortgage allowed in his own name against the estate and bids in the land of the estate at administrator's sale, and applies the claim in payment of the purchase money, he holds the land subject to the same trust as he would have held the money if paid to him by the administrator. Id.

6. The same rules apply as to such trusts in relation to a person who receives from the assignee such note and mortgage upon the same terms that the assignee received it. Id.

7. In such cases the trust does not arise until the assignee of the note and mortgage receives the money in payment of the same, or becomes the purchaser of the land at administrator's sale. Id.

8. If a debtor makes an assignment of his property, to a trustee in trust to pay the proceeds *pro rata* to his creditors, one to whom the trustee assigns the property with notice of the trust must execute it.

Sharp v. Goodwin, 51 Cal. 219.

9. If a trustee to whom a debtor has assigned his property in trust to pay the proceeds *pro rata* to his creditors, sells and assigns the property to a third person for value, with notice of the trust, and such person converts the property into money, and pays the creditors, they have no cause of action against the trustee. Id.

10. As a general rule, trustees and *cestui que trust* are regarded as so independent, that proceedings against one do not affect the other. Shay v. McNamara, 54 Cal. 169.

11. If the testator, after making a will, in which he devises all his property absolutely, writes a letter to the legatee, stating the trusts upon which the testator intended to devise the estate, and explaining how the legatee was to execute the trusts, and the legatee, during the lifetime of the testator, accepts in writing the terms of the trust, and promises to execute it faithfully,

a trust is created as expressed in the letter, and a court of equity will compel the legatee to execute it.

De Lawrence v. De Boom, 48 Cal. 581.

12. If trustees have authority, in their discretion, to execute a deed of the trust property, a court of equity may compel them to execute a conveyance in a proper case.

Saunders v. Schmaelzle, 49 Cal. 59.

13. If trustees who have a discretionary authority to sell and convey the trust property, sell the same, and receive the consideration, it is their absolute duty to convey the legal title. Id.

14. Whenever by the terms of a conveyance to trustees with power to sell it is doubtful whether the trustees take as joint tenants, or tenants in common, courts will hold, if possible, that they take as joint tenants. Id.

15. In a conveyance to trustees with power to sell, and use the proceeds to pay expenses and the debts of the grantor, if the conveyance is silent, as to whether the trustees take as joint tenants, or tenants in common, courts will hold that they take as joint tenants. Id.

16. When trustees, with power to sell, hold as joint tenants, and one of the trustees dies; as the whole estate descends to the survivors, so the power annexed to the trust devolves on them, and they may sell and convey the legal title. Id.

17. A deed conveying land to a trustee who has no beneficial interest, with power to sell and lease, will be most strongly construed against the trustee, and most favorably to the beneficiary under the trust.

Sprague v. Edwards, 48 Cal. 239.

18. When a conveyance is made to a trustee, who has no interest in the trust fund, with power to sell and convey the trust lands, subject to the approval of the *cestui que trust*, the deed of the trustee to a purchaser will not pass the legal title without the approval of the *cestui que trust* in writing. Id.

19. When a conveyance is made to a person as a trustee, and he, at the same time, executes and delivers to the grantor a declaration in writing in which there is no ambiguity, stating the objects and purposes of the trust, the powers and duties of the trustee, with reference to the trust estate, are to be ascertained from the deed and the declaration; and when so ascertained, the rights and duties of the parties must be controlled thereby. Tyler v. Granger, 48 Cal. 259.

20. In a case where two parties are contesting pre-emption claimants before the United States land officers, and the land is awarded to one and the patent issued to him, and the other then files a bill in equity to have the court adjudge the patentee his trustee, and compel him to make a convey-

ance of the legal title, the plaintiff must show, first, that he possessed all the necessary qualifications of a pre-emptor, for without these qualifications he has no standing in court; second, that the defendant did not possess those qualifications, and that the land officers, in deciding that he did, were imposed on and deceived by fraudulent practices and false testimony used before them, and procured by the defendant.

Burrell v. Haw, 48 Cal. 222.

21. The courts will not pass on the sufficiency of the evidence upon which the decision of the land officers was based in such case, but it must be shown that their decision was induced by fraudulent practices of the defendant, whereby the plaintiff was deprived of his right to pre-empt. *Id.*

22. In such case, the fact that the patentee was not a citizen and swore falsely on that point in his declaratory statement, is not sufficient to show fraudulent practices on his part on the question of citizenship; but it must appear that he produced witnesses who swore falsely on that point, and thereby deceived the land officers. *Id.*

23. Where real estate, with the fixtures appertaining thereunto, together with certain personal property, were conveyed in trust as security for the payment of a debt, and the creditor was obliged to resort to a court of equity to secure the protection of the personal property and fixtures from detriment and destruction: Held, that the court should take jurisdiction of the whole subject-matter of the litigation, and also decree a sale of the real estate proper. *Craft v. De Forest*, 53 Cal. 656.

24. The land department having determined that the defendant's homestead entry, No. 304, was valid, and it not being shown that the determination was based upon an erroneous decision of a matter of law, and entry No. 304 being prior to the initiation of the plaintiff's pre-emption, there is no ground on which the plaintiff can claim that the defendant acquired the title to the land under his homestead entry as his (the plaintiff's) trustee. *Powers v. Leith*, 53 Cal. 712.

25. The right to an estate in reversion becomes absolute on the happening of the event which terminates the intermediate estate.

Hawes v. Lathrop, 38 Cal. 493.

26. Where it was provided in a conveyance of real estate to certain parties in trust for a specified purpose, that if the trustees should declare by resolution that the objects of the trust were found to be impracticable, the estate thereby conveyed should be determined, and the land revert to the grantor, it was held that on the happening of the event the trust deed became void, and the right of the grantor became absolute. *Id.*

27. N. D., in consideration of natural love and affection and of one dollar, executed to

himself and his brother, R. D., jointly, a deed of conveyance of an undivided half of the rancho Dos Pueblos, in trust for his children, and, after subsequently conveying a portion of the rancho, by metes and bounds, to one D. H., died, leaving a will, wherein (after constituting three executors and enjoining upon them to pay his debts) he devised to them, in trust for his children, the rancho Dos Pueblos, or so much thereof as had not, before the date of the will, been conveyed by the deed of trust above mentioned, the share of each to be conveyed to him upon his reaching the age of twenty-one years. Bequests were also made to T. A. and J. A. All the executors qualified, but one of them afterward resigned. Afterward, and more than five years before the beginning of the suit, the other executors sold and conveyed portions of the land to H. and others, for the purpose of paying debts and charges of the trust, and also conveyed portions of the land, in professed pursuance of the trust, to certain of the adult heirs, some of whom accepted and others declined to accept the deeds, the title of two of those accepting afterward vesting, by means of conveyances, in H. and others of the purchasers aforesaid. Afterward, the acting executors and R. D. executed a deed of partition of the rancho between the two trusts, by which all of the land conveyed as aforesaid by the former fell into their allotment, and R. D. agreed to make such conveyances to the purchasers as might be necessary to perfect their titles. Afterward, a final decree of distribution was made by the probate court, by which the rancho Dos Pueblos was distributed to the acting executors, as trustees under the will, and in which no mention was made of the legacies to T. A. and J. A. No mention was made of the trust deed in the decree; and, indeed, except in the partition deed above mentioned, the trust deed was ignored by the executors throughout all their proceedings. In an action brought by the trustees in the district court to close the trust, against the heirs, R. D., the purchasers, and others, in which cross-complaints were filed by the several sets of defendants, the purchasers, among other defenses, pleading the statute of limitations and an estoppel *in pais*: *Held*, first, the deed of trust by N. D. to himself and R. D. was a valid, operative instrument as a declaration of trust, and, in an equitable proceeding, must control the legal title: It is not the legal conveyance or transfer of property, but the declaration of trust, that operates in the creation of trustees; and a trust will not be permitted to fail for the want of a trustee, even if none is named. In this case, also, the deed is referred to and recognized in the will, and the parties claiming under the will are estopped from denying its validity; second, the direction of the testator to the executors to pay debts did not.

give them a power of sale for that purpose; the deeds to H. and others were, therefore, wholly unauthorized and void; even if these deeds could operate to convey the legal title, the grantees, holding under the will, were bound to know its contents, and were, therefore, not purchasers in good faith, and took subject to the trusts; third, the deeds to the children can not be maintained, because the land was held in common and undivided with R. D.; and the executors, therefore, could not convey the undivided half held by the latter, and because the allotments were, therefore, too great; fourth, the partition between the trustees under the will and R. D. was void, because D. H. (the owner of an undivided half of the tract conveyed to him by N. D. in his life-time) was not a party; and, because R. D., under the deed of trust, had no power to make partition; fifth, there was no **estoppel in pais** against the heirs generally, or against those who had accepted the portions conveyed to them by the executors, and sold them to others, the purchasers in both cases having knowledge of the true state of the title, or the means of acquiring it with reasonable diligence; sixth, the decree of distribution in the probate court was final and conclusive as to the legacies to J. A. and T. A., and is as to them a complete bar; seventh, the **statute of limitations** has no application, the patent having issued since the beginning of the suit.

Hill v. Den, 54 Cal. 6.

28. Maria Antonio Carillo, wife of De la Guerra and mother of plaintiff, died in 1843, there being a large amount of common property. Jose kept possession of this property, and sold a portion of it during his life, and died in 1858, leaving a will appointing defendants his executors, and making them legatees of most of his property. Plaintiff now sues defendants for her share of the property disposed of by her father, Jose, and of that undisposed of and which came into the hands of defendants: *Held*, that, upon the death of the wife, the children of the marriage, plaintiff among them, succeeded to her interest in the common property, subject to the payment of debts; that Jose, the father, became trustee of plaintiff for this interest; that chancery has jurisdiction to settle the account, and ascertain the share and interest of the heirs; that no administration upon the wife's estate was necessary, the husband holding as surviving partner of the community; and that the remedy of plaintiff, as heir of her mother, is governed by the laws now existing, and her rights, whether arising out of a past system or the present, can be enforced just as would be enforced the rights of a representative at common law claiming of a surviving partner in a commercial partnership distribution of partnership effects left, after settlement of firm debts, in the hands of such survivor; *held, further*,

that Jose, the father, held as surviving partner, and not as owner, and that he could not by his own act, without the consent or laches of the heir or representative, change, for his own benefit, the tenure by which he held; that he, as trustee, could not silently disavow the trust, and set up an exclusive holding in himself; and that his holding would become adverse only from the time when notice is given the beneficiary or *cestui que trust* of the individual claim of the trustee; *held, further*, that if this were not so, still Jose, the father, held the property in presumption of law, as well for the heirs as for himself; that they were tenants in common with him; that his possession was their possession; and hence he could not merely by his acts of control or dominion as of his own property, however unequivocal, change the title and tenure, unless such acts and claims were brought directly to the knowledge of the heirs, and they assented or acquiesced.

Ord v. De la Guerra, 18 Cal. 67.

29. If the husband did so sell or dispose for other purposes, he could not, when called upon by the heir of the wife, set up as a defense a want of power to make such sale. The heir, by claiming his proportion of the proceeds, may affirm the sale. *Id.*

EXPRESS TRUST.

30. Where a declaration of trust accompanying a conveyance of real property, provided that parties making advances to the trustee, to a specified amount for certain designated purposes, with the consent of persons previously named in the declaration, as beneficiaries of the second class, should stand as to the advances so made, in the same position and receive payment in the same manner and proportion, as such previously named beneficiaries: *Held*, that the **trust estate was not liable for advances** made to the trustee for any other than the purposes designated in the declaration, nor for advances made for those purposes by third persons without the consent of the beneficiaries.

Beatty v. Clark, 20 Cal. 11.

31. Where the purposes designated in the declaration of trust were to secure advances to pay off a debt to a particular estate, to purchase and locate school warrants on certain lands, and to raise a crop upon the lands for the year 1856; and the trustee in one instance borrowed money to harvest the crops for 1856, and to put in the crops of 1857, and gave his promissory note as trustee for the amount borrowed, including also an amount for storage on grain, and stated in the note that for its payment all the property held by him in trust was pledged; and in another instance borrowed money in 1857 to meet the expenses of future farming operations, and gave his note for the same as trustee, in which he also stated that all the

property held by him in trust was pledged for its payment: *Held*, that the statement of the trustee in the notes did not create any lien upon the trust property; that even if raising a crop for 1856, as mentioned in the declaration, implied also the harvesting of the crops for that year, no allowance could be made on that account, inasmuch as it did not appear from the note or otherwise how much of the amount was borrowed for that purpose; that the other objects for which the money was borrowed, as stated in the notes, were not embraced by any of the purposes designated in the declaration of trust; and for the payment of the money the trustee had no authority to pledge the trust property; and, further, that he had no authority to accept the moneys and place the claims thereupon arising in the second class of claims secured, even if the moneys had been advanced for the express purpose of the trust, without the consent of the persons holding the claims of that class. *Id.*

32. If two partners are embarrassed with debts, and one executes a deed to the other, absolute on its face, with a consideration expressed, of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts, there is no express trust, nor does a trust arise by implication of law.

Burt v. Wilson, 28 Cal. 632.

33. T. agreed with M. that if they could obtain a road franchise from the legislature in T.'s name, and M. would draw a bill to that effect, and would construct half the road, T. constructing the other half, they should be equal owners and divide the tolls. M. drew the bill, which became a law, and constructed his half of the road; then, by express agreement, T. took possession of the road and collected the tolls on mutual account: *Held*, to be an express trust.

Miles v. Thorne, 38 Cal. 333.

34. A transfer of property by a debtor to a creditor, who undertakes to sell the same and apply the proceeds to the discharge of his own debt and those of certain other creditors, with the assent of the latter, clothes such creditor with a power, coupled with a trust for the benefit of those others, which he can not relinquish until those debts are discharged.

Handley v. Pfister, 39 Cal. 283.

35. If A. makes an absolute deed of his land to B., with the understanding between him and B. and C. that B. is to sell the land and use the proceeds to pay the debt of A. to C., C. can compel B. to account to him and pay over the proceeds.

Raynor v. Lyons, 37 Cal. 452.

36. A trust deed of real estate, taken by a person who loans money to the owner, defensible on payment of the debt, is some-

thing more than a mortgage. It conveys the legal title and an interest in the land.

Fuguay v. Stickney, 41 Cal. 583.

37. If A. conveys to B. a tract of land, to be re-conveyed to himself, he thereby creates an express trust, which B. may accept by accepting the deed.

Hearst v. Pujol, 44 Cal. 230.

38. When the attorneys for the parties withdraw from a sheriff money deposited with him as security for a judgment that may be rendered in an action, they hold the money in trust for both parties to the action, the same as it was held by the sheriff.

Hathaway v. Patterson, 45 Cal. 294.

39. When money deposited by a defendant with a sheriff, as security for property released on attachment, is withdrawn by the attorneys of the parties, and divided between them, and each gives his note to the other for one half of it, with a stipulation that it was to be held in like manner as if it remained in the sheriff's hands; after the plaintiff recovers judgment, the defendants' attorneys may be sued on the note given by them, and they can not set off, either the note of plaintiff's attorney to them, or what is due to them by their client, for their services in the action. *Id.*

40. If an attorney contracts with a party who claims land, to commence a suit to recover the land and to pay the expenses, and receive for his services and expenses one undivided half of what may be recovered, and the undivided one half of the result of a settlement or compromise of the matter, and the party compromises by having money paid to a third person, who, in consideration of the money, deeds to a fourth person land in trust for the party, such fourth person holds an undivided one half of the land in trust for the attorney.

Hoffman v. Vallejo, 45 Cal. 564.

41. The statute of limitations does not run in favor of a trustee, as against the *cestui que trust*, while the latter is in the possession of his estate, and there has been no adverse holding on the part of the trustee.

Love v. Watkins, 40 Cal. 547.

IMPLIED TRUST.

42. Where land is purchased in the name of one person, and the consideration is paid by another, a trust immediately is given and the person in whose name the conveyance is taken is deemed in law to hold as trustee for the one furnishing the money.

Osborne v. Endicott, 6 Cal. 149.

Hidden v. Jordan, 21 Id. 92.

Bayles v. Baxter, 22 Id. 575.

Simson v. Eckstein, Id. 580.

Millard v. Hathaway, 27 Id. 119.

43. When one person furnishes the consideration to buy land, whether that con-

consideration is money or other property, and the purchase is made, and the title is taken in the name of another, the land will be held by the grantee in trust for the person furnishing the consideration.

Currey v. Allen, 34 Cal. 254.

44. In order to create such a trust, the facts need not appear affirmatively on the face of the deed, but **may be proved by any note or memorandum** in writing of the nominal purchaser, even though he plead the statute of frauds.

Osborne v. Endicott, 6 Cal. 149.

45. The fact that the party receiving a conveyance of land **verbally agreed** at the time with the person paying the consideration that the former should, upon demand, **execute a conveyance** to the latter of the premises, does not make the trust express as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the statute of frauds.

Bayles v. Baxter, 22 Cal. 575.

46. If **several parties contract**, in writing, that one shall purchase land about to be offered at sheriff's sale, for the benefit of all, each to furnish his proportion of the money, and the buyer to convey to each, if no redemption is made, his proportion of the land, and one of the contracting parties, after the purchase is effected, on his own account purchases another judgment which makes him a redemptioner, and redeems and obtains a sheriff's deed, an implied **trust arises**, and he becomes a trustee *in invitum*, holding the legal title in trust for **all the parties** to the contract. Jenkins v. Frink, 30 Cal. 586.

47. If several parties are interested in the purchase of land made by one by mutual agreement, neither can exclude the other from what was intended for the common benefit; and any private benefit touching the common right which is secured by either party will turn him into a trustee for the benefit of all. Id.

48. Where a **part of the purchase money** of land is paid by a person other than the grantee, and no agreement is shown between the grantee and such person, a trust results in favor of the latter for an interest in the land, proportioned to his share of the purchase money.

Hidden v. Jordan, 21 Cal. 92.

49. Although a **verbal agreement** by A. to purchase land for B. may not be given in evidence to establish a resulting trust where the entire purchase money has been paid by A. and the conveyance taken in his name, yet if any part of the purchase money is shown to have been paid by B., a verbal agreement may then be proved which shall have the effect to deprive A. of all beneficial interest in the purchase, and to clothe the

entire estate in his hands with a trust in favor of B. Id.

50. H., being desirous of purchasing a certain farm, agreed verbally with J. that the purchase should be made by and in the name of J., and the conveyance taken to him; that H. should furnish a portion of the purchase money, and that the balance should be advanced by J. and within a certain time repaid to him with interest by H., upon which J. should convey the title to H. H. having furnished the portion of the purchase money as agreed, J. made the purchase, paid the whole price, and took a deed in his own name. In an action by H. to compel J. to execute a conveyance to him: *Held*, that the verbal agreement might be proved for the purpose of showing a resulting trust in favor of H., and that the effect of the transaction was to make J. a mere trustee of H. as to the entire property, holding the legal title as security for the repayment of his advances. Id.

51. Where **A. purchases land with his own funds**, but before the execution of the deed enters into a verbal contract with B. by which the deed from the grantor is executed directly to B., and B. is at some future time to pay A. the purchase money: *Held*, that a resulting trust is not created in favor of A. McCue v. Gallagher, 23 Cal. 51.

52. The sheriff was about to sell certain real estate on an execution in favor of C. A., at C.'s request, attended the sale and bid off the property, and had the bid credited on the execution, but took the certificate of purchase in his own name, and afterwards had a sheriff's deed made to him: *Held*, that A. held the legal title in trust for C.

Currey v. Allen, 34 Cal. 254.

53. In an action brought to establish an implied trust, on the ground that the deed was executed to one party and the purchase money furnished by another, the party alleging the implied trust **must prove** clearly that the **money belonged to him**; and if the testimony is merely parol, it will be received with great caution.

Millard v. Hathaway, 27 Cal. 119.

54. Where one pays the purchase money, and the deed is executed to another, the law implies a trust to be executed by a conveyance to the *cestui que trust*, on demand; and this implied trust is **not destroyed** because the **beneiciary stipulates**, in writing, to **repay the money**, with interest, until paid; and the trust is not to be executed until the money is paid. Id.

55. The **purchaser of parcels** of the land granted by congress to the state for internal improvements, who, before the entire purchase is made, **sells portions** thereof by quitclaim deeds to others, by whom the remainder of the purchase money is paid, and who thereupon **receives a patent** from the

state, becomes, constructively, the trustee of his vendee, and holds the title for their benefit. *Wasley v. Foreman*, 38 Cal. 90.

56. If a party who is in possession of land, without right, legal or equitable, is fraudulently deprived of the possession by one who does not deprive him of any right at law resulting from his prior possession, and the one who thus obtains possession then purchases the title from the true owner, he does not hold this title in trust for the prior possessor, and can not be compelled to convey it to him.
Scott v. Umbarger, 41 Cal. 410.

57. If one party agrees to unite with two others in the purchase of land, each to furnish one third of the purchase money, and such party to conduct the negotiations and buy the land for the least possible price, he assumes a position of trust towards his associates, and is bound to exercise the utmost good faith towards them, and share with them all the profits of the bargain.

King v. Wise, 43 Cal. 629.

58. If A. agrees to unite with B. and C. in the joint purchase of a tract of land, each to furnish one third the price, and A. to conduct the negotiations, and buy the land at the least possible price, and A. represents to them that the land cost six hundred and fifty dollars per acre, when it only cost five hundred dollars per acre, and a purchase is made at the former sum, and A. pockets the difference between the two prices, B. and C. are entitled to recover from A. the full sum they paid beyond what they would have paid at five hundred dollars per acre. Id.

59. Before bringing an action to recover such difference, B. and C. need not offer to rescind the contract of purchase, and an affirmance of the contract by them, after they discover the fraud practiced on them by A., does not destroy their right of action for the damages sustained. Id.

60. The facts that two parties purchase separate tracts of land, from one who had located school land warrants on the same before the land was surveyed by the United States, and which location was consequently void, and that said parties acquired possession of said tracts by virtue of said purchase, do not create the relation of trust or confidence between them, so as to make a subsequent purchase from the United States, of all the land, by one of the parties, as a pre-emptioner, inure to the benefit of the other party in equity.

Collins v. Bartlett, 44 Cal. 371.

61. When two or more persons separately purchase distinct parcels of land from a common grantor, who possesses the same under an invalid title, and one of them afterwards acquires the true title to the whole, he does not hold the true title as trustee for the other, nor is he estopped from denying that

the purchase from the holder of the invalid title was void. Id.

62. The tenure by which the pueblo lands are held by San Francisco is of a fiduciary nature, and can not be alienated except in accordance with the trust.

San Francisco v. Canavan, 42 Cal. 545.

S. D. v. S. D. & L. A. R. Co., 44 Id. 106.

63. It is for the legislature to decide how the trust, for which San Francisco holds the title to the pueblo lands, shall be performed.

San Francisco v. Canavan, 42 Cal. 545.

64. Where land is granted by congress to a city, in trust, to dispose of and to convey the same to parties in possession thereof, on such conditions as the legislature shall prescribe, and a condition prescribed is the payment of previous taxes before a certain time, and the person in possession does not make such payment, there is no beneficiary of the trust, and the city acquires the legal title divested of the trust, and may convey the same to any party.

Dupond v. Barstow, 45 Cal. 446.

65. In an action by the wife against the husband to obtain a divorce, and to have property which the husband has deeded to a third person decreed to be held in trust for the husband, and adjudged to be community property, and awarded to her, the facts that such third person is a brother of the husband; that the latter held a letter of attorney from the former, who lived in the Atlantic states; that the husband managed the property as he pleased, and the brother took little or no interest in it; that the brother was a man of small means at his own home, while the property here was valuable, and that the brother was not present at the trial in which his title was involved, are some evidence tending to show that the husband is the true owner, and that the sale to the brother was fraudulent.

Brown v. Brown, 41 Cal. 88.

66. If one who has a grant of land from the government of Mexico dies intestate, and then a person, mistakenly believing himself the heir, sells a part of the land to another, who afterwards, under the belief that he has acquired a good title, and without any fraud, obtains a confirmation of the grant and a patent from the United States, the patent does not deprive the heirs at law of their interest in the property, but the patentee holds the legal title in trust for the true heirs.

Wilson v. Castro, 31 Cal. 420.

68. It matters not in such cases whether the respective patentees acted in good faith, and did not know that they occupied to the heirs at law the relation of trustees in equity, for the trust arises as matter of law, and is a constructive trust. Id.

69. The respective patentees in such cases are presumed as matter of law to have no-

tice of the rights of the true heirs, and that they hold the legal title of the land in trust for them. *Id.*

70. The fact that the true heirs in such case had notice of the proceedings taken by the respective patentees to obtain confirmation of the grant and patents for the same from the United States, but did not intervene to protect their rights, does not destroy the trust. *Id.*

71. The fact that the true heirs, in such case, were silent during the proceedings for confirmations and obtaining patents, does not estop them from asserting their equitable right to the land, and enforcing the trust. *Id.*

72. If a Mexican grant of land is confirmed to the wrong person, and a patent of the United States for the same issued to a person who did not own or claim to own the grant, and had no right to the patent, the patentee will be deemed to hold the legal title in trust for the real parties in interest.

Salmon v. Symonds, 30 Cal. 301.

73. The law in such cases raises a trust in favor of the party to whom the grant was made, or his successor in interest, whether the patent was taken in the name of the wrong party as a matter of convenience, or for any other reason. *Id.*

74. Where S., who located such warrant and had conveyed all his interest in the located land to H., and afterwards procured the patent to the same from the state, he thereby acquired no new interest in the land of an adverse character, subsequent to his conveyance to H., but after the patent he held the naked legal title in trust for H.

Bludworth v. Lake, 33 Cal. 256.

75. In such a case the law raises a trust in favor of the party holding the beneficial estate, which a court of equity will enforce, and this whether S. intended to commit a fraud in procuring the patent or not. *Id.*

76. The failure of the holder of the beneficial estate to appear before the register of the state land office and contest S.'s right to a patent, did not conclude him. *Id.*

77. R. was the owner of promissory notes overdue, and desired to have the same collected. Having no means to pay attorney fees and costs, he arranged with C., an attorney, to take the notes for collection. By the arrangement C. was to furnish money to pay costs and disbursements, and have the notes indorsed to him, and bring suit in his own name, and be reimbursed, both for his fees as attorney, and for advances by him made, out of the proceeds when collected. R. then indorsed the notes to C., who gave him a receipt as attorney, stating that he received the notes for collection. C. brought suit in his own name, obtained judgment, and had an execution issued, but the same was returned unsatisfied. C. then made an

arrangement with a brother of one of the defendants in the judgment, by which the brother conveyed to C. a tract of land, and C. assigned him the judgment and paid him a sum of money beside. C. was solvent and willing to pay R. whatever was due him on a settlement: *Held*, that there was no resulting trust in favor of R., and that C. did not hold the land conveyed to him in trust for R., and that R. was only entitled to recover the money due him on a fair settlement.

Robles v. Clarke, 25 Cal. 317.

78. It seems that where the portion of the purchase money furnished by the party claiming the benefit of a resulting trust is not an aliquot portion of the whole, there is no resulting trust corresponding with the portion of the purchased money so furnished. *Id.*

79. Where one supposed he had acquired the legal title to land in trust for certain devisees under a will, and under that belief, in discharge of his supposed trust, paid off incumbrances existing on the land, and expended money necessary for its preservation: *Held*, that he was entitled to be reimbursed what he had so paid, with interest, notwithstanding that he had not in fact acquired the legal title to the land.

Morrison v. Bowman, 29 Cal. 337.

80. Where plaintiff deposits money with defendant to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff.

Baker v. Joseph, 16 Cal. 173.

81. In such case, if defendant used the money himself, he would be like a guardian using his ward's money, and be regarded as a borrower upon the same terms upon which he could have loaned to others. *Id.*

82. Where a son conveys real estate to his father, the only consideration being a verbal agreement by the father to make a will and devise to the son certain property, and the father dies without having complied with the agreement, the agreement is void, the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property, it being shown that the transaction was not a gift.

Russ v. Mebius, 16 Cal. 350.

83. If, in such case, the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. *Id.*

84. The doctrine of resulting uses and trusts is founded upon mere implication

of law, and, generally, this implication can not be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. *Id.*

85. No implication of trust arises upon a purchase of property by a parent in the name of his child, as is the case when the purchase money is paid by one person, and the conveyance taken in the name of a stranger. *Prima facie*, such purchase is regarded as an advancement. *Id.*

86. The fact, that the stock was held in his name in trust for another, the transfer having been made simply to enable him to become an officer of the company, does not relieve him from responsibility.

Wolff v. St. Louis W. Co., 15 Cal. 319.

87. The trust, in such case, is only implied; and the seventeenth section of the corporation act of 1853 applies only to the trustee of an express trust. *Id.*

88. If a confidential agent, trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent will be held as trustee for the owner of the money. *Wells v. Robinson*, 13 Cal. 133.

89. Where a judgment debtor remains in possession of a "water ditch" after sheriff's sale, and collects the rents and profits during the six months following, he is a trustee of the fund for the purchaser at the sale, and, if the fund be in danger of loss, a bill in equity to account will lie.

Harris v. Reynolds, 13 Cal. 514.

90. Defendants were the holders of a mortgage, executed by the Yreka water company and B. to them, to secure advances made, and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use: *Hehl*, that the action lies, that defendants are in possession of money which in equity and conscience they are bound to pay over; *held, further*, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants can not now repudiate it, and

retain money which they would not otherwise have received.

Krentz v. Livingston, 15 Cal. 344.

91. The facts constituting an implied trust can be proved by parol testimony.

Millard v. Hathaway, 27 Cal. 119.

Bayles v. Baxter, 22 Id. 575.

92. An implied trust can not exist in respect to a claim of title to land, which claim is without foundation.

Mandeville v. Solomon, 33 Cal. 38.

93. If one of two tenants in common, who have the title to land in fee, buys in an outstanding claim of title which is void, without an agreement to purchase for the use of his co-tenants, an implied trust can not be raised in favor of his co-tenant as to the void claim thus purchased. *Id.*

94. Where S., as attorney for plaintiff, conducted certain judicial proceedings to acquire the title to the property of H., which title did not pass, or was defective by reason of defects in said judicial proceedings, and after said relation of attorney and client had ceased, S., having discovered said defects, negotiated and purchased with defendant's money said property from H., in the name of and for the benefit of plaintiff alone, as his attorney: *Hehl*, first, that in law plaintiff and defendant were strangers; and, second, that in the absence of actual fraud on the part of the defendant, his title so acquired could not be subordinated to a trust in favor of plaintiff.

Learned v. Haley, 34 Cal. 608.

95. If one party pays the purchase money of land, to which another party takes the title, a resulting trust arises in his favor who paid the consideration. If one pays only a part of the consideration, a trust is thereby created in his favor *pro tanto*.

Case v. Codding, 38 Cal. 191.

96. Where A. agrees with B. that he will purchase a sheriff's certificate of sale of a mining claim, and take an assignment in his own name for the joint benefit of both, and A. makes the purchase, B. furnishing his proportion of the money, and takes a sheriff's deed in his own name, a resulting trust arises, and A. holds a part of the property in trust for B. Such resulting trust can not be defeated by the fraud of A. in making this agreement and taking B.'s money, when, in fact, he had already, unknown to B., made the purchase. *Dikeman v. Norrie*, 36 Cal. 94.

97. When the lender of money has assigned to him, as collateral security, a note and mortgage for a much larger sum, on a third person, and afterwards agrees with the borrowers, that at the foreclosure sale of the mortgaged premises, he would purchase the property in the name of the borrowers, and would hold the same for their benefit, subject only to a lien for the money loaned,

upon faith in which promise, the borrowers take no further interest in the sale, but the lender, in his own name, purchases, and for a sum much less than the amount called for in the note, and makes the payment of the purchase, by crediting the amount of his bid, less the costs, on the judgment, a trust is thereby created in favor of the borrowers, and equity will decree them a conveyance, if it is in the power of the lender, to make a title unincumbered by any acts of his own.

Price v. Reeves, 38 Cal. 457.

98. A resulting trust can not be established in favor of a plaintiff upon a mere allegation of a verbal agreement, to the effect that he was to be jointly interested with the defendant in the purchase of the property, and in the absence of any averment that he paid a portion of the purchase money at the time of the purchase.

Roberts v. Ware, 40 Cal. 634.

99. The party claiming the benefit of the trust must show that the money was paid before, or at the time of the execution of the conveyance. Case v. Coddling, 38 Cal. 191.

100. Where a number of settlers on a Mexican grant deeded their claims and contributed money to trustees, under an agreement that the trustees were to buy up the grant title, and afterwards deed to each settler the land in his possession, and there was a dispute between two of the settlers as to the right to a deed of a particular piece: *Held*, that though the extent of one's possession would generally be indicated by his fences, it was the fact of actual possession, with or without a fence, which would entitle the possessor to a deed.

Slattery v. Hall, 43 Cal. 191.

101. If one bargains with another for the purchase of a tract of land, with the knowledge of a third person, who stands by, and becomes a party to it, by advancing a portion of the money, to enable the purchaser to complete the bargain, and if such third person then, without the knowledge of the purchaser, buys from the seller a portion of the same land, for which he obtains a conveyance, which is placed on record before the conveyance to the first purchaser, such third person will become the trustee of the first purchaser, and if he sells the land to a *bona fide* purchaser, without notice, becomes liable for the damage sustained.

Mercier v. Hemme, 50 Cal. 606.

102. Where K. had purchased the homestead of defendant and her husband at a foreclosure sale at their request, and received a certificate of sale: *Held*, that a judgment recovered against K. by the plaintiff's grantor, in an action to quiet title, did not bind the defendant, whether the money paid by K. at the foreclosure sale, was paid on his own account, or advanced as a loan to the mortgagors; that if the former was the case, the de-

fendant and her husband derived no title or interest from K., and consequently were not his privies; that if the latter were the case, a trust resulted in their favor, but that they were not bound by the judgment against their trustee; and *held, further*, that the doctrine of relation could not be resorted to for the purpose of establishing the title of K. as of the date of the foreclosure sale, and of thus holding the defendants bound by the judgment against him.

Shay v. McNamara, 54 Cal. 169.

103. The plaintiff, to secure the note of her husband (given for his own indebtedness), executed, jointly with him, a mortgage upon land previously conveyed to her by him, by deed of gift duly recorded; and, upon the foreclosure of the mortgage, the land was purchased by one B., for the husband, and with his money, and was by B. conveyed to him. Afterward, the husband, to secure an antecedent indebtedness, conveyed to the defendant, who took without actual notice of the premises: *Held*, first, that the husband, in purchasing the property through B. at the foreclosure sale, was but paying his own debt, and therefore took the title in trust for the plaintiff; and, second, that the records were sufficient to put the defendant upon inquiry, and he was bound at his peril to inform himself as to the facts, and that he therefore took subject to the trust.

Hassey v. Wilkie, 55 Cal. 525.

TRUSTEES.

104. A trustee can not purchase nor deal with the subject of the trust, nor purchase debts to be paid out of the trust fund, nor place himself in a position antagonistic to the trust.

Page v. Naglee, 6 Cal. 241.

105. The purchase by a trustee of a debt to be paid out of the trust fund, and causing an action to be brought and judgment obtained thereon in the name of another, if not a fraud in fact, was a violation of his duties as a trustee, and it makes no difference in this respect whether his trust is created by deed or mortgage, or whether the same was void or not.

Id.

106. Having accepted the trust and received the rents of the property, the trustee can not dispute its validity, particularly for his own benefit.

Id.

107. A judgment so obtained by a trustee is void in law and a nullity, and may be enjoined at the instance of the party executing the deed of trust to secure the payment of his debts out of the fund.

Id.

108. Trustees act for the benefit of others and not for themselves, and the fair exercise of their judgments should be a protection to them. Very supine negligence or willful default will render them liable; but to make them liable for mere errors of judgment

would tend to discourage good and prudent men from undertaking any trust.

Ellig v. Naglee, 9 Cal. 683.

109. A mortgagee who is also a trustee is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another *cestui que trust*. Gunter v. Janes, 9 Cal. 643.

110. A trustee can not by mingling trust moneys with other funds change his character from that of trustee to that of mere debtor. Id.

111. The act of either the trustee or *cestui que trust*, without the consent of the other, should not be permitted to change the relation or capacity of the parties. Id.

112. If the trustee does a wrongful act, then he, by the act, consents to be treated as a trespasser or debtor, at the option of the *cestui que trust*. Id.

113. A trustee should never be permitted to defeat the rights of the *cestui que trust*, so long as it is in the power of a court of equity to enforce them. Id.

114. In cases of express trust the capacity and that of the *cestui que trust* are created by trust, and all the legal rights and duties belonging to the one or the other are but the legitimate results contemplated by the contract itself, and flow from the capacity of each party thus created by the concurrence of the two wills. Id.

115. When trustees act with good faith in the management of the trust property, and without selfish motives, they are entitled to be treated by a court of equity with liberality and indulgence, and especially when they act under the advice of counsel.

Ellig v. Naglee, 9 Cal. 683.

116. A delay on their part in bringing suit to recover the rents of the trust estate, if subsequently approved by the *cestui que trust*, will excuse them. Id.

117. Money advanced by the trustees to the *cestui que trust* with the understanding that the same should be repaid out of the rents of the trust property, is a lien only upon the net incoming rents, and not a lien upon the trust property. Id.

118. The same is true respecting the charges for legal services of one of the trustees in the management of the trust property. The rents must be applied to the payment of such allowances until they are liquidated. Id.

119. The trustee of a naked trust has no power to mortgage the trust estate.

Griffin v. Blanchard, 17 Cal. 70.

120. Where the trustee of a naked trust is in actual possession of the trust estate, and conveys it, for a valuable consideration, to a purchaser without notice of the trust, the title of the purchaser will prevail. Id.

121. Discretionary power in the execution of a trust can not be delegated to a stranger by assignment.

Saunders v. Webber, 39 Cal. 287.

122. A trustee, acting under a declaration of trust, expending money not expressly authorized by the declaration, is not entitled to reimbursement out of the trust property, unless the expenditure was necessary for the preservation of the property, or to prevent the failure of the designated trusts; and a third person advancing money to the trustee stands in no better position with reference to the trust property. If the third person advance the money with the approbation of the grantors in the trust deed, he can only enforce the equitable lien thus obtained against the residuary interest coming to them after all the claims mentioned in the declaration are satisfied.

Beatty v. Clark, 20 Cal. 11.

123. The trustee of an express trust may maintain an action to prevent waste or trespass upon the land held in trust, or to recover possession thereof, without joining with him his *cestui que trust*; and should he refuse to do so, his *cestui que trust* may compel him by action to do so.

Tyler v. Houghton, 25 Cal. 26.

124. A trustee of an express trust is a person having such beneficial interest in the trust estate, within the meaning of the four hundred and sixty-eighth section of the practice act, as to enable him to apply for a mandamus to compel the surveyor-general to allow him to contest before him the application of a third person for the purchase of the land held in trust. Id.

125. If one who holds the legal title in trust for devisees under a will makes advances to pay incumbrances on the trust estate, and then sells portions of the property, a court of equity, in taking an account, will confirm the sales and charge the trustee with the proceeds.

Morrison v. Bowman, 20 Cal. 337.

126. Where one has received property or money in trust to hold for the security of sureties on a recognizance, a release by the sureties of all claim on the property, and a demand on the bailee, terminates the trust, and it then becomes his duty to return the property to the bailor.

Skidmore v. Taylor, 20 Cal. 619.

127. If two or more persons, as mining partners, claim and develop a mine situated upon land owned by a third person, and the partners authorize one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them.

Settembre v. Putman, 30 Cal. 490.

128. If one of several partners in a mine holds the legal title in the same in his own

right to the extent of his interest, and in trust for his copartners to the extent of their interests, a sale made by him, without the consent of his associates, of an undivided interest not exceeding in amount the interest held in his own right, to one who had no notice of the trust, will convey only the title of the grantor, and not the interest of the *cestui que trust*. Id.

129. A guardian of an infant, appointed by the probate court, is not a trustee of an express trust within the meaning of section 6 of the practice act.

Fox v. Minor, 32 Cal. 111.

130. If one is employed by another to assist him in obtaining a conveyance of property, and trust and confidence are reposed in him to enable him to aid his employer in the business, and he violates the confidence and obtains a conveyance of the property to himself, he will be held to be the trustee of his employer and will be compelled to convey to him.

Webster v. King, 33 Cal. 348.

131. If one who is in possession of land, claiming to own it, finds that the conveyance of his grantor is defective, and to cure the defect, hands a quitclaim of his grantor, with an abstract of title, to an attorney and searcher of titles, and requests them to procure his grantor to execute the deed, and they undertake to do so, but instead thereof induce the former grantor to deed to one of them, who then deeds an undivided half to the other, they will become the trustees of their employer, and will be compelled to execute a conveyance to him. Id.

132. A conveyance to one in trust, to rent or sell the property, and apply the proceeds towards the payment of a debt of the grantor, conveys the fee, and the trustee has power to convey the legal title.

Thompson v. McKay, 41 Cal. 221.

133. Where the deed creating the trust conveys the trust estate to two trustees, and empowers them, or the survivor of them, to sell and dispose of the trust estate or any part of it, a conveyance by one of the trustees, while the other is acting as such, does not convey the legal title.

Learned v. Wilson, 40 Cal. 349.

134. Where the deed creating the trust empowers the trustees or the survivor of them, "with the approbation or at the request of" the *cestui que trust*, "expressed in writing, to sell and dispose of the trust estate or any part of it," such approbation is manifested by joining in the execution and acknowledgment of a deed by which the trustee effects the sale and conveyance of the estate.

Wilton v. Palmer, 39 Cal. 456.

135. A deed so executed and acknowledged vests in the grantee the entire estate in the lands therein described, as fully as it was held by the grantors under the trust deed. Id.

136. Where the *cestui que trust* assented to the deed in compliance with the terms of the trust, she could not thereafter complain that there was no consideration, and her heirs have, in this respect, no greater rights than she possessed. Id.

137. If the owner of land who is indebted to another person conveys the same to a third person in trust, and the trustee makes a declaration of the trust in writing, in which it is stated that he holds the land in trust, to sell the same at the end of sixty days, and apply the proceeds to the payment of the debt of the *cestui que trust*, unless within said time the *cestui que trust* finds a purchaser who will pay the debt to the trustee, and then to convey the land to such purchaser upon such terms and conditions as the *cestui que trust* may dictate, the trustee has not the right to the possession of the land during the sixty days, nor afterwards.

Tyler v. Granger, 48 Cal. 259.

138. In such case, if the debt is satisfied before a sale and conveyance made by the trustee in pursuance of the terms of the trust, equity will compel the trustee to make a conveyance to the *cestui que trust* or his assigns upon the payment of the amount due the trustee for his services and expenses. Id.

139. In such case the *cestui que trust*, or his assigns, may continue in the use and possession of the property until a sale and conveyance of the same, in pursuance of the terms of the trust. Id.

140. A trustee to whom land is conveyed by a debtor, with power to sell and use the proceeds, in payment of the debt and the expenses of the trust, and whose powers and duties are prescribed by a declaration of trust in writing, and who merely holds the title in trust as security for the debt, can not maintain ejectment against the *cestui que trust* or his assigns, to recover the land. Id.

141. A judge who orders a sale, and has the power to confirm or set it aside, comes within the reason of the rule that trustees, strictly so called, and other fiduciaries, can not make a valid purchase of any part of the estate, in respect to which they have duties to perform. Tracy v. Colby, 55 Cal. 67.

142. H. purchased land at an administrator's sale, and, on the day he received his deed, conveyed an undivided half of the land to C., the probate judge, who ordered and confirmed the sale, the latter paying therefor one half of the purchase money paid by H. In an action brought by the heirs of the intestate against H. and C. (the complaint alleging that the sale to C. was made in pursuance of an agreement, or understanding, between him and H., entered into prior to the administrator's sale): *Held*, that the declarations of H., made prior to

the sale, but in the absence of C., that he was about to purchase for the benefit of himself and C., were admissible in evidence. *Id.*

143. A party who purchases trust property, with a knowledge of the trust, occupies the same position with the original trustee. *Price v. Reeves*, 38 Cal. 457.

144. When property is conveyed to a trustee to rent and sell, and apply the proceeds to the payment of a debt of the grantor, a bona fide purchaser at the trust sale acquires a good title, even if the trustee, before the sale, had received sufficient money from the rents to pay the trust debt.

Thompson v. McKay, 41 Cal. 221.

145. One who purchases land from another, who acquired the title fraudulently, and thereby became a trustee, in order to protect himself in his purchase, must have been ignorant of any of the facts constituting the fraud, not only at the time of his purchase, but when he paid the purchase money and obtained his deed.

Scott v. Umbarger, 41 Cal. 410.

146. A court of equity has jurisdiction to decree a sale of property held in trust for charitable or religious purposes, when, in its opinion, the objects of the trust would be more effectually carried out by such sale.

Aleman v. Wensinger, 40 Cal. 288.

147. A decree of sale of property held in trust for religious or charitable purposes should require from the trustee a bond, with sufficient security, to be approved by the court, for the proper application of the proceeds of the sale to the purposes of the trust, according to the directions of the decree, and reserving the authority of the court upon proper showing to require additional security, or to appoint another trustee, if circumstances make it necessary. *Id.*

CESTUI QUE TRUST.

148. A court of equity will not permit a cestui que trust who is insolvent, to enforce and collect through his trustee, a judgment against a party who holds a just and valid demand against the cestui que trust, which he has no means of enforcing or collecting if a set-off is denied.

Hobbs v. Duff, 23 Cal. 596.

149. Where an administrator, at his own sale, becomes the purchaser through another person of land of the estate, there are strong reasons for holding that the relation of trustee and cestui que trust is not, by the fact of the sale, shifted from the land to the proceeds of the sale, but that the administrator remains a trustee as to the land until the heir affirms the sale.

Boyd v. Blankman, 29 Cal. 19.

150. When the cestui que trust can identify the trust fund, either in its original or in a substituted form, he may elect to

hold the original or substituted property, or may hold the trustee personally liable; but if he can not identify the property he must rely on the personal liability of the trustee.

Lathrop v. Hampton, 31 Cal. 17.

151. If the testator during his life-time, mingled the money of the cestui que trust with his own, and after his death neither the trust money nor property into which it was converted can be identified in the hands of the executor, the cestui que trust has only a claim against the estate, which must be presented to the executor for allowance, as required by the probate act. *Id.*

151a. A bond given by the owner of land to a person, conditioned to convey the land to him in trust for the stockholders of a corporation and their successors in interest, in proportion to the amount of stock held by each, with power to the trustee to sell under the direction of the board of trustees of the corporation, makes the corporation the real cestui que trust, and, in equity, it will be so regarded.

Coleman v. S. R. T. R. Co., 49 Cal. 517.

ENFORCEMENT OF TRUST.

152. A party seeking to enforce a trust against the administrator of a trustee is compelled, from the complex nature of the cause, to ask relief in a court of equity. The claimant of specific property is not a creditor within the meaning of the probate law, and therefore he is not bound to present his claim to the administrator.

Gunter v. Janes, 9 Cal. 643.

153. If the plaintiff alleges an express trust, it is incumbent upon him to prove it as alleged, but such a trust may be proved by circumstances, and to ascertain the intention of the parties, the court will consider the then existing circumstances. *Id.*

154. H. and others are creditors and beneficiaries under the trust of the second class; M. & Co. are creditors of the trustee claiming a lien upon the trust property, but subordinate to the claims of H. and others; M. & Co. threatened to bring suit and subject to sale the trust property, in order to reach the residuary interest of the grantors in the trust deed after satisfaction of the preferred claimants under the trust; to prevent this, and in consideration of an agreement by M. & Co. not to sue, H. and others execute a power authorizing the trustee to mortgage the real property held by him in trust to M. & Co., as security for the payment of their claims; the mortgage was executed accordingly, but by mistake the condition of the mortgage did not follow the terms defining the power; the delay stipulated for by H. & Co., and recited in the power as its consideration, was obtained in full: *Held*, that equity will afford relief and enforce the mortgage; *held, further*, that under

a stipulation for an equitable settlement of the rights of the parties upon the facts presented, it is immaterial which course of the two above mentioned for the correction of the defect is pursued; that the result of either is to give M. & Co., the mortgagees, priority in the security which H. and others, donors of the power, possessed by the trust fund to the extent of the latter's respective claims, and to place these claims in the position which the claims of M. & Co. would have occupied but for the execution of the power and mortgage, H. and others preserving relatively to each other, in their postponed claims upon the trust fund, the order of their original classification. *Beatty v. Clark*, 20 Cal. 11.

155. A decree establishing a trust in favor of the *cestui que trust*, and making allowances to the trustees for moneys by him advanced, in and about the trust estate, and directing the trustee to execute a conveyance of the trust estate, to the *cestui que trust* before payment of the moneys advanced by the trustee, is erroneous. The payment of the money should be made a condition precedent to the conveyance.

Robles v. Clarke, 25 Cal. 317.

156. A court of equity will enforce a trust against all persons who, with notice of the trust, come into possession of the trust property, in the same and with like effect as against the original trustee.

Lathrop v. Bampton, 31 Cal. 17.

157. If an action to enforce a trust could not have been maintained against a testator, it can not be maintained against his executor. *Id.*

158. A trust assumed by a testator will not be enforced against the executor when the identity of the trust fund is entirely lost, and it is neither shown to be in the hands of the executor in its primary condition, nor that it was converted by his testator into the property, or any part of it, in the executor's possession. *Id.*

159. Before a *cestui que trust* can claim specific, real, or personal property in the enforcement of the trust, he must show that it is the identical trust property, or that it is the fruit or product thereof in a new form. *Id.*

160. Relief in equity would be limited to the contract, and a sale could only be made by enforcing the trust.

Koch v. Briggs, 14 Cal. 256.

161. From sales under such trusts there is no equity of redemption, for there is no forfeiture. Performance of the trust carries out the contract of the parties. *Id.*

162. The bill can not be maintained on the ground of a trust; for, assuming that the municipal lands within the city of San Francisco were conveyed by the city to the fund commissioners, in trust for her credit-

ors, and that this trust was a portion of a contract, or so connected with the obligation of a contract as that the property was unalterably fixed by that disposition of it, the city would still have the equity of redemption at least, and could dispose of the subject of the trust with the assent of the legislature, subject only to the rights of the creditors or their trustees; or the legislature, as the paramount political authority, could authorize or make such disposition. But the title thus disposed of would go to the grantee, who would hold the land, subject only to the trust. The city could enjoin a sale of the property by the grantee, or interfere with his use or possession of it until it became necessary to enforce the trust.

San Francisco v. Beilman, 17 Cal. 443.

163. This court has not decided that a voluntary appropriation by public act, of property or its proceeds by a municipal body, when such appropriation is not associated with a contract, as part of its obligation or sanction, removes such property, or proceeds from the control of the municipal body or the legislature, or that the terms of the act making the appropriation are unalterable. *Id.*

164. If the the confirmee, in presenting his claim, acted as agent, or trustee, or guardian, or in any other fiduciary capacity, a court of equity, upon a proper proceeding, will compel a transfer of the legal title to the principal, *cestui que trust*, ward, other party equitably entitled to the same, or subject it to the proper trusts in the confirmee's hands. It matters not whether the presentation were made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim; a court of equity will control the legal title in his hands so as to protect the just rights of others. But in ejectment the legal title must control. *Estrada v. Murphy*, 19 Cal. 248.

165. M. and C. were both residing on an unsurveyed quarter section of public land, and agreed that it should be purchased from the state in the name of C., and that each should furnish one half the money to make the purchase, and pay one half the expense, and own one half the land, and that when the purchase was made from the state, C. should convey one half to M. C. afterwards pre-empted the land, and received a patent for it from the United States: *Held*, that before M. could have C. declared his trustee, and compel him to convey to him one half the land, he must show that the land could have been purchased from the state by one of them; that is, that the state had held the title, and would have sold and conveyed it.

McCreary v. Casey, 50 Cal. 349.

166. If a person, who desires to procure an insurance on his life for the benefit of his children makes a parol contract with

another, by which the former is to pay the premiums, and the policy is to be made payable to the latter, who is to hold it in trust for the children, and collect and hold the proceeds in trust for them, a court of equity will enforce the trust; and if the trustee is an improper person to receive the money and execute the trust, will remove him and appoint another.

Silvey v. Hodgdon, 52 Cal. 363.

167. Such trust should be clearly and distinctly proved; but may be proved by parol evidence. Id.

168. A court of equity will lend no assistance towards perfecting a voluntary contract, for the creation of a trust, nor regard it as binding, so long as it remains executory. Estate of Webb, 49 Cal. 541.

170. If such contract is executed by a conveyance of the property in trust, so that nothing remains to be done by the grantor or donor, to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, even if there was no consideration, and a court of equity will enforce the trust. Id.

171. If one who has had his life insured writes to his father and sisters that the insurance was made for their benefit, but makes no assignment or delivery of the policy to them, it amounts only to an executory agreement to create a trust in future, and can not be enforced in equity. Id.

172. If the administrator of an estate makes a sale of land belonging to the estate, under an order of the probate court procured by him, and at the sale becomes the purchaser, through another person, who takes and holds the legal title in trust for the administrator, and afterwards conveys it to him, the heir retains such an equitable interest in the land as is assignable, and the assignee may maintain an action against the administrator to enforce a trust.

Boyd v. Bankman, 29 Cal. 19.

BREACH OF TRUST.

173. In case the execution of a valid conveyance can not be decreed, the beneficiaries of the trust are entitled to recover its value from those by whose wrongful acts it was lost. Price v. Reeves, 38 Cal. 457.

174. In such case the value of the property at the time of the commencement of the suit is the measure of damages. Id.

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UNITED STATES.

1. The government of the United States is one of delegated powers; the right to decide ultimately upon the extent of powers granted has not been delegated to the United States,

nor prohibited to the states, and is reserved to the states by the provisions of the tenth amendment to the constitution; and therefore the decision of the supreme court of the United States on such questions is not binding in the state courts.

Ferris v. Coover, 11 Cal. 175.

2. The United States have the right to acquire foreign territory by treaty, and, after its acquisition, congress may pass laws to protect the private rights of the inhabitants of the ceded territory, guaranteed to them by the treaty, and such laws are beyond the interference of state authority.

Gardiner v. Miller, 47 Cal. 570.

3. A person who has been convicted of a crime against the United States by a federal court, and confined in the prison of the state with the consent of the state, is deemed to be in the custody of the federal authorities.

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USE AND OCCUPATION.

1. A defendant who entered under a bond for a deed from the plaintiff can not set off his improvements against the damages for use and occupation.

Kilburn v. Ritchie, 2 Cal. 145.

2. The right to recover for use and occupation is founded alone on contract.

O'Conner v. Corbitt, 3 Cal. 370.

3. No action for use and occupation will lie where possession is adverse and tortious, for such possession excludes the idea

of a contract, which in all cases of this action must be either express or implied.

Sampson v. Shaeffer, 3 Cal. 166.

4. No action for rent will lie where the possession is adverse and tortious, for such possession excludes all idea of a contract.

Ramirez v. Murray, 5 Cal. 222.

5. In an action for use and occupation the court was asked to instruct the jury "that it was necessary, to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff; and if the jury believed defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant;" which the court refused: *Hehl*, that in this the court erred.

Sampson v. Shaeffer, 3 Cal. 196.

VACANCY.

ELECTIONS, 17, 21. | OFFICE, 45, 54-64, 65-
JUDGE, 16-18. | 71.

VALUE.

1. The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands.

State v. Moore, 12 Cal. 56.

2. In ascertaining whether an adequate price was paid for a piece of property at the time of its sale, the evidence should be restricted to the question of what its market value was at that time.

Henry v. Everts, 29 Cal. 610.

3. The estate of such street railroad company in the streets of the city is property capable of being enhanced in value by the widening of the street, and by such widening a substantial benefit may accrue to the railroad company.

Appeal of N. B. & M. R. Co., 32 Cal. 499.

4. In the absence of a contrary showing, the value of property at a given time will be presumed to be what it was then worth in the market. The rental of property is not an unerring criterion of its value, even in case the title be perfect, and it is less certain if the title be doubtful. It may be considered for the purpose of ascertaining the value of the property rented, but should not outweigh other and direct evidence to the same point.

Kisling v. Shaw, 33 Cal. 425.

VAN NESS ORDINANCE.

1. THEORY AND EFFECT.
13. POSSESSION UNDER.
39. TITLE UNDER.
55. EFFECT OF LEGISLATION.
59. ESTOPPEL UNDER.

ITS THEORY AND EFFECT.

1. The Van Ness ordinance was framed upon the theory that the better right to the bounty of the city vested with the first possessor, provided his possession was actual, and had not been voluntarily abandoned, and such prior actual possessor is entitled to the benefits of the ordinance, notwithstanding an interruption of his possession by the intrusion or trespass of others.

Hubbard v. Barry, 21 Cal. 321.

2. The object of the Van Ness ordinance was to protect actual possessors—parties seeking, by settlement, to build up homes within the city limits.

Wolf v. Baldwin, 19 Cal. 306.

3. The effect of the Van Ness ordinance was to release to actual possessors, who were such on the first of January, 1855, the title and interest of the land so possessed. This interest was only the equity—in other words, the title subject to the trusts in favor of the city's creditors—of such property as was conveyed by the deeds to the commissioners of the sinking fund and the commissioners of the funded debt; and parties holding under the ordinance hold, as to the property conveyed in these deeds, in subordination to this trust, just as the city itself holds.

Board of Education v. Fowler, 19 Cal. 11.

4. The decisions in this court affirming the validity of the act of 1858, giving effect to the Van Ness ordinance, affirmed.

San Francisco v. Beideman, 17 Cal. 443.

5. This reservation of the lots for school purposes was not a sale or disposition of them so as to pass to third persons the interest of the city, but was simply a reservation of the lots for a particular town purpose.

Board of Education v. Fowler, 19 Cal. 11.

6. If such reservation were an attempted sale, then there would be great force in the argument that such sale could only be by ordinance in the form of a law, and not by mere resolution.

Id.

7. The lots so set apart or reserved by the city for its own uses did not pass, under the Van Ness ordinance, to a person in actual possession of the same on the first of January, 1855.

Id.

8. Whatever right or title, if any, the United States had in the lands embraced within the Van Ness ordinance, by the act of congress of July 1, 1864, passed to the city of San Francisco, for the use and benefit

of the persons in whom vested the Van Ness ordinance title.

Pickett v. Hastings, 47 Cal. 269.

9. The act of the legislature passed May 11, 1858, ratifying and confirming the ordinance of the common council of San Francisco, approved June 20, 1855, by which the city relinquished the pueblo lands within its corporate limits to the possessors thereof, made said ordinance take effect by relation, at the date of its passage.

Id.

10. By the words "legal process," used in the Van Ness ordinance, passed by the common council of San Francisco, and afterwards ratified by the legislature, is meant an action brought in a court of competent jurisdiction.

Id.

11. The words "may be recovered," in the phrase "may be recovered by legal process," used in the Van Ness ordinance, mean "shall be recovered."

Id.

12. The right or interest which the city of San Francisco had in its pueblo lands, it held subject to the control of the legislature of the state, and congress could not control the city in any manner whatever in respect to the disposition of such pueblo land.

Id.

POSSESSION UNDER.

13. The actual possession, by virtue of which parties obtain the title of the city of San Francisco to the pueblo lands under the second section of the Van Ness ordinance, means a possession accompanied with the real and effectual enjoyment of the property; that possession which follows the subjection of the property to the will and dominion of the claimant, to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. An inclosure by an ordinary fence, of the premises, without residence thereon, or improvements, or cultivation, or other acts of ownership, is of itself insufficient.

14. A mere inclosure by a fence is of itself only the declaration of an intention to appropriate and possess the premises; but does not, unaccompanied with any other acts, constitute the actual possession contemplated by the ordinance.

Id.

15. The proof of actual possession in this case is insufficient to enable plaintiffs to recover.

Id.

16. The nature of the possession required by the Van Ness ordinance discussed.

Id.

17. The nature of the possession in this case stated, and the conclusion reached that such possession brings defendant within the ordinance.

Id.

18. The proviso in the Van Ness ordinance, "provided that such possession has been continued up to the time of the intro-

duction of the ordinance; or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process," only determines the right under the ordinance as between the actual possessor and a former possessor whom the first had forfeited, and does not apply to the case of the city resuming possession of her own property, or, what is the same thing, a possession held by her license and permission, and does not operate to exclude her from her rights, and to deny her the benefits of her present lawful possession from the mere fact that a long while before the passage of the ordinance some one else was in unlawful possession of her property, and was put out unlawfully by a succeeding trespasser having no better title.

Hubbard v. Sullivan, 18 Cal. 508.

19. The court can not say that a fence built in San Francisco in 1850, and made of posts and boards, **two boards and a cap high**, was not a substantial fence, or that this in connection with building and occupying a house within it, and exercising control over the land, did not constitute an actual possession within the meaning of the Van Ness ordinance. The testimony was sufficient to require its submission to the jury.

Satterlee v. Bliss, 36 Cal. 489.

20. It was not the possession mentioned in the Van Ness ordinance that **conferred title**, but the **legislative confirmation** of the ordinance.

Valentine v. Mahoney, 37 Cal. 389.

21. The title under the Van Ness ordinance **dates**, not from the time possession of the land was taken, but **from the time of the passage of the act** confirming the ordinance. Id.

22. It can not be said that one person acquired a better title than another under the Van Ness ordinance. The one having the requisite possession took the title; the other took nothing. Id.

23. The Van Ness ordinance vested the title in a person not in possession by himself or tenant on the first day of January, 1855, provided such person had been in possession before that time, and his possession had been interrupted by an intruder, and could be recovered by legal process. Id.

24. The court are inclined to consider the word "tenant," as used in the Van Ness ordinance, as meaning a conventional tenant.

Brooks v. Hyde, 37 Cal. 366.

25. The word "tenant," as used in the Van Ness ordinance, is not restricted in its meaning to a mere conventional tenant, as was intimated in Brooks v. Hyde, 37 Cal. 366, but applies to any party who holds the actual possession in subordination to another party, under or by virtue of an agreement, either express or implied.

Irvine v. Adler, 44 Cal. 559.

26. The actual possession of land in San Francisco within the boundaries of the Van Ness ordinance, **by a tenant**, was the possession of the landlord, so as to entitle him to the benefits of that ordinance, and the same result followed if the tenant assigned the lease, and his assignee took possession.

McLeran v. Benton, 43 Cal. 467.

27. If, on the first day of January, 1855, a person was in possession of land in San Francisco, within the limits of the Van Ness ordinance, as the tenant of another, or, as against such person, an intruder who could have been evicted by legal process, the person thus in possession did not acquire title by the Van Ness ordinance, but the title vested in the landlord, or the person who could have recovered possession.

Brooks v. Hyde, 37 Cal. 366.

28. A title under the Van Ness ordinance does not accrue unless there is an actual possession of the premises.

Judson v. Malloy, 40 Cal. 299.

29. Occasional and casual acts of dominion exercised over land in San Francisco, without cultivating it or surrounding it with a fence, are not sufficient to establish title under the Van Ness ordinance.

Pattee v. Moyle, 44 Cal. 363.

30. If a quitclaim deed of a homestead within the limits of the Van Ness ordinance, in San Francisco, was made before January 1, 1855, by the husband alone, and he remained in possession until after said date, the title to the land by virtue of said ordinance vested in the grantor.

Brooks v. Hyde, 37 Cal. 366.

31. A defendant in ejectment for a lot in San Francisco, who had possession of the premises on the first day of January, 1855, and thence up to the introduction of the Van Ness ordinance, can not invoke the protection of that ordinance when the issue in the action is whether his possession was acquired by an intrusion upon the prior rights of the plaintiff.

Keane v. Cannovan, 21 Cal. 291.

32. There is **no limit as to the quantity** of land to which parties in possession become entitled under the Van Ness ordinance. All that a claimant of lands within the limits of the city of San Francisco need show, to entitle him to hold as against the city, is that he was in actual possession of such lands on the first day of January, 1855.

San Francisco v. Beideman, 17 Cal. 443.

33. The Van Ness ordinance does not limit the **quantity of land** to which the actual possessor acquires the title of the city; and the courts can not annex any limitation, but can only hold parties to clear proof of their actual possession. Id.

Wolf v. Baldwin, 19 Cal. 306.

34. The **amount of land** in San Fran-

cisco which, under the Van Ness ordinance, passed to a person in the actual possession, was not limited to one block.

Davis v. Perley, 30 Cal. 630.

35. Possession of a lot in San Francisco within the limits covered by the Van Ness ordinance, by a fence of posts and wires, four wires passing through each post, the fence being sufficient to turn cattle, but not goats and hogs, is sufficient to entitle the possessor to the benefit of the Van Ness ordinance. Howell v. Rogers, 47 Cal. 291.

36. One who was in possession of land in San Francisco, embraced within the area of the Van Ness ordinance, and who was ousted by an intruder before the ordinance took effect, in order to have acquired the Van Ness ordinance title, must have recovered possession from the intruder by virtue of his prior possession, in a suit commenced before his right of action on his prior possession was barred by the statute of limitations. He could not recover from such intruder by virtue of any title vested in him by the ordinance, but the recovery upon the prior possession vested in him the Van Ness ordinance title. Pickett v. Hastings, 47 Cal. 269.

37. A party who, on the first day of January, 1855, was in the actual possession of land in San Francisco, within the area covered by the Van Ness ordinance, claiming the same adversely to another party, and who continued in such possession up to the twentieth of June, 1855, and up to the commencement of an action by such other, is *prima facie* entitled to the title conveyed by the Van Ness ordinance, and it devolves on the other party to show, not only that he was ousted from the possession, but also that his possession was such as within the language of the ordinance, may be recovered by legal process. Id.

38. Persons who, before the passage of the Van Ness ordinance, had been in possession of land embraced within the area covered by it, and who had been ousted by intruders, and who had no other right or title than such as proceeded from prior possession, must have commenced their actions within the time prescribed by the statute of limitations; and the statute commenced running, as to such persons, on the eleventh day of April, 1855. Id.

TITLE UNDER.

39. The Van Ness ordinance, and the act of the legislature confirming the same, vested in the possessors described in the ordinance, a title to the lands therein mentioned, as against the city of San Francisco.

Carleton v. Townsend, 28 Cal. 219.

40. One claiming title to land in San Francisco under the Van Ness ordinance must show that either he or his grantors were in the actual possession of the land on the first

of January, 1855, and thence next ensuing to the twentieth of June, 1855.

Borel v. Rollins, 30 Cal. 408.

41. One who entered on a tract of land in San Francisco, claiming the whole under a deed describing it by metes and bounds, and took actual possession of a part only, there being no adverse possession of the rest, acquired title under the Van Ness ordinance only to the extent of his actual and not of his constructive possession.

Davis v. Perley, 30 Cal. 630.

42. City and county of San Francisco v. Beideman, 17 Cal. 462, and Wolf v. Baldwin, 19 Id. 314, as to amount of land donated to each person in possession by the Van Ness ordinance, and as to the possession required by the ordinance. Id.

43. After the facts tending to prove actual possession are in evidence, it becomes a question of law whether those facts establish such actual possession as to confer title under the Van Ness ordinance. Id.

44. The inclosure of a lot in San Francisco by building a fence around it made of posts eight feet apart and five feet high, with two boards nailed on the same, without actual occupation or cultivation of the lot, did not give such possession of the same to the person inclosing as to pass the title to him under the Van Ness ordinance.

Polack v. McGrath, 32 Cal. 15.

45. The statute of March 11, 1858, ratifying the Van Ness ordinance, gave to those claiming under the ordinance no new or additional ground of recovery not embraced in the ordinance itself.

Pickett v. Hastings, 47 Cal. 269.

46. The persons entitled to the benefit of the Van Ness ordinance consist of four classes: First, those who hold title by virtue of the grants and conveyances enumerated in the ordinance; second, those who were in the actual possession by themselves, or by their tenants, on the first day of January, 1855, and so continued up to the twentieth day of June, 1855; third, those whose possession had been "interrupted by an intruder or a trespasser," and "had been recovered by legal process;" and, fourth, those whose possession had been "interrupted by an intruder or trespasser," and "may be recovered by legal process." Id.

47. The persons embraced in such fourth class are such as might thereafter recover possession from such intruder, and such recovery was not one which might be had on one of the grants or conveyances mentioned in the ordinance, but a recovery upon some right or title other than such grants or conveyances. Id.

48. Where a Mexican grant to land situated within the limits of the city and county of San Francisco was confirmed by

the board of United States land commissioners, and, together with the survey thereof, was in 1863 affirmed by the United States district court, and on appeal said survey was confirmed by the supreme court of the United States: *Hell*, that under the provisions of the act of congress approved June 14, 1860, as against those claiming under the party who contested said survey in the district court and on said appeal, and who claimed title thereto under the Van Ness ordinance, the successors in interest of the grantee of said land acquired thereby such title thereto, without a patent from the United States, as to maintain an action of ejectment therefor.

Bernal v. Lynch, 36 Cal. 135.

49. In such case, the decree confirming the survey was an adjudication that said land mentioned in the decree confirming the claim was properly located and correctly surveyed; and the contestant of said survey having made himself a party to the proceeding for its confirmation, neither he nor those claiming under him can be permitted to collaterally question the decree. *Id.*

50. Conceding that said contestant acquired to said land, by virtue of the Van Ness ordinance, all the title which the city of San Francisco held to it as pueblo land, yet, as under said act of congress of 1860, said decree of confirmation was made the equivalent of a patent issued by the United States, the confirmer thereby acquired the title of the United States, and his title so acquired was unaffected by the act of congress of 1864, entitled "an act to expedite the settlement of titles to lands in the state of California." The claim of the confirmer was, by the decree of confirmation, established as a *bona fide* claim, and was therefore within the protection accorded to *bona fide* claims by the fifth section of said last-named act. *Id.*

51. If, as plaintiff contends in this case, the act of 1851 passed the title of the lot on which the **marine hospital in San Francisco** stands to the commissioners of the funded debt, then plaintiff can not maintain his action, because, even conceding that the legislature had power to divest this title by the act of 1858 confirming the Van Ness ordinance, still that ordinance and that act only give the occupants the right, title and interest of the city in the land so held.

Hubbard v. Sullivan, 18 Cal. 508.

52. Assuming that the title to the lot in San Francisco, on which the United States marine hospital stands, was in said city at the time of the passage of the Van Ness ordinance, then a deed in 1852 by the mayor of said city, in pursuance of an order of the common council thereof, conveying said lot to the United States, was effectual as a license from the city to the United States to

enter upon and hold the lot, even if the deed was not operative to pass the title. *Id.*

53. Assuming that this deed did not pass the title to the United States, then by and upon the passage of the Van Ness ordinance of 1855 and the act of 1858 confirming it, the United States, holding the lot under the city through this deed as a license, and having actual possession, may be considered as in possession for the city, and entitled to protection against the antecedent possession of the plaintiff or his predecessor. *Id.*

54. *Semble*, that the deed to the commissioners of the funded debt of San Francisco under the act of 1851, for the payment of the city debts, is a conveyance in trust for the purposes for which it was executed, leaving the residuary interest, after satisfying or discharging the trust, in the city, and that, subject to this right of the commissioners—supposing it to exist—the city could still, without objection from third persons, control the subject of the trust. *Id.*

LEGISLATION UPON, EFFECT OF.

55. The act of the legislature of 1858, validating the *alcalde* grants, mentioned in the proviso to the second section of the Van Ness ordinance, is effectual for that purpose, whether the grants were originally valid or not, or whether the title of the city of San Francisco came by grant to the old pueblo, or had its origin, by presumption or grant, in the act of congress.

Payne v. Treadwell, 16 Cal. 220.

56. The act of the state legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and state, a title to the lands in said ordinance mentioned.

Hart v. Burnett, 15 Cal. 530.

57. It is not clear that the order of the board of supervisors of the city and county of San Francisco, repealing the Van Ness ordinance, before the passage of the act of 1858, confirming it, destroyed the power of the legislature to give due effect to the provisions of that ordinance. *Id.*

58. Assuming that this repealing order was effectual to defeat the rights claimed to have vested under the ordinance, then the property claimed would belong to the city, and plaintiff here could not recover. *Id.*

ESTOPPEL UNDER.

59. Plaintiff here, claiming, through the Van Ness ordinance, the right and title of the city, is not in a position to say that the city had, at the time of the passage of the

ordinance, no title or claim to the premises. *Hubbard v. Sullivan*, 18 Cal. 508.

DEED, 334.

LAND, 578.

EJECTMENT, 103, 127.

SAN FRANCISCO, 52.

EVIDENCE, 394.

VARIANCE

1. The rule that the *allegata* and *probata* must correspond is not abrogated by the civil practice act. The plaintiff must prove his contract as alleged in his complaint, or he is not entitled to recover.

Stout v. Coffin, 28 Cal. 65.

Hathaway v. Ryan, 35 Id. 188.

2. If the answer denies the contract as alleged in the complaint, the plaintiff must prove it substantially as alleged.

Tomlinson v. Monroe, 41 Cal. 94.

3. If the complaint avers that the defendant accepted a horse with an agreement to sell him and account for the proceeds, proof that the price of sale was limited to three hundred dollars is also a variance. Id.

4. If the complaint alleges that the defendant accepted a horse, upon an agreement to sell him for a price not less than three hundred dollars, testimony that the horse was left with the defendant with authority to sell him at not less than three hundred dollars is no proof that the defendant bound himself to sell at not less than three hundred dollars, and there is a variance. Id.

5. A material variance between the contract as alleged and proved, is a ground of nonsuit, unless the plaintiff obtains leave to amend his complaint, so as to make it conform to the proofs. Id.

6. It is sufficient, where the complaint alleged an express promise to pay a debt which was barred by the statute, to prove an acknowledgment of the debt from which a promise to pay is implied.

Farrell v. Palmer, 36 Cal. 187.

7. Where the complaint in an action on a bill of exchange describes it as payable to the order of A., whereas the bill offered in evidence is drawn payable to B., it is a variance to be taken advantage of by objecting to the evidence, or by a motion of nonsuit.

Farmer v. Cram, 7 Cal. 135.

8. In a foreclosure suit on bond and mortgage, the fact that the bond offered in proof on the trial does not answer the description of the bond as recited in the mortgage, is matter of identity merely and not properly matter of variance, the bond offered answering to the description given in the complaint.

Blankman v. Vallejo, 15 Cal. 638.

9. When the case made by plaintiff's proof

differs from the averments of the complaint, and defendant makes no objection to the introduction of the evidence on this ground, the supreme court will not reverse the judgment on account of the variance.

Marshall v. Ferguson, 23 Cal. 65.

10. If in the progress of a trial evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, the error is waived, and the court may instruct the jury in relation to the whole field of inquiry covered by the evidence.

Boyce v. Cal. Stage Co., 25 Cal. 460.

11. In an action against a common carrier for not complying with a contract to carry and deliver a draft the complaint alleged that it was signed "John Q. Jackson;" the proof showed that it was signed "John Q. Jackson, agent;" *Held*, that the variance was immaterial.

Zeigler v. Wells, 28 Cal. 263.

12. If the complaint charges that the defendant received goods as a common carrier and warehouseman, to be stored by him, and by the next boat to be by him shipped and carried and conveyed to the place of destination, and to be by him there safely delivered to the plaintiffs, proof that defendant received the goods in his warehouse as bailee, and shipped them according to plaintiffs' directions, does not entitle plaintiffs to recover.

Stout v. Coffin, 28 Cal. 65.

13. In such case plaintiffs can not recover without proof that the defendant contracted to convey the goods. Id.

14. If the complaint alleges a promise to pay money to a corporation, and the promise proved was made to a committee of a church, there is a fatal variance between the complaint and proof.

Christian Coll. v. Hendley, 49 Cal. 347.

15. If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial.

Corcoran v. Doll, 32 Cal. 82.

16. Where the plaintiff declared upon a note made by one M'Kinley and one Campbell, and gave in evidence a note signed by H. C. M'Kinley and C. Campbell & Co.; *Held*, that the variance was important and substantial, and that the district court erred in admitting it in evidence.

Cotes v. Campbell, 3 Cal. 191.

17. Where, in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer de-

nies such title, plaintiff must prove his title as averred, at least in substance, and he can not, against defendant's objection, recover on another and different title.

Eagan v. Delaney, 16 Cal. 85.

18. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for that surprise. Id.

19. Plaintiff sues to enjoin the enforcement of a judgment recovered by defendant T. against plaintiff G.; and avers that G. paid T. the amount of the judgment and procured an assignment of it to defendant V., who seeks to enforce it against plaintiff: *Hell*, that on the trial, plaintiff could not be permitted to show that G. paid the judgment with the joint funds of himself and plaintiff, because the complaint avers the payment to have been made by G.

Coffee v. Tevis, 17 Cal. 239.

20. Where the complaint avers that the note and mortgage sued on were made to E., a married woman, and by her assigned to plaintiff, he can not recover because the right to assign was in the husband; and this, too, where the proof was that both husband and wife assigned the note and mortgage. In chancery cases the party must recover according to the pleadings, and not the proof, where there is a variance.

Tryon v. Sutton, 13 Cal. 490.

21. A joint contract can not be given in evidence where the pleadings set up a several contract alone. Stearns v. Martin, 4 Cal. 227.

22. The plaintiff can not recover against "the corporation of Bradley, Berdan & Co." upon a written contract entered into between himself and "Bradley & Co.," as the contract was not made by the corporation.

Morrison v. Bradley, 5 Cal. 503.

23. The party making an allegation in a pleading that the sale of a mining claim under which he claims title was in writing is not thereby precluded from proving that the sale was a verbal one.

Patterson v. Keystone Co., 30 Cal. 360.

24. An allegation of actual fraud is not sustained by proof of a mistake.

Mercier v. Lewis, 39 Cal. 532.

25. An objection that there is a variance between the evidence and the cause of action stated in the complaint can not be made for the first time on motion for new trial, or in the supreme court.

Bell v. Knowles, 45 Cal. 193.

26. If the answer sets up as a defense, in an action on a bill of exchange, a total failure of consideration, and the proof shows a par-

tial failure only, the variance is not an available one under our practice.

Plato v. Vega, 31 Cal. 383.

27. A judgment will not be reversed on the ground of variance between the pleadings and proofs when the variance does not mislead the appellant to his prejudice.

Began v. O'Rielly, 32 Cal. 11.

28. The seventy-first section of the practice act, requiring immaterial variances between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be literally construed and carried out.

Id.

29. In an action under the statute for causing, by wrongful act, the death of a person where the allegation of the complaint was that defendants owned, as tenants in common, the entire block in front of which the accident occurred, and the proof was that they owned it in distinct parcels in severalty, the variance was immaterial.

Gay v. Winter, 34 Cal. 133.

APPEAL, 621.

CRIM. LAW, 1705.

EVIDENCE, 447, 636,

637.

FORCIBLE ENTRY, 117.

JUSTICE COURT, 77.

LIBEL, 3.

NONSUIT, 47, 57, 59.

PLEADING, 716, 814-

819, 899, 1054,

1083.

VENDOR AND PUR-

CHASER, 50.

VENDITIONI EXPNAS.

1. There is a distinction between cases where a *venditioni expnas* is issued for the sale of personal property, and where it is issued for the sale of land. A *venditioni* issued in the former case must go to the officer who made the seizure.

Clark v. Sawyer, 43 Cal. 133.

2. When a sheriff, who levies a *feri facias* on land, goes out of office before having sold, the court may, by an order, direct his successor to sell the property levied on, and a *venditioni expnas* may be issued to such successor, and he may then sell and execute a deed to the purchaser. Id.

3. In cases where a sheriff who has received a *feri facias*, and made a levy on land, goes out of office without having sold, if a *venditioni expnas* is issued for the enforcement of the lien, no reason is perceived why it must necessarily be executed by the retiring sheriff who made the levy, and not by his successor in office. Id.

VENDOR AND PURCHASER OF REAL PROPERTY.

1. GENERALLY.

13. PURCHASER WITHOUT NOTICE.

23. PURCHASER WITH NOTICE.
 41. CONTRACT TO CONVEY LAND.
 50. MISCELLANEOUS CASES.

GENERALLY.

1. Under a verbal contract of sale of real estate, the delivery of the title deeds is equivalent to a symbolical delivery of, and admission into, possession of the property, as between vendor and vendee, whatever might be its effect in conferring actual possession, in case the rights of third persons were concerned. *Tohler v. Folsom*, 1 Cal. 207.

2. A failure on the part of the vendee to pay the purchase money for two years and more does not forfeit his right under the contract, as the vendor may proceed to enforce the payment of the debt at any time after it becomes due.

Gouldin v. Buckelew, 4 Cal. 107.

3. When the vendor of real estate under a power of sale, reserved in the contract of sale, sells the property either at public or private sale, the surplus, beyond the purchase money due, belongs to the vendee, and the payment of it may be decreed by judgment of the court against the vendor.

Id.

4. The title of a purchaser under a sale on a decree of foreclosure can not be impeached in a collateral action for irregularity in the proceedings on the sale.

Nagle v. Macy, 9 Cal. 426.

5. One Clark, being in the occupation of certain premises, conveyed them to one Baker, who executed a mortgage back to Clark as security for the purchase money. The conveyance and mortgage were simultaneous acts, and both were of the premises in fee. The legal title was not at the time in Clark, and Baker afterward purchased it in, and then executed a mortgage to one Touchard: *Held*, that the title subsequently acquired by Baker inured to the benefit of his mortgagee, Clark, and that a purchaser under the decree foreclosing Touchard's mortgage could only claim in subordination to Clark.

Clark v. Baker, 14 Cal. 612.

6. One who buys land during the pendency of an action to recover possession of it, in which his grantor is a defendant, may thereafter continue the defense in the name of his grantor, or may cause himself to be substituted in his place.

Mastick v. Thorp, 29 Cal. 444.

7. The strict rule which applies at common law between heir and executor applies equally between vendor and vendee, and between mortgagor and mortgagee.

Sands v. Pfeiffer, 10 Cal. 258.

8. The doctrine of *Gaven v. Hagen*, 15 Cal. 208, that a vendee of real estate under a contract of purchase, which is silent as to the possession, has no right to the possession

until a performance of the conditions prescribed by the contract to entitle him to a deed, commented upon and questioned.

Willis v. Wozencraft, 22 Cal. 607.

9. The equitable lien held by the vendor of real estate after absolute conveyance thereof, is not subject to levy and sale on execution, nor is it the subject of private transfer.

Ross v. Heintzen, 36 Cal. 313.

10. Where a tenant in possession by deed of bargain and sale conveys the premises occupied by him, for a valuable consideration, and his vendee is subsequently ejected by the landlord, in the absence of warranty, or with only special warranty against the acts of the vendor, the vendee is not entitled to relief, either in law or equity, against his vendor. *Hastings v. O'Donnell*, 40 Cal. 148.

11. The statute does not run against a vendee in possession under an executory contract, so long as he remains in possession with the acquiescence of the vendor.

Love v. Watkins, 40 Cal. 547.

12. It is a general rule, applicable alike to conditional and absolute sales, that a second vendee is not entitled to stand in any better situation than his vendor in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general denomination of currency. Whether a further exception to the rule exists in favor of bona fide purchasers from the purchaser at a conditional sale, is not decided. *Putnam v. Lamphier*, 36 Cal. 151.

PURCHASER WITHOUT NOTICE.

13. A subsequent purchaser who seeks to avoid a prior deed of the same premises, made by his grantor, on the ground that he is a purchaser in good faith and without notice, must show affirmatively that he paid a good and valuable consideration.

Colton v. Seavey, 22 Cal. 496.

14. In a suit to try the title to land between two who are purchasers from the same grantor, where the oldest deed is neither acknowledged nor recorded, the one claiming under the prior unacknowledged and unrecorded deed will prevail, unless the fact appears that the second purchaser bought without notice for a valuable consideration. It is not sufficient for the second purchaser that there is no finding of the fact or evidence on the subject, but the fact must be made to appear affirmatively.

Landers v. Bolton, 26 Cal. 303.

15. If the apparent possession of land is consistent with the title appearing of record, it is not the duty of the purchaser to make an inquiry concerning the title beyond what the recording office shows.

Smith v. Yule, 31 Cal. 180.

16. If at the time of the sale of land the record title is in the vendor and the vendor

is in possession, and another person is also in possession, there is no presumption of title out of the vendor, and no inquiry need be made of the other person as to his right or title. *Id.*

17. If the owner of a lot in a city occupies part of a house on the same, and another person occupies the remainder of the house, and while this occupation of both continues, the owner conveys to this other person whose deed is not recorded, and then conveys to a third person whose deed is first recorded, the possession of the one having the unrecorded deed is not sufficient to give notice to the subsequent purchaser. *Id.*

18. The possession of a vendee with an unrecorded conveyance will not give notice to a subsequent purchaser whose conveyance is first recorded, unless such possession is open, notorious and exclusive. *Id.*

19. A vendee of land, holding an unrecorded deed, in order to protect himself against a subsequent *bona fide* purchaser, without further notice than is implied from possession by such vendee, must show a *possessio pedis*—an actual *bona fide* possession consistent with his written title; and this possession must be evidenced by an actual inclosure, or something equivalent, as showing the extent and the fact of the dominion and control of the premises.

Havens v. Dale, 18 Cal. 359.

20. If the purchasers from parties alleged to have been insolvent bought in good faith, it is immaterial how many valid prior liens may have attached on the property; they are entitled to what remains after the liens are satisfied; or they would have a right to pay the liens and keep the property; and a court of equity would not interfere in such a case. The prior liens, to the extent of their amount, diminish the value of the property, and meet so far the objection of inadequacy of price.

Kinder v. Macy, 7 Cal. 206.

21. The rule that a subsequent purchaser in good faith and for a valuable consideration, and whose deed is first recorded, will hold the land conveyed, as against a prior purchaser, only applies where both parties claim under the same grantor.

Long v. Dollarhide, 24 Cal. 218.

22. The burden of showing that he is a purchaser in good faith and for a valuable consideration is cast upon the one claiming under a second deed but recorded first in point of time, and the deed itself is not evidence of these facts, but they must be shown by other testimony. *Id.*

PURCHASER WITH NOTICE.

23. The actual adverse possession of land by another party, at the time of the conveyance, will be notice to the purchaser, whose grantors only claim by a possession

short of the period fixed by the statute of limitations.

Partridge v. McKinney, 10 Cal. 181.

24. The purchaser of an equitable title takes the property, subject to all existent equities. He is not within the rule which protects a *bona fide* purchaser for value, and without notice of the real or apparent title.

Dupont v. Wertheman, 10 Cal. 354.

25. A vendor's lien for the unpaid purchase price of land may be enforced against the vendee and his grantees who have notice of the vendor's equities.

Pell v. McElroy, 36 Cal. 268.

26. Where the vendee's agent, in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. May v. Borel, 12 Cal. 91.

27. A purchaser of land subsequent to a suit brought against his vendors to quiet title, and to a notice of his pendens filed in the county recorder's office, is a mere volunteer, who takes subject to any decree in the suit.

Gregory v. Haynes, 13 Cal. 591.

28. In the absence of any statutory regulation, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice, in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment.

Sampson v. Ohleyer, 22 Cal. 200.

29. Instruments, in the acknowledgment or certificate of acknowledgment to which there was a defect or omission, and which were copied into the proper book of record, in the proper county, prior to the thirtieth day of April, 1860, impart to purchasers and incumbancers, becoming such after said date, notice of their contents, the same as though the acknowledgment and certificate had been in due form of law.

Landers v. Bolton, 26 Cal. 393.

30. A person purchasing land in the possession of a person other than the grantor is charged by the law with the duty of inquiring by what right or title he holds.

Smith v. Yule, 31 Cal. 180.

31. January 26, 1855, a judgment against C. became a lien on his land. May 7, 1855, R. purchased the land at sheriff's sale made on an execution issued on the judgment, and received a certificate, and a duplicate was filed in the office of the recorder. A judgment in favor of H. against C. became a lien on the same land March 1, 1855. November 17, 1855, H. purchased at sheriff's sale, made on an execution issued on his judgment, the same land, and a certificate of sale was made to him, and a duplicate also filed. July 7, 1858, H. received and recorded a sheriff's

deed. November 15, 1861, P., the assignee of R.'s certificate, received and recorded a sheriff's deed. H. had no actual notice of the sale to R. H. was in possession under his purchase, and November 6, 1861, P. sued to recover possession. *Held*, that H. had constructive notice of the prior sale, and that P. was entitled to recover.

Page v. Rogers, 31 Cal. 293.

32. Great inadequacy of consideration paid for land, as compared with its actual value, is sufficient to put the purchaser upon notice of a fraud by his vendor, in the purchase thereof, at a constable's sale.

Argenti v. San Francisco, 6 Cal. 677.

33. A party is not bound by a judgment rendered in an action of ejectment where he has not received legal notice of the action. Such judgment is not evidence against him of paramount title in the plaintiff in ejectment. Mere cognizance of the existence of the action is not legal notice. To be available, the notice must apprise the party whose rights are to be affected, of what is required of him, and the consequences which may follow if he neglects to defend the action.

Peabody v. Phelps, 9 Cal. 213.

34. Where a person purchasing land has actual notice of a former conveyance of the same land, he is not entitled to protection as a purchaser for value without notice; nor are his partners in the purchase, although they at the time knew nothing of such purchase.

Stanley v. Green, 12 Cal. 148.

35. A party in taking a conveyance in the name of his associates must be considered as having acted as their agent, and notice to him is equally notice to them. *Id.*

36. In an action to recover the value of certain buildings standing on certain lots, proof that one C., through whom plaintiff claimed, on the day of his entry, applied to one of the defendants for his consent to the erection of the buildings, is sufficient evidence to authorize the jury to infer knowledge on the part of C. of defendant's title at the time of such entry.

Kneeland v. Wilson, 12 Cal. 241.

37. Possession of land, claiming title, and having an equitable title, is notice to purchaser, from one holding the legal title, sufficient to put him on inquiry as to the possessor's right.

Killey v. Wilson, 33 Cal. 691.

38. If one who buys without paying a valuable consideration, and with notice of a prior unrecorded deed given by his grantor to another person, records his deed before the record of such prior deed, and after the record of such prior deed sells to another, who pays a valuable consideration, and buys without actual notice of the prior deed, such last purchaser has constructive notice of the prior deed, and it will take precedence over his own. *Clark v. Sawyer*, 48 Cal. 133.

39. Where the whole title of all the parties rests upon possession only, and A. sells land to B. by conveyance not recorded, and afterwards, while B. is in possession, claiming the entire property as his own, A. sells to another party by deed, duly acknowledged and recorded, the second purchaser will be deemed to have purchased with notice, and will not, therefore, be considered a subsequent purchaser in good faith.

Partridge v. McKinney, 10 Cal. 181.

40. In such case, B. will be permitted to show the real state of the case as against the second vendee of A. But where B. has left his possession, and at the time when he is out of possession, A. sells to another, it is otherwise. Then such second vendee becomes an innocent purchaser for value. *Id.*

CONTRACTS TO CONVEY LAND.

41. An action will not lie to recover damages for the breach of a verbal contract to reconvey real estate formerly conveyed by the plaintiff to the defendant.

Bartlett v. Aitkin, 48 Cal. 405.

42. A contract, by which the Western Pacific railroad company sells a quarter section of the land, granted by congress to the Central Pacific company, to aid in the construction of a railroad, and agrees to execute to the purchaser a deed when the company receives a patent, vests in the purchaser a perfect equity, with an absolute right to a conveyance as soon as the company receives the patent. *Baldwin v. Morgan*, 50 Cal. 585.

43. If the owner of land contracts to sell the same to another upon the payment of a fixed sum in installments, and the owner dies before the last installment falls due, and the purchaser petitions the probate court for an order requiring his executor to make a conveyance of the land, and the court decrees such conveyance on the payment of the last installment and the expenses of procuring the decree and making the deed, the purchaser must pay such expenses before he can claim a deed.

Smith v. George, 52 Cal. 341.

44. P. and K. were partners in the business of carriage-making, and the firm owned, among other property, an interest in certain real estate evidenced by a contract of sale, in accordance with which most of the purchase money had been paid. P. agreed to sell out his interest in the firm to K. and tendered a written bill of sale of all his interest in the firm property, but did not offer a deed specially to convey his interest in the real estate: *Held*, in assumpsit by P. against K. for the sum agreed to be paid by K., that the evidence would not support a finding that a sufficient tender had been made to P.

Plath v. Kitzmuller, 52 Cal. 491.

45. In such a case it is not necessary to plead the statute of frauds. *Id.*

46. The Central Pacific railroad company issued and distributed a circular inviting people to settle and make improvements upon its lands, and promising those that should do so that they should be preferred as purchasers when the lands should be offered for sale. The defendant settled upon the land and filed his application to purchase the same in the office of the company as directed by the circular, and made valuable improvements thereon. The company, without notifying the defendant that the price of the lands had been fixed, and without giving him the option to purchase, sold the land to the plaintiff, who took with notice of the defendant's equities: *Held*, in an action of ejectment, wherein the defendant filed a cross-complaint, setting up the above facts and praying that the plaintiff be compelled to convey to him, that the offer of the company, and the acceptance by the defendant, created a valid contract, and that the plaintiff took the legal title impressed with a trust in favor of the defendant, and should be compelled to convey the same to the defendant. *Boyd v. Brinckin*, 55 Cal. 427.

47. An agreement to sell land, and, upon the payment of the purchase money, to execute a good and sufficient deed therefor, requires of the vendor to convey to the vendee the title to the land, and is not satisfied by the tender of a deed sufficient in form, when the vendor has, in fact, no title to convey. *Haynes v. White*, 55 Cal. 38.

48. A vendee can not maintain an action to recover his purchase money from a vendor, who has failed to perform his contract, until he has been evicted, or has surrendered, or offered to surrender the possession. *Id.*

49. If an attorney in fact, who is not authorized by the power to execute an absolute deed of the land of his principal, but who is authorized by the power to execute a contract for the sale of the land, sells the land, receives the purchase money, places the purchaser in possession, and executes an absolute deed for it, the transaction amounts to a valid verbal sale, and creates a valid equitable title in the purchaser and his successors in interest. *Jones v. Marks*, 47 Cal. 242.

MISCELLANEOUS CASES.

50. Where, in suit to enforce a verbal contract for the sale of land, the complaint averring a balance of four hundred dollars to be due defendant when he should make a deed, and describing the land by its position with reference to adjoining tracts, a demurrer was put in, and being overruled, and defendant not answering, final judgment, by default, was entered for plaintiff—evidence being taken as to the contract before a referee—that plaintiff pay defendant three hundred dollars, the latter to make a deed of the land, which was described in the judg-

ment by metes and bounds: *Held*, that the judgment is erroneous, both as to the amount adjudged due defendant and in describing the land by metes and bounds; that the judgment should have followed the complaint in both these particulars, and that the departure is material and fatal. The judgment must be reversed, even though the evidence taken before the referee shows the land described in the complaint and judgment to be the same. The evidence was taken *ex parte*, and the defendant has a right to be heard, the subject-matter being the establishment of the actual boundaries of land. On the return of the cause, plaintiff can either take judgment in accordance with the allegations of the complaint, or amend by inserting a more specific description of the property. *Holman v. Vallejo*, 19 Cal. 498.

51. C. purchased certain lots, and borrowed the purchase money from M., to whom, as security for the loan, C. caused a deed, in form absolute, to be made by the seller, upon the agreement that when payment should be made of the money loaned, and interest, together with certain additional advances made to C. by M., the latter should convey the lots to C. To discharge this indebtedness C. negotiated a loan of C. I. Co. of a sum sufficient to liquidate M.'s demands, and one thousand five hundred dollars in addition, upon the agreements, which were fully executed, that C. should pay M., and receive from him the promised conveyance, and simultaneously execute a mortgage of the lots to C. I. Co., to secure said last loan. Subsequently C. I. Co. assigned an unpaid balance of its demand, together with said mortgage, to plaintiff, who brought suit to foreclose, and make K. a party defendant, to whom C. being indebted at the time of said purchase, and by reason thereof, had promised K. to buy for her a lot and thereon build a house, which should become her property. While said lots stood in M.'s name, C. pointed out to K. one of them as the one intended, built a house thereon, and K. went into possession, and so continued until said suit. There never was, however, any accounting between C. and K. at any time, or any price agreed or fixed on said lot: *Held*, that this transaction created no equitable title in K. which could have been enforced in a court of equity, as against C., if the title had been in him, and is void as a defense to plaintiff's said action.

Doe v. Culverwell, 35 Cal. 291.

52. M. sold to H. a tract of land in a city, divided into lots, and was to receive ninety thousand dollars therefor, together with one half of the profits over ninety thousand dollars which H. might receive from a sale of the lots. The agreement was in writing, which recited that the legal title to the lots was outstanding in S., and H. was to purchase it from S. M. afterwards assigned

this contract to Moore, as security for his debt to Smith, and also conveyed the land to Moore, to be held by Moore in trust, subject to the agreement with H. M. died leaving a will, and after his death, Moore, out of money belonging to the estate, paid S. and obtained his deed for a part of the lots, and H. and Moore then conveyed these lots to N.: *Held*, that the executor of the will of M. could not maintain an action for a reconveyance, to the estate, of the lots sold to N., but must sue H. and Moore for an accounting, and that, in a proper case, the balance due the estate might be decreed to be a lien on the lots sold N.

Stewart v. Nevins, 50 Cal. 276.

53. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third party, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgage afterwards foreclosed his mortgage, and was about to sell the property. The purchaser, at the previous sale, obtained an injunction to stay the sale, which was afterwards dissolved by the court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee: *Held*, that this judgment, of the court below, was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action.

Allen v. Phelps, 4 Cal. 256.

54. If A., being in possession of land, contracts in writing with B., to sell and convey the land to B. and to deliver him possession at any time within five years upon the payment of the price agreed on, and C., with notice of this contract, obtains from A. a deed of the land before B. has paid the agreed price, B. may pay the agreed price to C. and equity will compel C. to convey the land to B. and to deliver him possession of the same.

Hildreth v. Shelton, 46 Cal. 382.

54a. The fact that such land is public land, held by A. under the possessory act of this state, is no defense. *Id.*

55. The breach of a bond for title does not discharge the debt due for the purchase money; and the plaintiff, on such breach, can either resort to a court of equity to enforce its performance or maintain an action at law.

Bagley v. Eaton, 5 Cal. 407.

56. The commencement of this action was a sufficient demand for a conveyance, and from that time the plaintiff is entitled to rents and profits.

Heinlin v. Martin, 53 Cal. 321.

57. In the view of a court of equity, in the case of an agreement to sell land, the title being retained by the vendor as security for the balance of the purchase money, if the vendor obtains his money and interest, he gets all he expected when he entered into the contract. *Keller v. Lewis*, 53 Cal. 113.

58. The remedy of the vendor in equity for the persistent default of the vendee is to institute proceedings to foreclose the right of the vendee to purchase, the decree usually giving the latter a definite time within which to perform. *Id.*

59. Under a lease from C. to D., the latter had the election to purchase the leased premises for the sum of six thousand dollars, payable at any time during the term, with interest from the date of the lease at the rate of one per cent. a month, previous payments of rent to be credited on the interest, the interest falling due after the election to be paid semi-annually on specified days, and if not paid when due, to be compounded at the rate of two per cent. a month, the lessee also to pay the taxes on the land imposed during the term. D., during the term, notified C. of his election to purchase, and tendered him the sum of six thousand dollars, and also offered to pay the taxes, but did not tender or offer to pay the interest then due; C. declined the tender, and denied the right of D. to purchase. In an action by D. for a specific performance, the complaint containing an offer "to comply with all the terms and conditions of the contract:" *Held*, that the denial by the defendant of the plaintiff's right to purchase was a waiver of the necessity of a tender before the suit was brought, and that the plaintiff was entitled to a specific performance upon the terms of paying to the defendant, besides the taxes, the sum of six thousand dollars, agreed upon, with interest from the date of the lease at the rate of one per cent. a month, after deducting the amounts paid for rent.

Dowd v. Clarke, 54 Cal. 48.

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VENDOR'S LIEN.

1. A vendor has a lien on the land sold, for the purchase money, unless he has taken

security for his payment, though he has executed the conveyance.

Salmon v. Hoffmann, 2 Cal. 138.

2. When the vendor of real estate has not fully conveyed the title, his position is analogous to that of a mortgagee, and he may enforce his rights in the same manner. *Id.*

3. The vendor of real estate has a **lien** on the same for the **unpaid purchase money**, and such lien attaches to the land equally whether it has been conveyed to the vendee or is only contracted to be conveyed.

Hill v. Grigsby, 32 Cal. 53.

4. This lien is not a specific, absolute charge upon the property, but merely a **personal privilege** of the vendor, and does not pass by a transfer of his claim for the purchase money.

Baum v. Grigsby, 21 Cal. 172.

5. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere **equitable right** to resort to it upon failure of payment by the vendee.

Sparks v. Hess, 15 Cal. 186.

6. It is a right which can only be asserted by one who has parted with his property. It is the personal privilege of the vendor, given solely for his security, and is in its nature unassignable.

Williams v. Young, 21 Cal. 227.

7. Equity raises no lien in respect to real estate, except that of a vendor for the purchase money.

Ellison v. Jackson W. Co., 12 Cal. 542.

8. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either **direct a sale** of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Sparks v. Hess*, 15 Cal. 186.

9. Where a party purchases a **bridge, toll-houses, stables**, and out-houses appurtenant, with the right and privilege of his vendor in and to a "dug road" made on each side of the bridge, neither the purchaser, nor those claiming under him with notice, can object to a decree enforcing the vendor's lien against the premises, that the "dug road" is public land, and that therefore nothing would pass under a sale upon the decree. *Id.*

10. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the purchase money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case, the vendor has parted with the legal and equitable title, and possesses only a bare right,

which is of no operative force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining after the application of the proceeds arising upon such sale. *Id.*

11. The distinction between the lien of a vendor, after absolute conveyance, and the lien of a vendor when the contract of sale is unexecuted, stated. In the latter case, the vendor holds the legal estate as security for the purchase money, and can assign his contract with the conveyance of the title, and in that event his assignee acquires the same rights and is subject to the same liabilities as himself. In the former case, the vendor retains a mere equity, which, to become of any force or effect, must be established by the decree of the court.

Baum v. Grigsby, 21 Cal. 172.

12. A vendor of real estate has a lien on the same in the hands of the administrator of the purchaser, for the unpaid purchase money.

Cahoon v. Robinson, 6 Cal. 225.

13. If one sells land to another, and executes an absolute conveyance, and does not receive payment, the grantee holds the land in trust for the grantor to the extent of the purchase money, which trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase money will be enforced. *Burt v. Wilson*, 28 Cal. 632.

14. The term within which payment may be made by the vendee, to extinguish the lien, is limited, and ends after a sale under a judgment for the purchase money.

Truebody v. Jacobson, 2 Cal. 269.

15. If a bond be given for the purchase money, and the time for payment be extended beyond the period named in the bond, this does not release the lien. *Id.*

16. The lien which springs out of a title bond, predicated upon the covenants for the purchase money, attaches upon the land, unless expressly reserved; and if such reservation be made, it lies upon the purchaser to show it. *Id.*

17. A vendor of real estate who makes no conveyance, but gives a bond, conditioned for the execution of a conveyance, on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien.

Gouldin v. Buckelew, 4 Cal. 107.

18. It is not the vendee's duty to hunt up the assignees; they must look after their interest when the vendor sues for his money. The only protection is payment of the money; this alone will release the bond. *Id.*

19. Taking a note for the purchase money does not affect the lien; and if part be paid the lien is good for the residue, and the vendee becomes a trustee for all that remains unpaid. So the lien attaching to the land, an assignment, with or without notice, can not affect the rights of the vendor. *Id.*

20. Where a vendor of land has taken the notes of the purchaser in payment, and brings his action thereon at law, he should in that action, if at all, unite his equitable claim for a foreclosure of his lien, the same tribunal administering both law and equity. *Walker v. Sedgwick*, 8 Cal. 393.

21. But in a case where the party brought his separate actions, first at law on the notes and then in equity for a foreclosure, before the adoption of this rule: *Held*, that he be allowed both his legal and equitable remedies, on payment of the costs of the latter suit. *Id.*

22. And if the defendant has a legal offset to the notes: *Held*, that he may plead it in the latter suit. *Id.*

23. The objection that the proceedings may become too complex by permitting different questions of law and equity to be settled in one suit, is not sufficiently strong to overcome the plain provisions of the statute and the substantial dictates of justice. *Id.*

24. The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Id.*

25. Plaintiff conveyed to Mrs. B., with the consent of her husband, a tract of land in trust for certain children of Mrs. B. by a former marriage. The conveyance acknowledged the payment of a consideration of twelve thousand dollars, but no part of the sum was actually paid. To secure its payment, together with other indebtedness, Mrs. B. and her husband executed their promissory notes and a mortgage upon other property also held by her in trust for her children. By a subsequent arrangement between the parties, these securities were given up and canceled, and other notes of the same character executed, with a mortgage upon both pieces of property to secure their payment. Plaintiff seeks to enforce a lien against the property for the amount of these notes: *Held*, that as the plaintiff had actual notice of the trust, no equity was created in his favor by the execution of the mortgage, and the mortgage as such was void; that his lien as vendor was waived by the acceptance of the personal security of Mrs. B.

and her husband, and his only remedy is personal action on the notes.

Griffin v. Blanchar, 17 Cal. 70.

26. The lien of the vendor is **not waived** in the absence of express agreement to that effect, **by the taking of the note or other personal security** of the vendee for the purchase money, but is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention.

Baum v. Grigsby, 21 Cal. 172.

27. The equitable lien which a vendor of real estate, after an absolute conveyance, has, for the unpaid purchase money, is **waived by the taking of a mortgage** to secure the same, although the mortgage is void and can not be enforced.

Camden v. Vail, 23 Cal. 633.

28. The fact that such mortgage is defective does not revive the lien, as it is the intention of the vendor which controls, and this is as well shown by an informal act as one properly done.

Hunt v. Waterman, 12 Cal. 301.

29. A vendor's lien **does not exist** in this state where a mortgage security is taken for the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or upon other land. *Id.*

30. P. conveyed lands to M. by deed, which was immediately recorded, without receiving any portion of the purchase money, although it was in said deed recited as having been fully paid. Subsequently M. conveyed said lands to K. and H. for a sound price. From a time long prior to said conveyance from P. to M., to and including said conveyance by M. to K. and H., P. had been in the actual and notorious possession of said lands. At the time of said conveyances, M. was in insolvent circumstances. Subsequently, P. brought action against M., K., and H. to recover personal judgment for said purchase money against M., and to enforce therefor as against K. and H. a vendor's lien on said lands. At the trial P. failed to prove any notice of his equities to K. and H. (who defended on the ground that they were purchasers in good faith, without notice), except such as was imparted to them by P.'s said continued possession of the lands: *Held*, that the judgment, which was for P., as demanded, against K. and H., was properly rendered. *Pell v. McElroy*, 36 Cal. 268.

31. Where the lien of the vendor for the purchase money has attached to property before it acquired its character of homestead, neither husband nor wife can hold the property except in subordination to the lien. But this lien gives no right of entry or title;

it is a mere right to subject the property to sale, the title and right of possession remaining with the debtors until such sale.

Williams v. Young, 17 Cal. 403.

32. The title to the property in such case can not be acquired by a sale under execution on a judgment at law for the purchase money in the usual form, because such a sale is not an enforcement of the lien. The title, which comes from an enforcement of the lien, can only inure after chancery proceedings to settle the sum due and have the lien declared and a sale decreed. Id.

33. In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution under a judgment at law previously obtained by the vendor against the purchaser for the amount due, and return of *nulla bona* to sustain the allegation of insolvency. Walker v. Sedgwick, 8 Cal. 398.

34. Any conduct which shows an intention on the part of a vendor of real estate to give up his lien for the purchase money, will be a bar to its assertion, and the acceptance of collateral security raises the presumption of such intention, though this presumption may be rebutted by evidence.

Griffin v. Blanchard, 17 Cal. 70.

35. If the mortgage was void, this fact does not invalidate the debt intended to be secured by the mortgage.

Shaver v. B. R. & A. Co., 10 Cal. 396.

36. A verbal agreement by the vendee to reconvey the land to the vendor if he does not pay the purchase price does not prevent the enforcement of a vendor's lien.

Gallagher v. Mars, 50 Cal. 23.

37. If the vendor sells and conveys land, with a verbal agreement that the vendee shall pay the purchase price when demanded, the bringing of an action to enforce a vendor's lien is a sufficient demand, and the plaintiff is entitled to have his lien enforced. Id.

38. In 1854, Weber sold certain lands in San Joaquin county to Meroux, who paid part of the purchase price and gave his note for the balance. In 1858, Meroux died intestate, leaving a widow and two sons aged three and five years respectively. The estate was never administered upon. A year afterwards Weber, in an action against the widow and the children, the latter appearing by their guardian *ad litem*, obtained a decree of the district court enforcing a vendor's lien upon the land, in pursuance of which the land was subsequently sold to Weber: Held, that the decree, so far as it affected the title of the children by succession, was valid, and they could not, after attaining majority, maintain ejectment for the land.

Meroux v. Weber, 53 Cal. 130.

39. The acceptance of a distinct and separate security for the purchase money is,

prima facie, a waiver of the vendor's lien, but it is only *prima facie*, and may be rebutted. In this case the plaintiff manifested throughout an intention to rely upon the land as security for the purchase money, and his vendor's lien was therefore not waived.

Remington v. Higgins, 54 Cal. 620.

ASSIGNMENT, 76.

ATTACHMENT, 19, 23.

HOMESTEAD, 53.

MECHANIC'S LIEN, 68.

MORTGAGE, 14.

PLEADING, 1473-1476.

VENDOR AND PURCHASER, 9, 25, 53.

VENUE IN CIVIL ACTION.

3. WHERE ACTION TO BE TRIED.

9. RESIDENCE OF PARTIES.

11. MOTION TO CHANGE.

Convenience of Witnesses.

20. INCAPACITY OR BIAS OF JUDGE.

27. PRACTICE.

27. *Motion, When Made.*

32. *Plaintiff's Counter Motion.*

32. *Convenience of Witnesses.*

40. *Motion, May be Waived.*

44. *Granting Motion Discretionary.*

48. *When Imperative.*

54. *Appeal from Order.*

57. *Removing to Federal Courts.*

63. PROBATE PROCEEDINGS.

67. TRANSFER.

1. The peculiar condition of things in California is unfavorable to change of the place of trial, or delays in the administration of justice. Sloan v. Smith, 3 Cal. 410.

2. These applications often result in a loss of all the rights involved. Id.

WHERE ACTIONS TO BE TRIED.

3. Mining claims are real estate within the meaning of, and are governed by the provisions of this section.

Watts v. White, 13 Cal. 321; 23 Id. 506.

4. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy; and in such case there is no discretion in the court, the change being matter of right. Id.

5. Defendant has a right to have the action tried in the county of his residence, except in certain cases specified in the statute.

Loehr v. Latham, 15 Cal. 418.

6. Under the act of congress of 1789 and the statute of this state of 1855, respecting the transfer of actions from a state to a United States court, the court to whom the application is made must, before granting it, be satisfied that the application is founded upon facts which entitle the applicant to the order, and for this purpose has the right to inquire into the truth of the facts set

forth in the petition, as well as to investigate the sufficiency of the security.

Orosco v. Gagliardo, 22 Cal. 83.

7. To entitle a defendant, sued in the wrong county, to a change of place of trial, demand in writing must be made, as required by the code of civil procedure, section 396. Notice of a motion to change the place of trial is not such a demand.

Estrada v. Oreña, 54 Cal. 407.

8. Upon a motion to change the place of trial, in an action against a sheriff and his sureties, on the ground that the action was not brought in the proper county: *Held*, that the affidavit of merits (quoted in the opinion) was sufficient; and also that it was not necessary for affidavits to be filed by the other defendants.

Rowland v. Coyne, 55 Cal. 1.

RESIDENCE OF PARTIES.

9. The act of 1858 authorizes suit to be brought in any county designated in the complaint, when the residence of defendant is unknown. But to resist the application of defendant to change the place of trial, on the ground that he resides in a different county, plaintiff must show that he used all due diligence to ascertain the residence.

Loehr v. Latham, 15 Cal. 418.

10. The principal place of business of a corporation is its residence within the meaning of that term, as used in section 20 of the practice act, fixing the place of trial.

Jenkins v. California S. Co., 22 Cal. 537.

MOTION TO CHANGE PLACE OF TRIAL.

Prejudice.

11. Where one hundred citizens united in employing counsel to prosecute the defendant: *Held*, to be a sufficient ground for a change of venue. *People v. Lee*, 5 Cal. 353.

12. The granting or refusing of a change of venue, by reason of the bias and prejudice of the citizens of the county, is discretionary with the court, subject to revision only in cases of abuse.

Watson v. Whitney, 23 Cal. 375.

13. The right to move for a change of place of trial is not waived, if the notice of the motion is given at the same time at which the answer and demurrer are filed and served.

Mahe v. Reynolds, 38 Cal. 560.

Convenience of Witnesses.

15. If the action is brought in a county other than that in which the defendant resides, and he moves for a change of venue on this ground, the plaintiff, if he wishes to have the action tried in the county where the action was brought, on account of the convenience of witnesses, must make a counter

motion to have it retained. He can not permit the venue to be changed, and then move to return the case to another county.

Edwards v. S. P. R. Co., 48 Cal. 400.

16. When a defendant moves to change the place of trial to the county where he resides, the court should deny the motion, if it appears that the convenience of witnesses requires the cause to be tried in the county where it is pending.

Hall v. C. P. R. Co., 49 Cal. 454.

17. When the action is brought in a county other than that in which the defendant resides, he has a *prima facie* right to have the venue changed to the county of his residence, but this right is subject to the power of the court to retain the cause for trial in the county in which it was brought, if the convenience of witnesses and ends of justice require it. *Hanchett v. Finch*, 47 Cal. 192.

18. The court below may exercise its discretion on an application to change the place of trial on account of the convenience of witnesses, and where there is a conflict in the affidavits its ruling will not be disturbed, unless it appears that this discretion has been abused. *Id.*

19. The mere preponderance in number of witnesses on one side is not necessarily decisive of the application. *Id.*

INCAPACITY OR BIAS OF JUDGE.

20. If a judge is related to either of the parties to an action, by consanguinity or affinity within the third degree, he is disqualified from acting in the case in any matter except in the arrangement of the calendar or regulation of the order of business. Even if no objection is made, he has no right to act, and ought of his own motion to decline to sit as judge. In such case, an order of the judge dismissing the action is *void*, on the ground of his incapacity to act.

People v. De la Guerra, 24 Cal. 73.

De la Guerra v. Barton, 23 *Id.* 592.

21. Probate judge who has a power of attorney from any of the persons claiming to be heirs of the deceased, authorizing him to receive for them any money or property to which they might be entitled from the estate, and also letters offering him a percentage upon said proceeds coming to said alleged heir, is interested in the estate, and can not act as judge in any matter pertaining to such estate, except to arrange the calendar or change the venue.

Estate of White, 37 Cal. 190.

22. When the probate judge is interested in an estate, or in money coming to the heirs therefrom, he has jurisdiction to act as judge therein, and should grant a change of venue. It is no excuse for refusing a change of venue in such case to say that the judge decided correctly upon the matter before him, after refusing such change of venue. *Id.*

23. The exhibition by a judge of **partisan feeling**, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgment of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue, on the ground that the judge was disqualified from sitting. The law establishes a different rule for determining the qualification of judges from that applied to jurors.

McCauley v. Weller, 12 Cal. 500.

24. **Bias or prejudice** on part of the judge constitutes no legal incapacity to sit on trial of a cause, nor is it a sufficient ground to authorize a change of place of trial.

People v. Williams, 24 Cal. 31.

25. The fact alone, that the judge on a previous trial of the same cause made an erroneous ruling, is no evidence of the existence of bias or prejudice in his mind. *Id.*

26. An affidavit made on application to change the place of trial, which states "that the judge, as the affiant is informed, and verily believes, has frequently stated that he believes the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere charge upon information and belief, and does not show how the information was obtained, or upon what the belief was based. *Id.*

PRACTICE.

Motion, When Made.

27. The motion should be made **before or at the time of filing a demurrer**, when the grounds are apparent on the face of the complaint (Pearkes v. Freer, 9 Cal. 642); or before, as in the answer. It comes too late after an answer to the merits.

Tooms v. Randall, 3 Cal. 438.
Reys v. Sanford, 5 Id. 117.

28. It is not error in the court, on a trial for murder, to postpone the consideration of a motion on the part of the defendant, for a change of venue, until an attempt is made to impanel a jury.

People v. Plummer, 9 Cal. 298.

29. Where a motion is thus postponed, and counsel for prisoner afterwards declines, on the intimation of the court, to renew the motion, he can not take advantage, on appeal, of the failure of the court to order a change of venue. *Id.*

30. Where a motion was made to change the venue, on the ground that neither of the parties resided in the district; where no objection was made in the answer, and after nearly six months had elapsed before the ob-

jection was taken: *Held*, that the motion came too late, and was properly rejected.

Tooms v. Randall, 3 Cal. 438.

31. Under the provisions of title IV, part II, code of civil procedure, in an action to determine rights to real estate against several parties, each defendant is entitled as a matter of right to have the action tried in the county in which the real estate is situated, and it is not necessary that all the defendants should join in claiming such right. O'Neil v. O'Neil, 54 Cal. 187.

Plaintiff's Counter Motion.

Convenience of Witnesses.

32. As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist, by a counter motion, to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of defendant, but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion.

Loehr v. Latham, 15 Cal. 418.

33. On motion by defendant to change the place of trial, on ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon application for this cause to transfer the trial to another county. The affidavit must state the names of the witnesses. *Id.*

34. The practice upon this subject being unsettled, the parties, on the return of the cause, should have an opportunity of fully presenting the merits of the motion. *Id.*

35. It will operate against the application for a change of venue where the affidavit of the party shows that all the witnesses of his adversary reside in the place from whence he applies to move the trial.

Sloan v. Smith, 3 Cal. 410.

36. The affidavit on motion for change of venue **should state the facts** in such a manner as to enable the court to draw its own inference whether or not an impartial trial could be had in the particular case. If it fail in this, it will not warrant the court in changing the venue. *Id.*

37. On application by defendant to change the place of trial on the ground of residence, the plaintiff may resist by showing that the convenience of witnesses and the ends of justice will be promoted by the retention of the cause, and the court may, on a proper

showing of such facts, refuse to change the venue.

Jenkins v. California S. Co., 22 Cal. 537.

38. Where a change of venue is asked by defendant on the ground of his **residence**, if the convenience of witnesses requires that the action should be retained for trial in the court where it was commenced, the plaintiff should present that fact in opposition to the motion, and if he neglects to do so, it is doubtful whether he can afterwards apply to the court to which it has thus been removed to have it sent back again.

Pierson v. McCahill, 22 Cal. 127.

39. Time to file counter affidavits, on a motion to change the place of trial, is a matter of discretion in the lower court, and will not be reviewed on appeal. Id.

Motion may be Waived.

40. The right is one which a party may waive, either expressly or by implication.

Pearkes v. Freer, 9 Cal. 642.

41. It is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. Watt v. White, 13 Cal. 321.

Overruling Vallejo v. Randall, 5 Cal. 462.

42. An objection to the venue, if made on grounds appearing in the complaint, must be made at or before the time of filing the demurrer, or it will be deemed waived.

Pearkes v. Freer, 9 Cal. 642.

43. If a defendant, sued in a county where he does not reside, demurs to the complaint, and the demurrer is sustained, and he there demurs to an amended complaint before giving notice of a motion for change of venue, he waives the right to have the case tried in the county where he resides.

Jones v. Frost, 28 Cal. 245.

Granting Motion Discretionary.

44. The granting of a change of venue is discretionary with the court below, subject to review only in the cases of gross abuse.

People v. Fisher, 6 Cal. 154.

Sloan v. Smith, 3 Id. 410.

45. The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial court, and subject to review only in cases of abuse.

Pierson v. McCahill, 22 Cal. 127.

46. Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still if the court grants the application, it has acted judicially upon a matter within its cognizance and where it was clothed with discretion, and by the order the place of trial becomes changed.

People v. Sexton, 24 Cal. 78.

47. An order refusing a change of venue on the application of defendant in a criminal prosecution will only be reviewed in cases of gross abuse of discretion.

People v. Fisher, 6 Cal. 154.

When Imperative.

48. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case, there is no discretion in the court, the change being a matter of right.

Watts v. White, 13 Cal. 321.

49. Where the same fraudulent debtor confesses several fraudulent judgments in several courts, it would not be necessary for a creditor to bring a different suit in each different court. And where there is an exception to the general rule, it is the business of the plaintiff to show in his complaint that he comes within it.

Uhlfelder v. Levy, 9 Cal. 607.

50. The court is not bound by its own motion, to change the venue.

Vallejo v. Randall, 5 Cal. 461.

Overruled so far as it conflicts with Watts v. White, 13 Cal. 321.

51. If the defendant procures a change of venue the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried.

Brooks v. Douglass, 32 Cal. 208.

52. When two motions are pending in an action at the same time, one to change the venue, and one to dismiss, an entry of a judgment of dismissal, without any formal order denying the motion to change the venue, is a virtual denial of the same.

People v. De la Guerra, 24 Cal. 73.

53. The court acts judicially upon a matter within its own cognizance, in making the order changing the venue.

People v. Sexton, 24 Cal. 83.

Appeal from Order.

54. An appeal from an order refusing to change the venue of an action operates as a stay of all further proceedings in the case in the court below until such an appeal is determined. Pierson v. McCahill, 23 Cal. 249.

55. It is error in the court to refuse to change the place of trial upon a proper showing. Grewell v. Walden, 23 Cal. 165.

56. This court having complete appellate power over the right to grant a change of venue, it is not to be supposed that it will trust implicitly in the discretion of inferior courts.

People v. Lee, 5 Cal. 353.

Removing to the Federal Courts.

57. To authorize a transfer of an action, in which there are several defendants, from a

state court to a United States court, under the provisions of the judiciary act of 1789, on the ground of the **alienage** of parties defendant, all of the defendants must be within the description of the persons entitled to a transfer, and all must join in the application.

Calderwood v. Hager, 20 Cal. 167.

58. Thus, where in an action of ejectment commenced in a state court against several defendants, some of whom were citizens of the United States and of this state, and one of whom was an **alien** residing in the state, an application was made by the alien defendant for a transfer of the case to the United States circuit court under the provisions of said act, which was denied: *Held*, that the denial was proper.

Id.

59. All defendants in an action in a state court **must be aliens** or citizens of another state to authorize the removal of the cause to a federal court for trial.

Calderwood v. Braly, 28 Cal. 97.

60. An **appeal** from the supreme court of this state to the **supreme court of the United States** is taken within ten days "after rendering the judgment" within the meaning of these terms, as used in the act of congress, and operates as a *superior*, if the writ of error is sued out and lodged with the clerk and the proper security given, within ten days from the time a petition for rehearing is denied.

Magraw v. McGlynn, 32 Cal. 257.

61. C. being one of four defendants in ejectment, moved to transfer the action to a United States court on the ground of his **alienage**, and an order was made staying all proceedings until motion could be heard. Before the hearing of the motion plaintiffs dismissed the action as to C. and one other defendant, and took judgment against the other two, who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C. having appealed from that order and from the judgment: *Held*, that the denial of the motion was proper, as after C.'s dismissal it could not properly be entertained.

Reed v. Calderwood, 22 Cal. 463.

62. One of several parties, defendants to a cause pending in one of the courts of this state, filed his affidavit for its removal to the United States district court, on the ground that he was an **alien**: *Held*, that it must appear that the contest was between a citizen of this state, and a citizen of a foreign state.

Welch v. Tennent, 4 Cal. 203.

Greely v. Townsend, 25 Id. 604.

PROBATE PROCEEDINGS.

63. Proceedings for the settlement of an estate, and matters connected therewith, are

not civil actions within the meaning of title II of the practice act, so as to transfer them from one county to another.

Estate of Scott, 15 Cal. 220.

64. The probate court of a county has jurisdiction to change the place of trial of an issue of fact to the probate court of another county.

People v. Almy, 46 Cal. 245.

65. When the place of trial of an issue of fact in the probate court is changed to another county, the clerk of the court to which the case is sent can certify a transcript of the proceedings and result of the trial back, and the court from which the case was sent can enter the appropriate judgment.

Id.

66. When an issue of fact is joined in a probate court, as to the competency of a testator to make a will, and three trials, had at great expense, in which the juries disagree, have shown that an impartial jury can not be obtained, it is not error to change the venue.

Id.

TRANSFER.

67. The plaintiff commenced an action of forcible entry and detainer against the defendant, in a justice's court. The justice, instead of trying the case, certified it to the district court: *Held*, that the transfer was illegal, and could not defeat the plaintiff's rights by operating a discontinuance.

Larue v. Gaskins, 5 Cal. 507.

APPEAL, 101.	FORCIBLE ENTRY,
CONSTITUTIONAL	116.
LAW, 160.	JUSTICE COURT, 15,
CRIMINAL LAW, 235,	57-63.
386, 594, 1387, 1695.	MANDATE, 150.

VERDICT.

1. GENERALLY.
53. SPECIAL VERDICT.
70. MONEY VERDICT.
73. CHANCE VERDICT.
79. ENTRY OF VERDICT.
90. IMPEACHING VERDICT.
97. SETTING ASIDE VERDICT.

GENERALLY.

1. A general verdict will conclude all parties who do not answer separately or demand separate verdicts.

Winans v. Christy, 4 Cal. 70.

Ellis v. Jeans, 7 Id. 409.

2. Where a verdict is general, its effect will be limited to such issues as necessarily controlled the action of the jury.

Id.

3. A general verdict does not operate as an **estoppel**, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues.

McDonald v. B. R. & A. Co., 15 Cal. 145.

4. A verdict found on any fact or title distinctly put in issue is **conclusive in another action** between the same parties or their privies in respect of the same fact or title.

Kidd v. Laird, 15 Cal. 161.

5. But the fact or title **must be material and relevant**; must be distinctly in issue; must be tried by the jury, and constitute the basis of their verdict; and, unless specially found, must have been necessarily passed upon by the jury. Id.

6. Where the complaint alleges a trespass on a dam site and dam in the process of erection, and on the site for a canal and the canal thereon surveyed and commenced, that the defendant, with force and arms, expelled the plaintiff from said property, and has since kept him thus expelled, and demands a judgment for damages only, a verdict for the plaintiff for damages does not necessarily find all the facts averred in the complaint. Such verdict does not necessarily find a continual withholding of possession, or other facts entitling plaintiff to an injunction.

N. C. & S. C. Co. v. Kidd, 37 Cal. 282.

7. A joint verdict against the defendants answering and a defaulting defendant is conclusive against all the defendants, when a separate verdict has not been demanded.

Anderson v. Parker, 6 Cal. 197.

Ellis v. Jeans, 7 Id. 409.

8. When several persons whose possessions are not joint, but separate, are joined as defendants in an action to recover land, and no demand is made at the close of the trial for separate verdicts, and no objection or exception is taken to the verdict on that ground, in time to afford an opportunity to correct it, the defendants can not afterwards object to a joint verdict and judgment.

Hicks v. Coleman, 25 Cal. 122.

9. When no damages are claimed in an action to recover real estate, no injury can result from a joint verdict. Id.

10. In an action to recover possession of land the jury rendered the following verdict: "We, the jury in this cause, find a verdict in favor of the plaintiff against defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages." *Held*, to be substantially a general verdict, covering all the issues, and that it does not limit the finding to any particular fact or single issue. Hutton v. Reel, 25 Cal. 478.

See Leese v. Clark, 28 Cal. 26.

11. Where several defendants in ejectment unite in an answer amounting to a general denial, a joint verdict is proper, though the answer concludes with a prayer for separate verdicts. To entitle defendants to separate verdicts they should set forth, with specific description, the parcels which they severally occupy or claim, and thus di-

rect the attention of plaintiff to the course of defense upon which they will separately insist. Patterson v. Ely, 19 Cal. 28.

12. The finding of a jury, or of the court below, acting as a jury, upon a question of fact, is final and conclusive.

Perry v. Cochran, 1 Cal. 180.

Duff v. Fisher, 15 Id. 380.

13. Where the form of the verdict agreed upon in open court, by the respective counsel, was a general verdict as to the whole property, after the jury has found such a verdict for the defendant, it is too late for the plaintiff to insist upon a verdict in a different form, or to assert a right to a portion of the property upon principles not applicable alike to all the property.

Sexey v. Adkison, 40 Cal. 408.

14. The verdict of a jury which finds the plaintiff to be entitled to a certain amount of money, is not void for uncertainty; it is equivalent to saying that they find the issues in favor of the plaintiff and assess his damages at that sum.

Mendelson v. Anaheim L. Co., 40 Cal. 657.

15. If a verdict is so defective that it can not serve as the basis of a judgment, the waiver of the defect, by the other party, and consent that a certain construction thereof should be taken as the verdict, is as irregular and ineffectual as the verdict itself.

Campbell v. Jones, 38 Cal. 507.

16. If a verdict be fatally informal, but before the jury are discharged the party against whom it was given agreed to such an interpretation thereof as would sustain a judgment, such agreement should be held to cure the defects in the verdict. Id.

17. Plaintiff takes up two hundred and twelve acres of land under the possessory act of this state, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses, claiming the right to do so by paying to plaintiff the money value of the trees, etc. Plaintiff sues for damages for the trespasses committed and asks a perpetual injunction against future trespasses; verdict: "We, the jury, award the plaintiff forty-two dollars damages." Judgment accordingly, the court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit: *Held*, that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that the nature of the property destroyed and threatened to be destroyed is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him.

Daubenspeck v. Grear, 18 Cal. 443.

18. If the court, instead of having the verdict corrected by the jury, attempted to correct it by the judgment, and go beyond the verdict, it is error.

Ross v. Austill, 2 Cal. 183.

19. The verdict must be confined to the matters put in issue by the pleadings.

Benedict v. Bray, 2 Cal. 251.

Truebody v. Jacobson, Id. 285.

20. When the jury found the only issues involved in the controversy, an exception to the verdict, that no verdict was found upon the issues presented by the pleadings, will not be sustained.

Burritt v. Gibson, 3 Cal. 306.

21. The jury have no right to find a verdict in favor of a party which is contrary to or inconsistent with the pleadings.

Tevie v. Hicks, 41 Cal. 123.

22. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts; unless they do so, however, they will be concluded by the general verdict.

Winans v. Christy, 4 Cal. 70.

23. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and the defendants being in possession.

McGarvey v. Little, 15 Cal. 27.

24. The verdict of a jury in a chancery case is only advisory to the chancellor or this court.

Still v. Saunders, 8 Cal. 281.

25. In chancery cases, the court below may disregard the verdict of a jury.

Goode v. Smith, 13 Cal. 84.

26. The mere fact that a verdict is entitled in the name of the plaintiff and one of the defendants, is immaterial. It need not be entitled at all.

McGarrity v. Byington, 12 Cal. 426.

27. The mere fact that the pleader had used terms of expression in stating his case which were under the old system of practice used in particular kinds of action, will not necessarily give character to, or determine the effect or meaning of, the verdict.

McLaughlin v. Kelly, 22 Cal. 211.

28. The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of the parties.

Perkins v. Wilson, 3 Cal. 139.

29. A recovery, if had, must be grounded upon the facts which are averred in the complaint, and not upon those which are denied.

Gregory v. Haworth, 23 Cal. 653.

30. A stipulation that a verdict should

be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results.

Suñol v. Hepburn, 1 Cal. 258.

31. A defective allegation of a fact may be cured by default or verdict, but not so the entire absence of any allegation whatsoever.

Hentsch v. Porter, 10 Cal. 555.

32. Where a declaration states a condition precedent, and fails to aver performance, the defect must be urged on demurrer; it comes too late after verdict.

Happe v. Stout, 2 Cal. 461.

33. An omission to allege delivery, in an action on a bond, can be taken advantage of only on demurrer, and not after verdict.

Garcia v. Satrustegui, 4 Cal. 244.

Wilkins v. Stidger, 22 Id. 231.

34. A verified complaint, which, in stating a special demand essential to the cause of action, contains only the general averment that "defendants, though often requested, have refused," etc., is sufficient in this respect, unless demurred to for want of certainty. If not demurred to, the defective averment is cured by verdict and judgment, and the objections can not be raised for the first time in the appellate court.

Mills v. Barney, 22 Cal. 240.

Jones v. Block, 30 Id. 227.

35. When a complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by a verdict or default.

People v. Rains, 23 Cal. 127.

36. Where several defenses are pleaded, either of which is good in law, and the verdict is for the defendants, and the court errs in its instructions to the jury as to one of the defenses, the judgment will be reversed, unless it is made to appear that the verdict was rendered on one of the defenses, in relation to which no error was committed.

Wiseman v. McNulty, 25 Cal. 230.

37. The general rule as to the effect of a verdict upon defects in pleading is that wherever facts are not expressly stated which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intentment.

Garner v. Marshall, 9 Cal. 268.

38. Where there is enough in the verdict to ascertain the intention of the jury, the court may instruct the jury to amend it as to form, not affecting the substance, so as to make it good in law, and it is error in the

court not to give effect to the verdict where such intention can be ascertained.

Truebody v. Jacobson, 2 Cal. 269.

39. If the statement discloses no refusal on the part of the judge of the court below to charge the jury on any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts of the case.

George v. Law, 1 Cal. 364.

40. The court in this case having instructed the jury that, if they found that plaintiffs were entitled to the mining ground, they must find a verdict for one thousand dollars damages upon the admissions of the answer: *Held*, that because the jury brought in a verdict for one instead of one thousand dollars damages, it was not therefore to be concluded, in direct opposition to their general verdict, that they did not find the title in the plaintiffs. The damages being admitted by the pleadings were not in issue, and the verdict in that respect was immaterial.

McLaughlin v. Kelly, 22 Cal. 211.

41. Where a jury are instructed to bring in a sealed verdict, and they retire, and after agreeing upon the verdict, seal it up and give it to the officer in charge of them, the clerk being absent, and request him to give it to the clerk, which is done; and after the meeting of the court the following morning, the verdict is opened, in the presence of the jury, and read by the clerk, without exception: *Held*, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the court itself as if it had been directly delivered to the clerk.

Paige v. O'Neal, 12 Cal. 483.

42. Nor will it make any difference when the names of the jurors were not called and they were not asked whether they had agreed upon their verdict, where the parties were present and took no exception at the time; and where it is not pretended that the verdict entered differs from the one sealed up, or that the result is in any respect affected by the omission. *Id.*

43. In ejectment for a tract of land, plaintiff under a deed from one McDowell, the case turned upon the question whether plaintiff, at the time of his purchase from McDowell, had notice of a prior verbal sale of the land from McDowell to defendant. The jury to whom this question had been submitted in special issues, returned a verdict, "if possession was notice, he had:" *Held*, that this finding is insufficient, because equivocal, neither finding directly the fact of possession, nor the time of it, nor the kind of possession. Woodson v. McCune, 17 Cal. 298.

44. This court refused in this case to render judgment in favor of defendants upon the findings, on the ground that the verdict

does not find the facts in issue with sufficient distinctness. *Id.*

45. Where the point on which the case hinged was whether Kappelman & Co., who employed plaintiff to do work, acted as contractors in their individual capacity or as agents of defendants, and the jury found a special verdict that "the work and labor done by plaintiff in the construction of the dam was done at the instance and request of Kappelman & Co., who were the agents of the corporation defendant:" *Held*, that this verdict does not support a judgment for plaintiff, because it does not show in and of itself a legal conclusion of liability, not finding whether K. & Co. acted as agents or otherwise.

Garfield v. K. F. & T. M. Co., 17 Cal. 510.

46. The jury under a general submission found "a verdict in favor of plaintiffs, with one dollar damages:" *Held*, that the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; that this equitable relief was a matter of right, the denial of which by the district court was error.

McLaughlin v. Kelly, 22 Cal. 211.

47. Courts may impose, as a condition of allowing a verdict to stand in other respects, the remission of damages in cases where there was no evidence on the subject of damages, or where the evidence was entirely incompetent, or where the court differs from the jury as to the effect of the evidence. But where, as in this case, the verdict for the damages was based entirely upon an admission by the record, it must stand. The admission, if good for anything, is good for the entire amount specified.

Patterson v. Ely, 19 Cal. 28.

48. The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk.

Reynolds v. Harris, 8 Cal. 618.

49. It is the office of a trial jury, by their verdict, to find the facts in issue, whether general or special, and with the legal effect of those facts they have no concern.

Fitzpatrick v. Himmelmänn, 48 Cal. 588.

50. A verdict of guilty of an "unlawful entry and forcible detainer" is proper in form, under the second section of the forcible entry and detainer act of April 2, 1866. The third section of the act applies to a different class of detainers.

Conroy v. Duane, 45 Cal. 597.

51. In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such verdict is conclusive that the plaintiff was

peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants C. and V., and that the corporation did not participate in the trespass. *Fremont v. Crippen*, 10 Cal. 211.

52. The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another, and such a verdict is conclusive against the possession of the corporation. *Id.*

SPECIAL VERDICT.

53. The practice act confers express authority upon the courts below to direct a special verdict. *Burritt v. Gibson*, 3 Cal. 396.

54. The court may direct a special verdict to be entered in the action. *Id.*

55. Where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate only to one fact.

Phoenix W. Co. v. Fletcher, 23 Cal. 492.

56. A special verdict settles the facts, and the court, by its judgment, pronounces the conclusions of law upon the facts found. If the court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time.

Allen v. Hill, 16 Cal. 113.

57. A special verdict must, under section 174 of the practice act, find the facts expressly and specially, and not generally or impliedly. *Breeze v. Doyle*, 19 Cal. 101.

58. It is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury. *American Co. v. Bradford*, 27 Cal. 360.

59. In an action to recover a quartz ledge, when the defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only of the ledge, a special verdict awarding defendants that portion of the ledge they claim without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs.

Gonzales v. Leon, 31 Cal. 98.

60. The acceptance by the plaintiff of a special verdict which gives defendant part of the property in dispute, without a finding on the other issues, is a withdrawal from the consideration of the court of all that property in relation to which there is no finding. *Id.*

61. A special verdict that defendants are entitled to all of a quartz ledge between their notices, being three hundred and fifty

feet more or less, gives defendants all between the notices, if more than three hundred and fifty feet. *Id.*

62. The party in whose favor a judgment is rendered on a special verdict must move for a new trial, if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate court. *Garwood v. Simpson*, 8 Cal. 101.

Duff v. Fisher, 15 Id. 389.

63. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed, among other things, to find specially as to the negligence of the captain or crew of the steamer, and they found generally for plaintiff, four hundred dollars damages; and, also, that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good in the absence of any objection at the time of its rendition, that it was not responsive to the special direction.

Algier v. Steamer Maria, 14 Cal. 167.

64. Probably the finding, apart from the general verdict, was a finding of negligence, for an insufficient spark-catcher is hardly distinguishable from none at all; and this is proof of negligence. *Id.*

65. When the jury are directed by the court to find a general verdict, and also to make a special finding of facts upon questions submitted to them, and a general verdict is returned in favor of one party, while the finding upon the special issues is in favor of the other party, the court should render judgment in accordance with the special finding, if they embrace all the issues raised in the pleadings. If, however, there is any one in issue in the pleadings, not covered by the special findings, the judgment should be rendered on the general verdict.

McDermott v. Higby, 23 Cal. 489.

66. When a jury renders a general verdict and also special findings, the latter will control the former if there is any inconsistency between them; and the court will direct judgment to be entered in accordance with the special findings.

Leese v. Clark, 20 Cal. 387.

67. Where special issues are submitted to a jury, and they announce that they can not agree upon the special issues, but can agree upon a general verdict, and by consent of the counsel on both sides the special issues are withdrawn, and a general verdict received by the court, no error is committed.

Mitchell v. Hockett, 25 Cal. 539.

Leese v. Clark, 20 Id. 387.

68. When the jury are directed by the court to find a general verdict, and also to make a special finding of facts upon questions submitted to them—and a general verdict is returned in favor of one party, while the findings upon the special issues are in favor of

the other party—the court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings. If, however, there is any one issue in the pleadings not covered by the special findings, the judgment should be rendered on the general verdict.

McDermott v. Higby, 23 Cal. 489.

69. If the jury have special issues submitted to them, and find on these issues, and also find a general verdict for the plaintiff, and when the verdict is read, the court declares that on the findings the defendant must have judgment, and some of the jury then dissent from the special verdict, and the court sends them out for further deliberation, and they then return with general verdict, but are unable to agree on the special verdict, the court should not accept the general verdict. Fitzpatrick v. Himmelmann, 48 Cal. 588.

MONEY VERDICT.

70. The theory of the law is, not that the party recover the particular note or chose in action, as is commonly imagined, but that he recover damages for the non-performance of the contract; and in case of failure to pay money due, the true damage is the amount of money owing, and the interest which was agreed upon. Guy v. Franklin, 5 Cal. 417.

71. An action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against James R. Duff and James T. Ryan; and eleven other defendants in that suit, upon the ground that James R. Duff and James T. Ryan are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset are insolvent; *Held*, that the set-off can not be allowed, as well because of the provisions of section 47 of the practice act, which require a counter claim to be between parties to the record between whom a several judgment might be had in this action, as of the provisions of sections 176 and 199, which would require a judgment for the excess to be given against the plaintiff, although as against him it is not claimed that defendants have any demand. Duff v. Hobbs, 19 Cal. 646.

72. A verdict for the recovery of money must be certain as to the amount.

Watson v. Damon, 54 Cal. 278.

CHANCE VERDICT.

73. When jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of those sums by the number of persons composing the jury, which result should be their verdict, a verdict thus found is irregular, and will be set aside.

Wilson v. Berryman, 5 Cal. 44.

74. But if such means be adopted merely to arrive at a proper result for the purpose of determining what the verdict shall be, without any being bound thereby, and afterwards the jury agree upon such sum as their verdict, the court will not disturb it. *Id.*

75. Such verdicts are regarded in the same light as gambling verdicts. *Id.*

76. The jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover, and that the several sums thus marked should be added together and the total amount divided by twelve, and that the quotient, whatever it might be, should be their verdict without further consultation or discussion: *Held*, that this was not a chance verdict, within the meaning of the second subdivision of the one hundred and ninety-third section of the practice act; *held, further*, that such verdict was vicious, and should be set aside if the facts were proved by competent testimony.

Turner v. Tuolumne W. Co., 25 Cal. 397.

77. A verdict which is arrived at by each one of the jurymen marking such sum as he thinks proper, and then adding the several sums together and dividing the total by twelve and making the quotient the verdict, is not a chance verdict within the meaning of the second subdivision of section 193 of the practice act.

Boyce v. Cal. Stage Co., 25 Cal. 460.

People v. Hughes, 29 *Id.* 257.

78. A verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside.

Donner v. Palmer, 23 Cal. 40.

ENTRY OF VERDICT.

79. Where an informal verdict is received and recorded by the consent of the plaintiffs, and judgment in form is afterwards entered thereon, on appeal, the informality will not be considered.

Treadwell v. Wells, 4 Cal. 260.

80. The court should direct the verdict of a jury to be recorded as rendered by it. That will be treated as the verdict which the jury actually brings in.

Moody v. McDonald, 4 Cal. 297.

81. Before a verdict is recorded it should be declared by the foreman of the jury, or if sealed, read by the clerk, so that the parties may be distinctly informed of its purport. It is irregular to record the verdict before it is thus announced, but the irregularity must be objected to at the time, or it will not be noticed on the appeal.

Blum v. Pate, 29 Cal. 69.

82. Assent to a recorded verdict, expressed by the foreman, is conclusive upon

all the jury, unless a disagreement is expressed at the time. Id.

83. If the jury fails to find the fact of a lien, the court can not render a judgment essentially different from the verdict, and the judgment so far will be reversed.

Walker v. Hauss-Hijo, 1 Cal. 186.

84. If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error.

Kilburn v. Ritchie, 2 Cal. 145.

85. Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for a new trial.

Hutchinson v. Bours, 13 Cal. 50.

86. A court may, in term time or vacation, order verdict on a judgment rendered and recorded, if the motion for a new trial were taken under advisement. Id.

87. The judgment in pursuance of the verdict is the act of law upon record facts, and follows as a matter of course, unless the court intervene. Id.

88. Counsel, in the trial of a cause, can not object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge as would, in his judgment, be sufficient to present all the questions raised by the pleadings.

Marius v. Bicknell, 10 Cal. 224.

89. If the verdict of a jury goes beyond the issues raised by the pleadings, and passes upon an extraneous fact not embraced therein, it is *void pro tanto*, and the surplus matter may be disregarded in entering the judgment.

Marquard v. Wheeler, 52 Cal. 445.

IMPEACHING VERDICT.

90. It is a settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen can not be received to defeat his own verdict; and in a criminal case, the affidavit of a jurymen, made after verdict, that he had formed and expressed an opinion before the trial, can not be received on motion for a new trial.

People v. Baker, 1 Cal. 403.

91. The affidavit of jurors will not be allowed to contradict their verdict.

Castro v. Gill, 5 Cal. 40.

Amsby v. Dickhouse, 4 Id. 102.

Wilson v. Berryman, 5 Id. 44.

Boyce v. Cal. Stage Co., 25 Id. 475.

92. It seems that the testimony of the sheriff is competent to disclose what transpires in the jury-room.

Wilson v. Berryman, 5 Cal. 44.

93. The appellate court must infer in favor of the verdict below, unless error is clearly manifest.

Allen v. Phelps, 4 Cal. 259.

94. The amendment of 1862 to section 193 of the practice act, allowing the affidavits of jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trial made after its passage, although the verdict and judgment sought to be set aside were rendered previously.

Donner v. Palmer, 23 Cal. 40.

95. The affidavits of jurors can not be received for the purpose of impeaching their verdict, unless it is a chance verdict within the meaning of the second subdivision of the one hundred and ninety-third section of the practice act.

Turner v. Tuolumne W. Co., 25 Cal. 397.

Boyce v. Cal. Stage Co., 25 Id. 460.

96. The affidavits, of the jurymen who rendered a verdict, that they misunderstood its effect, can not be received to impeach or defeat it.

Polhemus v. Heiman, 50 Cal. 438.

SETTING ASIDE VERDICT.

97. A general objection to the form of a verdict, without any specification of the particulars in which it is alleged to be defective, will not be considered.

Mahoney v. Van Winkle, 21 Cal. 552.

98. Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared merely presumptive evidence of fraud, the jury may find against such presumption.

Billings v. Billings, 2 Cal. 107.

99. The admission of improper testimony is no ground for disturbing a verdict, where it is evident by the verdict itself that no injury was done thereby to the party objecting to its admission.

Priest v. Union Canal Co., 6 Cal. 170.

100. Where there are several separate defenses, each of which is sufficient to defeat the action, and these defenses are submitted to the jury, with evidence in support of each, and the verdict is general for the defendants, it can not be set aside, if it be right as to any one issue, though wrong as to all the others.

Kidd v. Laird, 15 Cal. 161.

101. The practice act applies as well to legal as equitable actions, so far as its provisions are consistent with the rights and remedies administered in courts of equity. And the only way in which the verdict of a jury on issues submitted can be reviewed is by motion for new trial—except, probably, that the court, whether sitting in equity or on the trial of a common law action, may, of its own motion, set aside the verdict of a jury when clearly and palpably against the evidence.

Duff v. Fisher, 15 Cal. 375.

102. Verdict on contradictory proof not interfered with by the supreme court.

Baker v. Joseph, 16 Cal. 173.

103. A verdict obtained upon incompetent evidence may be set aside; but this can not be done if the evidence were admitted without objection, nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to.

McCloud v. O'Neill, 16 Cal. 392.

104. In such cases, that which vitiates the verdict, is the error of the court in admitting the evidence, and if the party seeking to set aside the verdict be not in a position to take advantage of this error, he can not object that the evidence was improperly admitted.

Id.

105. When the verdict returned by the jury is informal, it is the duty of the court to explain to them its defects, and direct them to put it in proper form.

People v. Dick, 34 Cal. 663.

106. Where a case is tried by a jury, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony.

Dickey v. Davis, 39 Cal. 565.

107. A verdict will not be set aside as contrary to the evidence, where there were but two parties to the transaction, and one of them is dead, and the survivor, the only witness, is contradicted on other matters, and does not testify positively as to the existence of the fact on which the jury found.

Thompson v. Toland, 48 Cal. 99.

AMENDMENT, 9, 10.
APPEAL, 481, 577, 607.
ASSIGNMENT, 93.
CLAIM AND DELIVERY, 80-82.
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CRIMINAL LAW, 974.

EJECTMENT, 63, 388-390.
EQUITY, 131-135.
JUDGMENT, 100-101.
NEW TRIAL, 29-40.
STIPULATION, 34.
TRIAL, 71.

VERIFICATION.

1. The verification prescribed by sections 55 and 113 of the practice act, though differing in form, is the same in substance. A party who swears to the truth of a pleading thereby affirms a knowledge of its contents, even though his affidavit does not contain the statement that he has read or heard it read, and knows the contents thereof.

Patterson v. Ely, 19 Cal. 28.

2. The object of the verification is to insure good faith in the averments of the party. If he aver matters positively, the verification will be sufficient if his affidavit states that the pleading is true of his own knowledge; if he aver matters "upon information and belief," or "upon information or belief," the verification will be sufficient if his affi-

davit state, that as to the matters thus averred, he believes the pleading to be true.

Id.

3. The omission of the words "when it is verified," in the act of 1860, amending the sixty-fifth section of the practice act, is a mere clerical misprision. The amendment by the act of 1860 to this section, and also to section 46, was not designed to change the character of answers or to abolish any distinction between those verified and those not verified.

Skirm v. Farrand, 18 Cal. 314.

4. Held, that the exhibits attached to the answer, consisting of copies of the pleadings and proceedings in the action in the United States circuit court, needed no further verification than what arises from the statement in the answer that they are such copies; that no distinct verification of them was requisite; and that were it otherwise, then the certificate of the United States circuit court clerk was sufficient.

Ely v. Frisbie, 17 Cal. 250.

5. The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief can not exist together.

Humphreys v. McCall, 9 Cal. 59.

6. Where in ejectment, the verification to the complaint made by one of the plaintiffs is, that "the foregoing complaint is true of his own knowledge, except as to the matters therein stated on the information and belief of plaintiffs, and as to those matters he believes it to be true:" Held, that the verification is sufficient, although the person making the oath does not state that he "has read the complaint, or heard the complaint read, and knows the contents thereof."

Patterson v. Ely, 19 Cal. 28.

7. Defendants in this case, in answer to a rule to show cause why an injunction should not issue, filed their answer denying fully the allegations of the complaint, and verified in substance thus: "Wm. H. P., one of the defendants, being sworn, says his co-defendant F. left this state for the state of New York before the complaint herein was filed, and is not in this state; that the foregoing answer is true, of this defendant's own knowledge, except as to the matters therein stated to be upon the information and belief of defendants, and as to those matters, he, this defendant, believes the same to be true:" Held, that the verification of the answer, though not complying in form with the exact language of the statute, is sufficient to entitle the answer to be used as an affidavit.

Ely v. Frisbie, 17 Cal. 250.

8. No expression of belief in a verification is necessary, if a pleading does not contain a statement of any matters on information and belief. Patterson v. Ely, 19 Cal. 28.

9. The attorney of plaintiff being a notary public, may take the affidavit verifying the complaint.

Kuhland v. Sedgwick, 17 Cal. 123.

10. A jurat to an answer is in form and substance an affidavit, and may be taken before a county recorder.

Pfeiffer v. Riehn, 13 Cal. 643.

11. A verification to a complaint is sufficient, though made by only one of the plaintiffs. Patterson v. Ely, 19 Cal. 28.

12. By verification of the complaint the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange, by requiring a sworn answer.

Brooks v. Chilton, 9 Cal. 640.

13. The verification of an answer may be omitted whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by such answer.

Drum v. Whiting, 9 Cal. 422.

APPEAL, 567.

PLEADING, 150, 282,
410, 411, 841-843.

VESSELS.

1. OWNERSHIP OF.

12. LIEN UPON.

17. PROCEEDINGS AGAINST.

25. MISCELLANEOUS PROVISIONS.

OWNERSHIP OF.

1. The transfer of a minority interest in a vessel by virtue of a sale under execution, does not confer on the purchaser any more extensive control than the execution debtor himself enjoyed; and, as a general rule, the majority of owners can control not only the employment and destination of a vessel, but also the appointment of a person to take charge of her as master. It does not alter the case, that the debtor was the master of the vessel, for his right to the possession and command is not the subject of sale on execution.

Loring v. Illsley, 1 Cal. 24.

2. Where the master of a vessel was one-third owner, and all his right, title and interest in the vessel had been sold under execution against him: *Held*, that the purchaser of his one-third interest was not entitled to supersede the master in the command of the vessel, nor deprive him of the possession thereof. Id.

3. The owner of a ship, chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by intrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions.

Brooks v. Minturn, 1 Cal. 481.

4. The rule of law that possession of personal property is *prima facie* evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule.

Bailey v. New World, 2 Cal. 370.

5. When the master of the vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. Id.

6. If a vessel is chartered in the usual way, either for a particular voyage or for a period of time, the charterer having authority to appoint the master, and undertaking to victual, man, and navigate her at his own expense, he will be deemed the owner *pro hac vice*, and the general owner will not be personally liable on contracts of affreightment or for supplies.

Oakland C. M. Co. v. Jennings, 46 Cal. 175.

7. If the owner charters the hold of his vessel, but appoints her master and sails her at his own expense, he will be liable on contracts of affreightment made by the master with shippers who have no notice of the charter party. Id.

8. If the registered owner of a vessel appoints her master, with an agreement that the master is to have the entire control of the vessel, and victual and man her, and make contracts of affreightment, and divide the gross earnings with the owner, the owner is liable on contracts of affreightment made by the master with shippers who have no notice of the arrangement between the master and owner.

Tomlinson v. Holt, 49 Cal. 310.

9. The master of a vessel is presumed, even at a home port, to have authority to contract for such articles for the use of the vessel as come under the general appellation of ship's stores, and the owner of the vessel is liable for the value of the same, unless he shows that the master had not such power.

Crawford v. Roberts, 50 Cal. 235.

10. If supplies for a vessel are purchased at a home port, by the captain, with the knowledge and consent of the ship's husband, the owners are, *prima facie*, liable for the same. Id.

11. In such case the owners are liable, even if credit is given to the ship's husband, unless exclusive credit was given to him. Id.

LIEN UPON.

12. One part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements.

Sterling v. Hanson, 1 Cal. 478.

13. Where it appears clearly from a charter party, that the intention of the owner of the ship and the charterer is that

the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel.

Brown v. Howard, 1 Cal. 423.

14. Thus, where it was agreed in a charter party that a vessel should be chartered for fifteen months, at two thousand dollars per month, to be employed in the Pacific trade, and that the payments for the hire of the vessel should be made semi-annually in the city of New York: *Held*, that the owner of the vessel had lost his right of lien on the cargo for the non-payment of the sum stipulated in the charter party. *Id.*

15. Where A., the owner of a sea-going vessel, executes to B. a mortgage thereon, which is recorded in the custom-house of her home port, B. commences suit to foreclose the mortgage, and makes C. a party defendant thereto, on the ground that he has purchased the vessel, subject to the lien of plaintiff's mortgage. C., in his defense, avers that the mortgage was void under our statute of frauds, and that he now held the vessel discharged from the same: *Held*, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C. *Mitchell v. Steelman*, 8 Cal. 363.

16. If a credit is given for supplies and materials furnished a vessel, the lien of the person furnishing the same, for the price thereof, continues on the vessel for the period of one year from the time the demand falls due.

Edgerly v. Schr. San Lorenzo, 29 Cal. 418.

PROCEEDINGS AGAINST.

17. An act of the legislature authorized the issuing of attachments against boats and vessels "used in navigating the waters of this state;" and *held*, that the *Sea Witch*, which belonged to the port of New York, was intended for the New York and China trade, had been in the harbor of San Francisco but a few days, and was never otherwise used in navigating the waters of this state than by sailing into the harbor of San Francisco from the ocean, was not, within the meaning of the statute, a boat or vessel used in navigating the waters of this state.

Souter v. Sea Witch, 1 Cal. 162.

18. Where a bond was given in pursuance of section 8 of the act passed April 10, 1850, providing for the collection of demands against boats and vessels, for the discharge of the vessel, in a case where the vessel was not liable to be attached under the act: *Held*, that judgment rendered against the principal and sureties in the bond was erroneous, on the ground that a bond given for the release of a vessel, when the vessel was

not liable to seizure under that act, was invalid. *McQueen v. Ship Russell*, 1 Cal. 165.

19. The fact that a vessel, lost while being towed out to sea, is insured, does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance, for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. *White v. Mary Ann*, 6 Cal. 462.

20. A recovery by the owner in such an action will bar another action for the same cause, and therefore the defendant can not raise the objection that the action is not brought by the real party in interest. *Id.*

21. In actions against boats and vessels, it is not necessary that the vessel should be attached in order to acquire a lien, as against subsequent purchasers.

Meiggs v. Scannell, 7 Cal. 405.

22. In an action against boats and vessels under the statute, the service of process in the manner prescribed by statute is equivalent to an actual seizure. *Id.*

23. It seems, that where a chartered vessel is seized and detained by a revenue officer of the United States, the charterer can not be made liable for demurrage during the period of such detention.

Brooks v. Minturn, 1 Cal. 481.

24. In actions against boats and vessels, under the statute, the lien attaches only when service is had in the suit. It was not the intention of the legislature to make the lien attach when the liability was incurred.

Fisher v. White, 8 Cal. 418.

MISCELLANEOUS PROVISIONS.

25. In order to authorize the captain of a vessel to pledge or sell the property of his owners for necessities, certain facts must be established: The vessel must be in a foreign port; the voyage must be unfinished; the pledge or sale must be indispensable to enable the ship to complete her voyage.

Marziou v. Pioche, 8 Cal. 522.

26. Vessels plying between San Francisco and Sacramento, and San Francisco and Stockton, are liable to the payment of harbor dues to the city and county of San Francisco.

San Francisco v. S. N. Co., 10 Cal. 504.

27. A sale of a vessel of the United States, at sea, forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival in a port of the United States. *Davidson v. Gorham*, 6 Cal. 343.

28. The responsibility of taking a position or berth for a vessel in port rests upon the master of the vessel or the harbor master; therefore the owner is not exempt from lia-

bility for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port.

Griswold v. Sharpe, 2 Cal. 17.

29. The registry of the bill of sale and mortgage at the expected port of arrival before her arrival, it seems, in no way affects the question of the national character of the vessel. Davidson v. Gorham, 6 Cal. 343.

30. Where the new owner under such a sale mortgaged the vessel while still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered: *Held*, that the mortgage was good against attaching creditors of the new owner, who levied immediately on her arrival, neither party taking the requisite steps to obtain a new registry; as the vessel had lost her national character, and was therefore not subject to the provisions of the law requiring the registry of sales and mortgages. Id.

31. The registration of vessels is not compulsory upon their owners, it being a privilege and advantage, of which they may or may not avail themselves, as they choose. Id.

32. Where a sale of a vessel is made, part cash, and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of the vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement.

Fowler v. Fisk, 12 Cal. 112.

33. Nothing in the act of May, 1851, indicates any intention on the part of the legislature to exclude the public slips from the act of March. Hyman v. Read, 13 Cal. 444.

ADMIRALTY, 6.
DAMAGES, 31.
EVIDENCE, 33.

FREIGHT, 2.
LIEN, 20.
TAXATION, 159.

VETO.

SUNDAY, 2.

VICIOUS ANIMALS.

1. The owner of a ferocious dog, knowing the vicious propensities of the animal, keeps it at his own risk, and is responsible for any injury inflicted by it upon a person who is free from fault.

Laverone v. Mangianti, 41 Cal. 138.

VIEW.

CRIM. LAW, 763, 1149 | EJECTMENT, 422.

VIS MAJOR.

ACT OF GOD, 1, 2.

VOLUNTARY PAYMENT.

TAXATION, 407. | STREET, 176.

VOTE.

ELECTION.

WAGER.

1. Wagers are recoverable in this state as at common law, except such as are prohibited by law, or are against public policy, or calculated to affect the interest, character, or feelings of third parties.

Johnson v. Fall, 6 Cal. 359.

2. A party placing money in the hands of another for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited.

Hardy v. Hunt, 11 Cal. 343.

3. The bailor does not part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal. Id.

4. Upon the retraction of the wager, the right to the possession of the money is in the agent or bailee, and he may maintain an action for it where the bailor interposes no objection. Id.

5. At common law, wagers made in respect to matters not affecting the feelings, interest, or character of third persons, or the public peace or good morals, or public policy, are legal contracts, which may be enforced by action. Johnston v. Russell, 37 Cal. 670.

6. Wagers upon the result of elections are against public policy, and are therefore void; and hence, money put up in the hands

of a stakeholder may be recovered if the wager be repudiated and a return of the money be demanded at any time before the election has taken place, and the result has become generally known, but not thereafter.

Id.

7. J. made a wager with F. that Seymour would receive a majority of the votes cast in this state at the presidential election in 1868, and F. made a wager with J. that Grant would receive a majority of said votes. The money was put in the hands of R. as stakeholder. After the election had taken place and the result had become known, J., having lost his wager, notified R. that he repudiated the wager, and demanded his money, but R., notwithstanding, paid the money to F., according to the terms of the wager. In an action by J. against R. to recover his stake, it was held that a recovery could not be had.

Id.

8. Wagers upon the result of public elections are illegal and void upon grounds of public policy. Hill v. Kidd, 43 Cal. 615.

9. An action to obtain affirmative relief, upon a contract of wager made upon the result of a public election, can not be maintained. Id.

See GAMING.

WAIVER.

1. A party may, by agreement, waive a right created by statute for his benefit.

Bowen v. Aubrey, 22 Cal. 566.

People v. Robinson, 46 Cal. 94.

APPEAL, 461, 508, 547.

APPEARANCE, 19.

ARREST AND BAIL, 10.

BILLS AND NOTES, 233, 240.

CONTRACT, 266, 274.

CRIMINAL LAW, 489, 592, 779.

DAMAGES, 7-9.

DEFAULT, 4.

DEMAND, 7.

ERROR, 8, 9.

ESTOPPEL, 166, 167.

EVIDENCE, 330, 343, 344, 505.

EXECUTION, 333.

FINDINGS, 56, 60.

LANDLORD AND TENANT, 113.

LIMITATIONS, 41.

NEW TRIAL, 434, 443-451.

OAKLAND, 15.

PLEADING, 482, 1359.

SALE AND DELIVERY, 11.

TRIAL, 20-26.

WAR.

1. The passage by the legislature of an act creating a debt for the purpose of repelling invasion or suppressing a rebellion, without a submission of the question to a vote of the

people, which act recites in its preamble the existence of war, and refers in the body of the act to such recital for the reasons which operated upon that body to induce the passage of the act, is evidence of a determination by the legislature that the exigency justifying its action in creating the debt has arisen.

People v. Pacheco, 27 Cal. 175.

CONSTITUTIONAL LAW, 336.

WAREHOUSE.

1. When a warehouseman, who has goods in charge, states to one who is about to take possession of the same, by a legal process, that he has no charges on the goods, this is a waiver of the warehouseman's lien for charges, if any he had.

Blackman v. Pierce, 23 Cal. 508.

2. The transfer of a warehouse receipt, in good faith and in the ordinary course of business, operates to transfer to the holder the title to the goods covered by the receipt.

Davis v. Russell, 52 Cal. 611.

3. There is no difference between a warehouse receipt and a bill of lading in this respect. Id.

WAREHOUSE RECEIPT.

INSTRUCTIONS, 126.

STAT. OF FRAUDS, 52.

WAREHOUSE, 2, 3.

WARRANT (ARREST).

CRIMINAL LAW, 476.

WARRANT (TREASURY).

1. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the state treasurer, a warrant on the treasurer is absolutely void.

Butler v. Bates, 7 Cal. 136.

2. Warrants drawn by the controller of state, delivered to the payees thereof, and by them indorsed in blank, were presented by the holders to the state treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the state, came into the hands of defendants, ignorant

that they had been stolen. Defendants present them to the treasurer, and in lieu thereof, receive state bonds payable to bearer, under the funding act of 1857, and part with them. The state sues for the bonds or their value: *Held*, that the action does not lie; that defendants having received the bonds *bona fide*, and without fraud, for warrants apparently good against the state, are not liable in this form of action.

State vs. Wells, 15 Cal. 336.

3. Where the order for the allowance of a county warrant is assailed by the county, in a court of equity, for fraud, the circumstances must be set out, and it must be shown how and why the county made no defense to the claim while the proceedings to establish it were before the supervisors. The mere fact that a party made an unjust claim, and supported it by unjust practices, is not sufficient to authorize the interposition of equity.

El Dorado Co. v. Elstner, 18 Cal. 144.

4. A warrant issued by the auditor of a county, and which had been duly presented by the holder to the treasurer, for payment, and indorsed by him "not paid for the want of funds," prior to the passage of the act, and the holder having elected not to present his warrant to said commissioners, and it was therefore **never funded**, is, nevertheless, a valid claim against the county, and it is the duty of the treasurer of the county to pay the same from the first moneys in the treasury, applicable to such payment. Rose v. Estudillo, 39 Cal. 270.

5. If there were funds in the treasury of the county, applicable to such payment at the time the demand was made by the holder of the warrant, which were raised under the law as it stood before the passage of the act, and the warrant was first in the order of outstanding, unfunded debt of the county, which existed prior to the act in question, he had a right to be paid from these funds, which the legislature could not deprive him of, without his consent. Id.

6. The act having provided what taxes may be imposed by the county, for county purposes, and designated the purpose to which each fund shall be devoted, no provision being made for that class of indebtedness to which the claim of the holder of the warrant belongs, except the funding provisions contained in the act, and there being no funds in the treasury of the county applicable to that purpose, at the time he made his demand on the treasurer, he has no remedy, except to apply to the legislature to provide the means of paying his debt. Id.

CONSTITUTIONAL	MANDATE, 126, 143,
LAW, 218, 266.	146, 176.
CONTRACT, 70.	STATE, 58-61.
CONTROLLER, 2.	STREET, 131.
COUNTY, 1-7, 17.	

WARRANTY.

1. OF REAL ESTATE.

14. OF CHATTELS.

OF REAL ESTATE.

1. Where there is a covenant of warranty the payment of the purchase money can not be resisted as long as the grantee remains in possession. Nor under the same circumstances can the purchase money be reduced. Norton v. Jackson, 5 Cal. 262.

2. A covenant of the grantor, warranting the title of the land sold as "**indisputable and satisfactory**," is not broken if the title is good and valid.

Winter v. Stock, 29 Cal. 407.

3. W. entered into a contract in writing with S., agreeing to convey to him a lot of land, and in the contract warranted the title to be "**indisputable and satisfactory**, or no sale." S., at the same time, let W. have a sum of money on account of the purchase: *Held*, that if the title was good and valid, W. could not recover back the money from S. Id.

4. If a deed conveys a tract of land by metes and bounds, excepting therefrom such portion of such land as may have before been conveyed by the grantor to other persons, and contains a **general covenant of warranty** of the land thereby intended to be conveyed, and also a covenant that if any portion of the land has been before conveyed to other persons, the grantor will convey to the grantee other lands of like quantity and quality, the former covenant relates to lands which the deed purports to convey, and not to the land which the grantor covenanted to convey in the latter covenant.

Vance v. Peña, 33 Cal. 631.

5. Where land is sold with covenant of warranty, accompanied with a delivery of possession, for which the purchaser gives a note for the purchase money, the promise to pay, and the warranty, are independent covenants, and the enforcement of the one is not dependent upon the performance of the other. Norton v. Jackson, 5 Cal. 262.

6. Eviction by process of law is requisite to enable an action to be maintained on the covenant. Id.

7. In the common law as well as the civil law, the defendant can not avoid the payment of the purchase money on the ground that the title existed elsewhere than in the grantor. In order to constitute a breach of warranty or quiet enjoyment, there must be an **eviction** under the judgment of a competent court on a paramount title.

Fowler v. Smith, 2 Cal. 44.

8. An action for false and fraudulent representation as to the naked fact of title in the vendor of real estate can not be maintained by the purchaser, who has taken pos-

session of the premises sold, under a conveyance with express covenants.

Peabody v. Phelps, 9 Cal. 226.

9. If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. Id.

10. Generally a vendor with warranty of title is not a competent witness for the vendee in a controversy concerning the title. In real estate, the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff.

Blackwell v. Atkinson, 14 Cal. 470.

11. A covenant of non-claim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel.

Gee v. Moore, 14 Cal. 472.

12. But this covenant is confined to the estate granted, and where that is "the right, title and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after-acquired interest. Id.

13. When a purchaser of land does not obtain the title which the deed purported to convey, and the covenants embrace, and he goes into and retains possession under the deed; and the failure of the title goes to the entire consideration paid, or to be paid, for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount title in another, and offering to redeliver possession, and account for the rents and profits.

Walker v. Sedgwick, 8 Cal. 398.

OF CHATTELS.

14. The use in a sale note of a given name for the goods sold is a warranty that they bear that name. Flint v. Lyon, 4 Cal. 17.

15. There is no warranty in the following words of a sale note: "We have this day sold you two shipments of seeds, for arrival."

Moore v. McKinlay, 5 Cal. 471.

16. To constitute a warranty no precise words are necessary; it will be sufficient if the intention clearly appear. Id.

17. A warranty will not be implied except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use. Id.

18. Where the plaintiff inspects the goods before purchasing, the case is taken from the operation of the rule of implied warranty. Id.

19. Where the vendor of chattels in his possession gives a written bill of sale to the vendee containing no covenant of warranty, there is an implied warranty, the same as

though the sale was by parol; and the warranty arising by implication may be rebutted by parol evidence, the same as it could be if the sale was a verbal one.

Miller v. Van Tassel, 24 Cal. 458.

20. The vendor of chattels in his possession warrants the same by implication. The warranty is a presumption of law arising from the possession of the vendor and the sale. Id.

21. This presumption may be rebutted by proof on the part of the defendant that he refused to give a warranty title, and that the plaintiff agreed to take the property at his own risk. Id.

22. There is no breach of an express warranty of title to chattels sold until the vendee's possession is disturbed by the true owner. Gross v. Kierski, 41 Cal. 111.

23. When goods are in possession of a vendor, who, dealing with them as owner, sells and delivers them to the purchaser, nothing being said as to the title, the law implies that he warrants the title to the property sold. Id.

24. No particular words are necessary to constitute a warranty as to the character, condition, or quality of goods sold, but if the vendor, at the time of sale, affirms a fact as to the essential qualities of his goods, and the purchaser buys on the faith of such affirmation, it is an express warranty.

Polhemus v. Herman, 45 Cal. 573.

25. There may be an express or implied warranty when the contract for the sale of goods is executory, as well as when it is executed. Id.

26. If the vendee accepts the goods sold when delivered by the vendor, and renders the vendor an account, it does not prevent the vendee from recovering damages for a breach of a warranty made by the vendor as to their quality, if the vendee thus accepted and rendered the account in ignorance of the true condition of the goods. Id.

27. If the vendor warrants the goods sold, and the vendee discovers after they are delivered that there has been a breach of the warranty, he is not compelled to return the goods, although he may do so and rescind the contract, but he is at liberty to retain them, and bring an action for the breach of the warranty, or he may plead the breach in reduction of damages in an action brought by the vendor for the purchase money. Id.

28. If one party contracts to deliver to the other wool, "in good order," and the latter agrees to accept and pay for it, the clause, "in good order," is an express warranty. Polhemus v. Heiman, 50 Cal. 435.

29. A mere praise of personal property, indulged in by the owner when offering it for sale, does not, under the rule of the com-

mon law, amount to an express warranty of its quality or marketable condition.

Byrne v. Jansen, 50 Cal. 624.

30. A mere praise of personal property, such as wool, indulged in by the owner when offering it for sale, does not amount to an implied warranty of its quality or condition, if the buyer has an opportunity to examine it and fails to do so, and no artifice is used by the seller to prevent him from making an examination. Id.

31. A covenant not to sue, made to a portion only of joint debtors, does not release any of them. Matthey v. Gally, 4 Cal. 62.

DEED, 306, 315, 328,	LIMITATIONS, 142,
411.	MEXICAN LAW, 43.
DEFENSES, 6, 53.	PLEADING, 557, 933,
INSURANCE, 24.	963.

WASTE.

1. At common law there is no forfeiture of an estate for years for the commission of waste, but it was made so by the statute of 6 Edward I, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to triple damages.

Chipman v. Emeric, 3 Cal. 273.

2. In an action for waste, when triple damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either cite the statute or conclude to the damage of the plaintiff against the form of the statute.

Id., 5 Cal. 239.

3. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing of the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings if there be danger of irreparable mischief.

Hicks v. Michael, 15 Cal. 107.

4. In cases of waste, if anything is about to be abstracted from the land which can not be restored *in specie*, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. Id.

5. On application for injunction to restrain waste or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. Id.

6. In a case where the judgment directs a sale of real property, the **undertaking on appeal**, in order to stay a sale, need only provide security against waste, unless there is a provision in the judgment for the payment of a deficiency, in which case it must provide for the payment thereof.

Englund v. Lewis, 25 Cal. 337.

INJUNCTION, 186-190. TREES AND TIMBER, 10.

WATER RIGHTS.

1. RIPARIAN RIGHTS—TITLE TO WATER.
19. APPROPRIATION.
43. RIGHTS TO USE OF.
89. DIVERSION OF.
95. ACTIONS FOR DIVERSION.
112. COMMISSIONERS AND OVERSEERS TO REGULATE WATER-COURSES.
115. WATER COMPANIES.
135. MINING WATER RIGHTS.
156. MISCELLANEOUS DECISIONS.

RIPARIAN RIGHTS—TITLE TO WATER.

1. The right to water must be treated in this state as a **right running with the land**, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and, as such, has none of the characteristics of mere personality. Hill v. Newman, 5 Cal. 445.

2. Running water, so long as it continues to flow in its natural course, can not be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property, but this right carries with it no specific property in the water itself.

Kidd v. Laird, 15 Cal. 161.

3. When the water of a stream leaves the possession of a party, all his right to, and interest in it, is gone.

Eddy v. Simpson, 3 Cal. 249.

4. The riparian proprietor, to whom water first comes, has not the right to erect dams across the stream and spread out the water, so that it is lost by absorption and evaporation to an extent that prevents it from flowing to another riparian proprietor as it would have done but for the dams.

Ferreira v. Knipe, 28 Cal. 340.

5. It is not a **reasonable use** of water for a riparian proprietor, who desires to use the same for watering cattle and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption so as to injure another riparian proprietor below. Id.

6. Under settled principles, both of the civil and common law, a riparian propri-

etor has a usufruct in the stream as it passes over his land. *Pope v. Kinman*, 54 Cal. 3.

7. Where **underground currents of water**, flowing in the defined channels, are shown to exist, the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them. *Hanson v. McCue*, 42 Cal. 303.

8. In a controversy respecting the use of the waters of a **spring**, where there was nothing to show that it was supplied by any defined flowing stream: *Held*, that it must be presumed to be formed by the ordinary **percolations** of water in the soil. *Id.*

9. Waters **filtrating or percolating** in the soil belong to the owner of the freehold, like the rocks and minerals found there; and he may use them as he chooses, free from any usufructuary rights of others. *Id.*

10. Where the owner of a spring of living water, supplied by percolation only, and having no natural channel or outlet, constructed an artificial channel, by means of which he conducted the water over certain intermediate vacant lands to his residence, and a subsequent occupant of a portion of the intermediate land enjoyed the use of water flowing through the channel for fifteen years: *Held*, that such occupant acquired no rights as against the owner of the spring, and could not prevent him from tapping such spring and using all its waters for his own profit. *Id.*

11. The bed of a **river is a public highway** of the state, and within its absolute control, subject only to the rights of commerce. *Green v. Swift*, 47 Cal. 536.

13. On the facts of this case, as admitted by the pleadings or found by the court, the defendant could, at most, exercise no greater rights in respect to the diversion or use of the waters of the **subterranean stream** flowing across his land to the spring of the plaintiff, than if he had been an upper and the plaintiff a lower riparian owner on a surface stream flowing across their respective lands. *Hale v. McLean*, 53 Cal. 578.

14. On the facts admitted or found, the defendant was not entitled to divert the whole body of the stream. *Id.*

15. Whether the upper proprietor on a **subterranean stream** can exercise the same rights as against a lower proprietor in respect to the diversion and use of the water, as though it was a surface stream, not decided. *Id.*

16. Whether the incidental obstruction or diversion of a **subterranean stream**, in the prosecution by an upper proprietor of a mining or other legitimate enterprise beneath the surface, can be made the foundation of an action by a lower proprietor, not decided. *Id.*

17. The right of a **riparian owner** to have the water of a stream run through his land is a vested right, and any interference with it imports at least nominal damages, even though there be no actual damage. *Creighton v. Evans*, 53 Cal. 55.

18. A judgment determining the rights of parties as riparian proprietors on the same stream of water is conclusive when the conditions remain unchanged. *Los Angeles v. Baldwin*, 53 Cal. 460.

APPROPRIATION.

19. The natural water in a ravine belongs to the first appropriator thereof, and for either a diversion or appropriation thereof an action will lie. *Hoffman v. Stone*, 7 Cal. 49.

20. A **notice of intention** to appropriate the waters of a certain stream is evidence of possession, but of itself alone is not sufficient. Taken with other acts, it amounts to sufficient evidence. *Thompson v. Lee*, 8 Cal. 275.

21. An appropriation of water for **mill** purposes, stands on the same footing as an appropriation for the use of miners. *McDonald v. Bear River Co.*, 13 Cal. 220.

22. The **erection of a dam** across a natural water-course is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam is brought into the water-course by canals constructed by the owners of the dam. *Kelly v. Natoma W. Co.*, 6 Cal. 105.

23. Possession or actual appropriation must be the **test of priority** in all claims to the use of water, wherever such claims are not dependent on the ownership of the land through which the water flows. *Id.*

24. Such appropriation can not be constructive. *Id.*

25. To render valid a claim of water by appropriation, the claim must be for **some useful or beneficial purpose**, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer. *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

26. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. *Id.*

27. The **notice of the intention** to appropriate the water must be sufficient to put a prudent man on inquiry. *Kimball v. Gearhart*, 12 Cal. 27.

28. The doctrine of relation in the appropriation of water only applies when the first acts, from which the party appropriating seeks to date his right, indicate the intention of appropriating such water. *Id.*

29. Where parties projecting a ditch to convey water give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and mark out and designate the line of such ditch by the usual marks and indications, and pursue the work on the ditch with a reasonable degree of diligence until the same is completed so as to receive the water, they are entitled to such water as against all persons subsequently claiming or locating it. *Id.*

30. In appropriating unclaimed water on the public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable; surveys, notices, stakes, and blazing of trees, followed by work and actual labor, without abandonment, will, in every case, where the work is completed, give title to the water over subsequent claimants. *Id.*

31. The title to the water conveyed through a ditch constructed in such manner will, on completion of the work, date back from the beginning of the work as against subsequent appropriators. *Id.*

32. In determining the question of diligence in the construction of such a work, the jury have a right to take into consideration the circumstances surrounding the parties at the date of the appropriation, such as the nature and climate of the country traversed by such ditch, together with the difficulties of procuring labor and materials. *Id.*

33. The diversion of the waters of a stream with the object of drainage simply, or without the intention of applying them to some useful purpose, does not constitute an appropriation.

McKiuney v. Smith, 21 Cal. 374.

34. The taking up of the waters of a stream for a special limited purpose, is an appropriation of only so much of the water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation, which will give to the second locator a paramount right to the use of all the waters of the stream not required for the specific purpose of the first appropriation. *Id.*

35. If a tract of land in the mineral region, bordering on a natural stream, is inclosed and appropriated for garden or orchard purposes, and the waters of the stream are afterwards appropriated for mining purposes at a point above the inclosed land, the water thus appropriated must be

so used as not to materially injure the fruit trees or garden.

Wixon v. B. R. & A. Co., 24 Cal. 367.

36. One who appropriates for mining purposes the waters of a ravine or stream, upon the public lands in the mineral region, must take and use the same in such manner as not to injure or destroy orchards or gardens bordering on the stream, which have been inclosed and planted before the water was appropriated. *Id.*

38. If the first appropriator of water takes only a part of the quantity flowing in a stream, another may afterward appropriate the remainder, and if the first appropriates the water only during certain days in the week, another may afterward take during the remaining days of the week.

Smith v. O'Hara, 43 Cal. 371.

39. One who enters into the possession of a ditch used for appropriating water, under a verbal sale made to him of the same, does not succeed to the rights of the seller, so as to claim the benefit of the seller's prior appropriation of the water flowing in the same, but must date his appropriation from the time he enters into possession. *Id.*

40. While the dam and canal of the party claiming the water are in process of construction, but are not yet in a condition to appropriate the water, the use of the water by other parties is no injury, and such use affords no ground for relief, legal or equitable. *N. C. & S. C. Co. v. Kidd*, 37 Cal. 282.

41. If a party claiming water is constructing his dam and canal, but has not yet diverted the water, an action for damages and to recover the possession of the dam site and dam, and of the canal site and canal, will afford an adequate remedy for the trespass upon the ouster from their possession. *Id.*

42. H. constructed a water ditch, by which he appropriated three hundred inches of water from a running stream, but not all of the stream. B. appropriated the remainder of the water. Subsequently H. made a new ditch, appropriating water from the same stream. In a suit to enjoin B. from interfering with H. in the use of the water, H. obtained a verdict that the second ditch did not diminish the quantity appropriated by B., and judgment was rendered enjoining B. from disturbing H. in the use of three hundred inches of water: *Held*, that the judgment was consistent with the verdict and with justice.

Higgins v. Barker, 42 Cal. 233.

RIGHT TO USE OF WATER.

43. The foundation of a right to water is the first possession; and this right is usufructuary, and consists not so much in the fluid itself, as in its use. The owner of land

over which it flows has the right to its use during its passage. This right is not in the *corpus* of the water, and only continues with its possession. *Eddy v. Simpson*, 3 Cal. 240.

44. Rights to the use of water become fixed after five years' **adverse enjoyment** of the same. *Crandall v. Woods*, 8 Cal. 136.

45. The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises a presumption of title to the same, in the person enjoying the same, as against a right in any other person, which might have been, but was not asserted; but in order that this presumption of title may be conclusive, the right to the use of the water must have been asserted under a **claim of title**, with the knowledge and acquiescence of the person having a prior right, and must have been uninterrupted.

American Co. v. Bradford, 27 Cal. 360.

46. The burden of proving an **adverse** uninterrupted use of water for five years, with the knowledge and acquiescence of the person having a prior right, is cast on the party claiming it; and if he leaves it doubtful whether the use was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor. *Id.*

47. **Possession of public land** gives the right to the use of water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another who has taken the same up subsequently, but before the attempt to change the course of the water. *Id.*

48. The owner of a ditch has the exclusive and absolute power of control, and right of enjoyment, of the water diverted by and flowing in his ditch, but whether such water be his private property is not necessary to decide. *Kidd v. Laird*, 15 Cal. 161.

49. No distinction can be drawn between a **mill owner** and a miner as to their rights in appropriating water.

Ortman v. Dixon, 13 Cal. 34.

50. The line upon which a ditch is actually intended to be dug **should be run** within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch-owners date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Parke v. Kilham*, 8 Cal. 77.

51. Where a party takes up a **mill seat** on public agricultural land, erects a saw-mill, dwelling, etc., and appropriates the water of the stream for the use of the mill, he may use the water for a grist-mill erected at the same place years afterwards.

McDonald v. Bear R. Co., 13 Cal. 220.

52. From the policy of our laws it has

been held in this state that the right to water exists without private ownership of the soil; upon the ground of prior location upon the land, or **prior appropriation** and use of the water. *Hill v. Newman*, 5 Cal. 445.

53. The mere act of commencing a ditch with the intention of appropriating the water is not sufficient of itself to give a party an exclusive right to the water of such stream.

Kimball v. Gearhart, 12 Cal. 27.

54. The interest in water acquired by one who locates on the bank of a stream, and appropriates the waters of the same for machinery, **is not property in the water** as such, but the right to the momentum of its fall at the point of location and to the flow of the water in its natural course above.

McDonald v. Askew, 29 Cal. 200.

55. Right to water acquired by appropriation **may be transferred** like other property. *McDonald v. Bear R. Co.*, 13 Cal. 220.

56. If by the erection of a mill and the possessory right of land on a stream, the water be acquired, a **transfer** of the possession of the property to a vendee, as owner, passes the water right. *Id.*

57. Where plaintiff appropriated a portion of the waters of a stream, and diverted it by means of a dam and ditch, sufficient for the purpose in the natural condition of the stream as it then existed, it does not necessarily follow that he thereby acquires the **right to raise his dam** higher and higher, as occasion might require, to obviate the obstructions to its use, in the manner of its said original appropriation, occasioned by physical changes in the condition of the stream, not anticipated, whether arising from natural or artificial causes.

Nevada W. Co. v. Powell, 34 Cal. 109.

58. The question, What is the **extent of the right** originally acquired by plaintiff in such a case to which all subsequently acquired rights must be subordinate? is one of fact for the jury. *Id.*

59. If the plaintiff appropriated a portion of the waters of a stream, and constructed a ditch and dam, amply sufficient, under the conditions of the stream and the country as they then existed, to make the appropriation available, and thereby acquire the right to appropriate and use said portion of said waters in said manner only, this would not prevent or impair the right of other parties to acquire a right to the **surplus waters** of the stream or to its bed and banks, or the adjacent land, to any extent that should not interfere with rights previously acquired. And when the right of the subsequent appropriators once attach, the prior appropriator can not encroach upon them, by extending his rights beyond the first appropriation. *Id.*

60. In such case, when the right has once vested in the **subsequent appropriator**

tor, the prior appropriator would be no more justified in extending his claim, or changing the means of his appropriation, to the prejudice of the second appropriator, than the latter would be in encroaching upon the prior rights of the first. In such case, each appropriator is, in respect to the particular thing appropriated by him, prior in time and exclusive in his right. Id.

61. Where the plaintiff, by means of a dam of a certain height and dimensions, constructed at a certain point on Shady creek, and the excavation of a ditch extending therefrom, which at the time of their construction were held adapted to and ample for the purpose, appropriated a portion of the waters of said creek, **whatever was left unappropriated**, either of the waters of said creek or mining ground therein, was open to be appropriated by defendants; and if the defendants by first appropriation, acquired the right to work their mining claims, located in the bed and banks in said stream above plaintiff's dam, in their condition at that time, the plaintiff was not authorized, by subsequently erecting a higher dam, to interfere with said right; and this, although by subsequent changes not wrought by defendants, occurring in the bed of the stream at the point chosen for its diversion, without so raising said dam. Id.

62. When plaintiff appropriated the waters of Shady creek, and before other conflicting interests had vested, the right to the water carried with it the right to construct such works as were necessary to the full enjoyment of the water. But when he established his works and fully appropriated the water by means sufficient for the purpose, and used it for a term of years in a particular mode, then, unless there was something manifesting a more extended right, other parties had a right to suppose he had thereby defined the limits of his right, and act accordingly. Id.

63. Where the court instructed the jury, in substance, that if plaintiff acquired the prior right to divert a portion of the water of Shady creek, by means of a dam and ditch, and the dam and stream should at any subsequent time, by reason of mining by strangers above, become filled up to such an extent as to make it necessary to raise the dam higher than it originally was, to enable the plaintiff to continue the diversion by means of said ditch, then the plaintiff is entitled to make additions to the height of the dam from time to time, as occasion requires, without limitation, and wholly irrespective of the effect of these additions upon the interests of other parties acquiring rights for mining and other purposes on the stream above, subsequent to said original appropriation of the waters of the stream: *Hell*, that the principle on which such instruction is founded is inadmissible, and the instruction erroneous. Id.

64. The appropriation of water by the defendant corporation prior to August, 1874, was of the waters of Old South Fork and not of Kern river.

Stein Co. v. Kern I. Co., 53 Cal. 563.

65. The right of the defendant corporation to divert the waters of Kern river, based upon its appropriation in August, 1874, is subordinate to that of the several corporations which are joined as plaintiffs—except the Goose lake canal company—to divert the several amounts by them respectively appropriated prior to August, 1874. Id.

66. The city of Los Angeles is not the owner of the *corpus* of the water in the Los Angeles river.

Los Angeles v. Baldwin, 53 Cal. 460.

67. Possession or actual appropriation is the **test of priority** in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows.

Kimball v. Gearhart, 12 Cal. 27.

68. An irrigating ditch, constructed, repaired, and controlled by two or more persons, **does not cease to be private property** because the several persons interested in it have not accurately defined their rights therein, or in the waters flowing in it, nor because they have, by election, selected a person to distribute the water among them.

Cate v. Sanford, 54 Cal. 35.

69. Such a mode of constructing and managing a ditch, though the irrigators be numerous, does not operate as a **dedication** to the public. Id.

70. *Hell*, accordingly, that such a ditch came under the exception in the sixth section of "an act to provide for and regulate irrigation in the township of Los Nietos, in the county of Los Angeles. (Stats. 1877-8, p. 374.) Id.

71. In this case the **rights** of both parties, as **fixed by the priority** and extent of their respective appropriations, though not founded on the legal title, are as perfect and absolute as if acquired by prescription, or express grant from the riparian owner.

Kidd v. Laird, 15 Cal. 161.

72. Where parties have appropriated the prior right to the use of the water of a stream, by the commencement and partial completion of a ditch and flume, they have the right to use so much of the waters of the stream as are necessary to preserve their flume from injury, while in the process of construction. *Weaver v. Conger*, 10 Cal. 233.

73. The **first appropriator** of the water of a stream passing through the public lands in the state has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its ap-

appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity, as often as they choose.

Butte Co. v. Vaughn, 11 Cal. 143.

74. The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him, as well as below. Hill v. King, 8 Cal. 336.

75. If two persons, one prior in point of time to the other, appropriate water from the same stream, by means of ditches, and a third person turns water into the stream from his ditch starting out of another stream, without the intention of recapturing it, the water thus turned in becomes *publici juris*, and belongs to the persons who appropriated the stream, according to their priority of right. Davis v. Gale, 32 Cal. 26.

76. If two persons appropriate water from the same stream, one prior in point of time to the other, and a third person builds a flume in the stream so as to increase the flow of water, the prior appropriator is first entitled to the increased flow of water to the extent of his appropriation. Id.

77. If the water of stream A. be diverted from its natural channel by C. and used by him, and then flows from his works into stream B. by natural channels, it is lost to the first possessor, and he can not reclaim it on the ground that the water of stream B. was increased by his means.

Eddy v. Simpson, 3 Cal. 249.

78. If the water of stream B. be in the possession of another party, D., the addition made to it, flowing from the works of C., become a part of the body of water, and D. has the right to its possession and use, and C. has no right to withdraw it. Id.

79. Where a ditch was cut by the grantors of the plaintiffs, for the purpose of drainage simply, and not with the *bona fide* intention of appropriating the water thus diverted to some useful object, and the ditches of defendant were built for the express purpose of taking said water, and did do so: Held, that thereby they gained a priority over the grantors of plaintiffs, and all persons holding under them.

Maeris v. Bicknell, 7 Cal. 261.

80. Merely cutting a ditch for a drain and using the water for no useful purpose gives no priority. Id.

81. But where a ditch is made for the purpose of using the water, the right thereto dates from the commencement of the work. Id.

82. If one who has appropriated a part of the water of a stream to propel machinery at a point on the same, makes a conveyance of

all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale.

McDonald v. Askew, 29 Cal. 200.

83. A person who has built a mill on a stream and appropriated a part of its water to propel machinery, does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above. Id.

84. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other purpose. But the extent of the right depends on the nature and uses of the appropriation. If he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, persons below may appropriate this residuum so as to make it a vested right.

Ortman v. Dixon, 13 Cal. 33.

85. A person who has appropriated the water of a stream, and caused it to flow to a particular place by means of a ditch, for a special use, may afterwards change the use to which he first applied the water, and the place at which he used it, without losing his priority of right, as against one who has dug a ditch from the same stream before the change is made. Davis v. Gale, 32 Cal. 26.

86. One who has appropriated the water of a stream by means of a ditch for the purpose of working a particular mining claim, may, after he has worked out the claim and abandoned the same, extend his ditch and use the water at other points, and for a different purpose, without losing his priority of right as against one who afterwards dug a ditch from the same stream and appropriated water before the claim was worked out. Id.

87. Where water from an artificial ditch is turned into a natural water-course, and mingled with the natural waters of the stream, for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not, in so doing, diminish the quantity of the natural waters of the stream, to the injury of those who have previously appropriated such natural waters.

Butte Co. v. Vaughn, 11 Cal. 143.

88. The burden of proof devolves on the party thus mingling the water belonging to him with that appropriated by others. He can only claim such quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the op-

posite party in the use of the full quantity to which he was originally entitled. *Id.*

DIVERSION OF.

89. A person entitled to divert a given quantity of the water of a stream **may take the same at any point** on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change.

Kidd v. Laird, 15 Cal. 161.

90. This right so to change the point of diversion does not depend upon how the right to the use of the water was acquired, whether by express grant, or by prescription; or whether it rests in the parol license, or the presumed consent of the proprietor. The difference as to the source of right relates to the mode of determining its existence and extent, and not to the manner of its exercise and enjoyment. *Id.*

91. Where a party attempts to construct a dam on a creek, for the purpose of diverting the water at that point, and such diversion is illegal as against another party, who has a dam lower down, the latter may oust the former from the possession of the ground at that point, and prevent the construction of the dam.

Butte T. M. Co. v. Morgan, 19 Cal. 609.

92. A person appropriating and diverting the water of a stream at a given point **can not afterwards change the point of diversion** to the prejudice of a subsequent locator. *Id.*

93. *Kidd v. Laird*, 15 Cal. 161, does not hold that the first appropriator has an absolute and unqualified right to change the point of diversion, and the doctrine of that case is affirmed. *Id.*

94. If A. is the owner of a ditch, and of the right to divert and use the waters of a stream in the same, and B. diverts the waters of the stream at a point above A.'s ditch, and uses them for mining, but turns them back into A.'s ditch at another point before A. has use for them, A. has no cause of action against B. *Union W. Co. v. Crary*, 25 Cal. 504.

ACTIONS FOR WRONGFUL DIVERSION.

95. The **gravamen** of the action is the diversion of the water, and the fact that the diversion is accomplished by different means is not important enough to require several counts.

Gale v. Tuolumne W. Co., 14 Cal. 25.

96. A general allegation in a complaint for the diversion of water, that plaintiffs were entitled to all the water flowing into the canyon at the head of their ditch, entitles them to prove a diversion of water from the

smaller branches of the canyon supplying water to that point.

Priest v. Union C. Co., 6 Cal. 170.

97. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: *Held*, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 340.

98. No equitable remedy can be had for a mere past diversion of a water-course; but when the injury is continuing, relief may appropriately be sought in equity.

Tuolumne W. Co. v. Chapman, 8 Cal. 392.

99. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action.

Parke v. Kilham, 8 Cal. 77.

100. Where the defendants had constructed a ditch for mining purposes, and the plaintiffs had subsequently constructed another, taking its water from the same stream, and brought suit for damages sustained by reason of an enlargement of defendants' ditch, made after the commencement of plaintiffs' ditch, causing a diversion of a greater quantity of water, and praying for an injunction: *Held*, that defendants are **not limited to the quantity of water turned into their ditch in the first instance**, unless by the general plan, size, and grade of the ditch, it was not capable of carrying more water than was then diverted. If, by reason of obstructions in the ditch, or irregularity in the grade at that time, it was not capable of diverting as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. But if they continued to divert only the original quantity of water long enough to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove the obstructions or adjust the grade, they would be limited to the amount thus diverted, and plaintiffs would be entitled to the residue.

White v. Todd W. Co., 8 Cal. 443.

101. This court will require a case of very palpable mistake or error to be made out, before it will overrule the verdict of the jury on issue of fact, joined in an action for the diversion of water.

Brown v. Smith, 10 Cal. 508.

102. In an action for diverting water from plaintiffs' ditch, plaintiff and defendants both having ditches supplied from the same stream, the plaintiffs' rights being prior and paramount, defendants asked the court to

instruct the jury, that if defendants had brought water from foreign sources, and emptied it into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, "less such amount as might be lost by evaporation, and other like causes." The instruction was given, with the explanation that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator: *Held*, that the explanation was proper, the concluding words of the instruction being too general and indefinite.

Burnett v. Whitesides, 15 Cal. 35.

103. In an action to recover damages for the diversion of the waters of a stream from plaintiffs' mills, an averment as to the **precise quantity** of water required for the use of the mills, and to which plaintiffs claimed to be entitled, is an **immaterial averment**; and a recovery of damages would not establish plaintiffs' right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit.

McDonald v. B. R. & A. Co., 15 Cal. 145.

104. In such action for damages, no issue could be taken upon the averment as to the particular quantity of water diverted. *Id.*

105. The owners of a ditch by which the waters of a stream have been first appropriated are entitled to recover damages for injury or loss sustained, caused by dams or other obstructions having been erected on the stream above the head of the ditch, by which the regularity of the flow of its waters is so disturbed as to cause actual injury or loss to the proprietors of the ditch.

Natoma Co. v. McCoy, 23 Cal. 490.

106. On the trial of an action to recover such damages, proof that in consequence of the irregularity of the flow of water the owners of the ditch have lost their customers, is competent evidence. *Id.*

107. In an action for the wrongful diversion of water, where the answer sets up more than five years' continuous adverse possession in the defendant, if the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff, in rebuttal, may introduce evidence to show that defendant's possession had not been continuous, or uninterrupted, or adverse, but he can not claim as a right to introduce evidence to prove the same facts that were proved in his opening.

Union W. Co. v. Crary, 25 Cal. 504.

108. A court of equity should not **license a trespass** upon ditch property in the mining regions, nor compel the owner to exchange the same for another means of conveyance for the water flowing therein.

Gregory v. Nelson, 41 Cal. 278.

109. If a plaintiff owns a ditch and right

of way for same, by priority of location, a court of equity has no power, by its judgment, to allow the same to be **washed away for mining purposes**, provided an aqueduct of sufficient capacity to carry the water is previously built in its place. *Id.*

110. If one of two joint owners of a flume used for mining purposes brings an action to recover damages for an injury to the joint property, caused by opening a water ditch above the flume, it is error for the court to reject evidence that the other joint owner gave his consent to having the ditch opened.

Crary v. Campbell, 24 Cal. 634.

111. The clause of a decree enjoining the defendants "from in any manner interfering with the waters of said springs, so as to prevent the same, or any part thereof, from flowing into Lytle creek," only applies to defined streams, and does not restrain him from availing himself of **percolations** upon his own land, even though he might thereby diminish the water which would otherwise issue from the springs.

Hustan v. Leach, 53 Cal. 262.

COMMISSIONERS AND OVERSEERS TO REGULATE WATER-COURSES.

112. A water commissioner, appointed under the act of May 15, 1854, to regulate water-courses, etc., has no power, as such, to repair a water-course or to remove an obstruction from it.

Pico v. Colimas, 32 Cal. 517.

113. If an abutment to a bridge is wrongfully built in the channel of a stream, the remedy, if any exists, is against him by whom the injury was committed.

Crowell v. Sonoma Co., 25 Cal. 313.

114. The board of water commissioners for San Bernardino county, created under the act of February 18, 1864, are merely agents selected for the public convenience, to regulate the distribution of water according to the rights of the parties in interest; but their action in distributing water does not prevent the parties from applying to the court for, nor the court from granting, relief, if to any one is distributed more than his just proportion of water.

Daley v. Cox, 48 Cal. 127.

WATER COMPANIES.

115. Unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them.

McConnell v. Denver, 35 Cal. 365.

116. The superintendent or managing agent of such company has **no authority to bind the company by a promissory note**, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or such authority may be implied from his acts recognized by the company with full knowledge of the acts at the time of the recognition. *Id.*

117. A member of such a company has no general authority by virtue of such membership to bind the company by his contracts. *Id.*

118. If an unincorporated ditch company duly authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not. *Id.*

119. Where the **bed of a water-course**, extending through the farming lands of R., is used by K. as a channel to convey the waters discharged into it from his ditch, of which it forms a connecting link, such water-course **will be considered as part of K.'s ditch**; and where R.'s lands were injured by a deposit of sediment thereon, resulting from an overflow of the water-course, which was caused either by the failure of K. to have it properly cleared of impediments, or by turning into it a quantity of water which, added to the natural waters flowing therein, exceeded its capacity to carry the same, K. is liable in damages to R. for such injury.

Richardson v. Kier, 37 Cal. 263.

120. As to the liability of ditch-owners for damages done by water discharged or sold from ditches, *Richardson v. Kier*, 34 Cal. 63, is affirmed. *Id.*

120a. The sale of a ditch used for appropriating water **can not be proved by parol evidence**. *Smith v. O'Hara*, 43 Cal. 371.

121. In a lease from the defendant to the plaintiff of the **Los Angeles water works**, it was provided that the plaintiff should not dispose of water for purposes of irrigation, but should only take from the river the water necessary for domestic purposes. The defendant took water from the plaintiff's pipes for the purpose of sprinkling the streets of the city; but, during the period that this was done, the plaintiff had on hand of the waters of Los Angeles river more than sufficient for supplying the inhabitants of the city with water for domestic purposes. In an action by the plaintiff to recover from the defendant the value of the water taken, *held*, that the plaintiff was only entitled to receive pay for water furnished to the inhabitants of the city for domestic purposes, and that it had no right to the surplus.

L. A. W. Co. v. Los Angeles, 55 Cal. 176.

122. In *San Francisco v. Spring Valley*

Water Works, 48 Cal. 493, it was decided that the Spring Valley Water Works was formed under the general law of 1858, and that its rights, duties, and obligations were derived solely from that law.

S. V. W. W. v. San Francisco, 52 Cal. 111.

123. In *San Francisco v. Spring Valley Water Works* it was also decided that, by reason of the provisions of the general law of 1858, there are purposes for which water is furnished by the Spring Valley Water Works, for which the city and county is bound to pay the legal rates. *Id.*

124. Also, that the Spring Valley Water Works is bound to furnish water to the city and county free of charge "in case of fire or other great necessity." *Id.*

125. Primarily, it is the duty of the Spring Valley Water Works to furnish to all the inhabitants, the men, women, and children, of the city and county (the rates fixed according to law being paid) water for family uses; being water for drinking, lavation, for domestic animals, and for other like domestic uses. *Id.*

126. For water furnished for such "family uses" to those of the inhabitants to whom it is the duty of the city and county to provide all or some of the necessities of life, as prisoners and the occupants of charitable and educational institutions, the city and county is bound to pay the rates established in accordance with law. *Id.*

127. The Spring Valley Water Works are not bound to furnish water for any other purposes, unless the obligation is imposed upon that company by the clause of the statute which requires water companies to furnish water to the city and county "in case of fire or other great necessity, free of charge." *Id.*

128. It is the duty of the company to furnish water free of charge for fires, and this includes the furnishing of water free for engines and engine-houses. *Id.*

129. The water is to be furnished to the inhabitants for family uses on payment of rates; to the city and county government free for all purposes for which it may be necessary and proper in the exercise of its police and governmental functions, being for other purposes than the "family uses" of individuals to whom the city and county is under obligations to furnish water. *Id.*

130. The word "great" in the statute does not qualify the word "necessity," so as to limit the furnishing of water free to cases of rare and casual demands. *Id.*

131. Since, by the terms of the statute, the corporation is entitled to charge only for water supplied for "family uses," there is no hardship in compelling it to furnish the city and county, "to the extent of its means," free of charge, all water necessary for watering streets, public squares and

parks, for flushing sewers, and for all like purposes beneficial to the public, and in aid of the health and good government of the people of the city and county. *Id.*

132. The power to charge tolls or rates for water is a franchise conferred on corporations formed under general laws for the formation of water companies, and can be exercised by a corporation only in the manner provided for in those laws.

S. V. W. W. v. Bryant, 52 Cal. 132.

133. The act of March 1, 1876, "to establish water rates in the city and county of San Francisco," and the supplemental act of April 3, 1876, are unconstitutional and void, in so far as they attempt to provide a mode of fixing rates to be charged by corporations in San Francisco, differing from the mode provided for other corporations by general laws. *The S. V. W. W. v. Bryant*, 52 Cal. 132, affirmed.

San Francisco v. S. V. W. W., 53 Cal. 608.

134. If a corporation contracts with a city to supply it with pure fresh water for all purposes, except the sprinkling of streets, and the contract contains a clause, that if any other corporation receives permission to furnish the city with water on more favorable terms, the same terms shall be extended to the corporation contracting; and if another corporation is granted more favorable terms, and then purchases the rights and franchises of the old corporation, it does not thereby become bound by the contract, but may supply the city on the terms it enjoyed before the purchase. *Id.*

MINING WATER RIGHTS.

135. Persons who, under the local customs and decisions of the courts in California, had acquired a right to the use of water in a ditch prior to the passage of the act of congress of July 26, 1866, acquired by said act a right of way and of the ditch through which the water was running, over the public lands, and the subsequent grantees of the United States take subject to the easement.

Broder v. Natoma W. Co., 50 Cal. 621.

136. The Pacific railroad companies, by virtue of the acts of congress of 1862 and 1864, granting them lands to aid in the construction of a railroad, did not acquire an equity in the land granted which state courts are bound to respect, until commissioners, appointed under the fourth section of the act, certified that the railroad and telegraph line had been completed on a subdivision examined by them. *Id.*

137. The Pacific railroad companies, by virtue of the acts of congress of 1862 and 1864, granting them lands, did not acquire a right to abate ditches on such lands as a nuisance, provided the ditch had acquired a right to the use of water which was recog-

nized by the local customs and decisions of the courts prior to the passage of the act of congress of July 26, 1866, granting the right of way to ditch-owners over the public lands. *Id.*

138. If a ditch for the conveyance of water for sale in the mining regions receives its supply of water from a stream at its head in the mountains, and extends a number of miles down, the water flowing through it the whole distance, and the title of the owner to the upper half or section of the ditch afterwards passes to one person, and the title to the lower half to another, the person who acquires the upper half is entitled to the exclusive use of the water from the stream at the head of the ditch.

Reynolds v. Hosmer, 51 Cal. 205.

139. An adverse use must be open and as of right, and also peaceable; for if there is any act done by the other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use. *Cave v. Crafts*, 53 Cal. 135.

140. The act of congress of July 26, 1866, "granting the right of way to ditch and canal-owners over the public lands," conferred rights to waters appropriated for agricultural purposes, and operates to confirm such rights, initiated and maintained prior to the passage of the act. *Id.*

141. If a mining company owns a mining claim, and buys a water ditch, "and the water rights thereto appertaining," this purchase does not, of itself, constitute the ditch and water rights appurtenances of the mining claim. *Quirk v. Falk*, 47 Cal. 453.

142. If there is a ditch leading out of a creek, and a mining company owns the ditch, and also owns a mining claim, and uses a portion of the creek in working its claim, it does not follow that the ditch is an appurtenance of the mining claim. *Id.*

143. The party who buys a mining claim and its appurtenances, and who asserts that a ditch and its water rights passed to him by the conveyance, as appurtenances to the claim, must, in order to hold them as such, prove that they were appurtenances. *Id.*

144. A decree enjoining the owners of a mining claim, situated on a creek below a dam at the head of a ditch, from diverting any water from or in any manner interfering with the waters of the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied.

American Co. v. Bradford, 27 Cal. 360.

145. The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. He is entitled to the water so undiminished in quantity as to leave sufficient

to fill his canal or ditch, as it existed at the time of subsequent appropriations of the stream above him. Any other rule would involve an absolute prohibition of the use of all water of a stream above any ditch supplied by it, in order to preserve the quality of a small portion taken therefrom.

B. R. & A. Co. v. N. Y. Co., 8 Cal. 327.

146. Appropriation and use for a beneficial purpose are the tests of right to water in the mineral regions, while the place and character of its use are not such tests.

Davis v. Gale, 32 Cal. 26.

147. The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation, without interruption or diminution in quantity.

Phoenix W. Co. v. Fletcher, 23 Cal. 481.

148. One who enters upon a stream of water above the prior appropriator and erects hydraulic works must so construct them as not to impede the regularity of the flow of the water, if its irregular flow would injure the first appropriator. Id.

149. A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong. Id.

150. The construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, to be used in irrigating a garden, or fruit trees, gives to the party constructing the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he can not be divested by persons subsequently entering for mining purposes; and a court of equity will enjoin miners thus entering, from injuring the reservoir, or diverting the water therefrom.

Rupley v. Welch, 23 Cal. 452.

151. As between ditch-owners and miners using the waters of a stream in the mineral region for mining purposes, the law does not tolerate any injury by one to the prior rights of the other. Hill v. Smith, 27 Cal. 476.

152. In controversies in the mining regions between the prior and subsequent appropriators of water, the question to be determined is, Has the use and enjoyment of the water, for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant? Id.

153. The mere change in the use of water from one mining locality to another does not forfeit the right.

Maeris v. Bicknell, 7 Cal. 261.

154. Plaintiffs constructed a dam across

Clear creek and dug a ditch for some distance along its bank, by means of which all the waters of the stream were diverted and returned to the creek at a point half a mile below. The object of the diversion was to drain the channel of the stream below the dam and supply water for working a tract of mining claims owned by plaintiffs in the bed of the stream. Subsequently defendants dug a ditch at a point above, through which they diverted the waters of the same stream for general mining purposes. Still later, plaintiffs extended their ditch to other mining points and to agricultural land below, and used the water for mining and irrigating at these latter places. In an action by plaintiffs to recover for injuries occasioned by the diversion of defendants to the use of the water at the latter points to which plaintiff's ditch had been extended: *Held*, that the prior right of plaintiffs was limited to the use of the water for working their original claims in the bed of the stream; that as to the surplus above what was required for that particular purpose, defendants' right was paramount; and that plaintiffs could not recover.

McKinney v. Smith, 21 Cal. 374.

155. In an action involving the right to and extent of a water privilege claimed by plaintiffs under an alleged appropriation by a number of copartners, defendants, to limit the extent of the appropriation, offered in evidence a paper, purporting to be a copy of the original locating notice of the copartners and without direct proof of its execution, showed that it was prepared with a knowledge of some of the partners, and was seen as a posted notice by a portion of them at the point of diversion and about the time the work was commenced, and that its position was such that it must probably have been seen by all: *Held*, that upon this proof the paper was admissible as part of the *res gesta*. Id.

MISCELLANEOUS DECISIONS.

156. The deterioration in the quality of the water, by reason of being used for mining purposes, before it reaches the ditch of the prior locator, must be deemed *damnum absque injuria*.

B. R. & A. Co. v. N. Y. Co., 8 Cal. 327.

157. Where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use, each can not successfully defend an action on the ground that his act alone did not materially affect the water.

Hill v. Smith, 32 Cal. 166.

158. Suit by plaintiffs as prior appropriators of the water of Middle Yuba river, for damming up and diverting the water of three lakes situated one above the other, opening into each other, and discharging their water

into the Middle Yuba river through the same channel, which is about a mile long, and is called "lake stream." The quantity of water varies with the seasons. Sometimes the stream is a torrent, and sometimes it is almost or quite dry. Defendants, to create a supply for their ditch during the summer, erected a dam at the outlet of each lake, converting it into a sort of reservoir, from which the water was drawn as needed, contending that the circumstances justified the erection of the dams, and that the great value of the lakes as reservoirs justified the injuries resulting to plaintiffs: *Held*, that there is no law for such position; that if the injuries to plaintiffs were trivial, they would be *damnum absque injuria*, but that the legal superiority of conflicting rights can not be determined by a comparison of their value.

Weaver v. Eureka Lake Co., 15 Cal. 271.

159. Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is **personal property**, and is as much the subject of sale, an article of commerce, as ordinary goods and merchandise. Engaging in the business of furnishing it to the inhabitants of a city for equivalent considerations to be received is engaging in "a species of trade or commerce" within the meaning of the corporation act of 1853. Ice companies organized to furnish the inhabitants of a city with ice, and gas companies organized to furnish them with gas, and the company in question organized to supply them with water, all stand upon the same footing. They are engaged "in a species of trade or commerce," though not in the technical acceptance of the terms "trading" or "commercial corporations."

Heyneman v. Blake, 19 Cal. 579.

160. There is no doubt that the ditch-owners would be responsible for wanton injury or gross **negligence**, but they are not liable for a mere accidental injury, where no negligence is shown, to a miner locating along the line subsequent to the construction of the ditch.

Tenney v. Miner's Ditch Co., 7 Cal. 335.

161. The owner of a ditch is bound to use that degree of care and caution in its construction and management, to prevent injury to others, which ordinarily prudent men use in like instances, when the risk is their own.

Wolf v. St. L. Co., 10 Cal. 541.

162. Flumes constructed at different parts of the line of a ditch can not change the general character of the work as an excavation. Such flumes are mere connecting links of the ditch over ravines and gulches, and the whole work must be regarded as a ditch.

Ellison v. Jackson W. Co., 12 Cal. 542.

163. If the owner of a ditch is entitled to all the water flowing down the stream where the ditch starts out, other parties hav-

ing ditches on the same stream can not complain of its **enlargement**.

James v. Williams, 31 Cal. 211.

164. A ditch-owner may only adopt a ravine, which is also a natural water-course, as a part of his line of ditch, to the extent of the capacity of his ditch to convey water. If an injury result from an overflow of the water of such ravine, not occasioned by its use as part of such ditch, the ditch-owner will not be responsible therefor.

Richardson v. Kier, 34 Cal. 63.

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1. WHARVES.
9. WHARFAGE.

WHARVES.

1. A wharf company is bound to keep its wharf in a proper condition, and it is liable for losses sustained by reason of its neglect to do so.

Trim v. Vallejo St. Co., 7 Cal. 253.

2. It does not follow as a legal conclusion that a wharf erected below high-water mark in tide waters and upon the soil thereunder belonging to the state, is a public nuisance, or an injury to commerce and navigation. Whether such wharf is a public nuisance is a question of fact.

People v. Davidson, 30 Cal. 379.

3. If a wharf is erected in the tide waters and upon soil belonging to the state, without a license from the state, it will belong to the state, and possession of the land and wharf, if withheld, can be recovered in ejectment by the state. Id.

4. The owner of a lot on the water front of San Francisco has no right, without a license, to wharf out from his own land into the bay.

Dana v. Jackson St. Co., 31 Cal. 118.

5. At common law a riparian proprietor on navigable water has no right to wharf out against his own land. Id.

6. An application to the board of supervisors for a franchise to construct a wharf in accordance with the provisions of the act of March 1, 1870, must particularly describe the locality of the wharf.

Templeton v. Coburn, 48 Cal. 563.

7. If a wharf is constructed over the land of a riparian proprietor, extending beyond low-water mark into deep water, he can not maintain ejectment for that part of the wharf extending beyond low-water mark into the ocean. Coburn v. Ames, 52 Cal. 385.

8. The state may maintain ejectment for a wharf constructed without authority beyond low-water mark. Id.

WHARFAGE.

9. A mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise, or incorporeal hereditament, an uncertain profit issuing out of the realty.

De Witt v. Hays, 2 Cal. 463.

10. The term wharfage is applied to a charge for landing goods, whether upon an artificial erection or a natural landing.

Sacramento v. New World, 4 Cal. 41.

11. An action for wharfage may be maintained, although the law imposing it speaks only in terms of a charge for "arrivals."

Sacramento v. Confidence, 4 Cal. 45.

12. The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be claimed for that part of the wharf below the line of low water. Gunter v. Geary, 1 Cal. 462.

13. Dockage is collected to assist in defraying the expense of dredging; and under the lease from the state harbor commissioners to the defendant (made under the act of April 4, 1870, stats. 1870, p. 799), by the terms of which the defendant is to do all the dredging at its dock, the former have not the right to collect dockage fees for vessels engaged in the defendant's business, landing at its wharf; but the latter may, under contract with such vessels, collect such fees.

People v. S. F. Gas Co., 54 Cal. 248.

14. The rate of toll prescribed by the state harbor commissioners for coal is ten cents per ton, but a reduced rate is allowed for merchandise landed upon wharves, and taken thence in lighters or other vessels, or warehoused without drayage. Defendants' coal was removed from their wharf by cars run upon a railway supported by timbers resting upon the wharf: Held, in an action for the tolls, that the difference between the two rates was intended to cover the wear and tear of wharves by the passage of loaded means of conveyance, whether wagons, drays, or cars; and that the defendant (who was bound, by the terms of its lease from the harbor commissioners, to pay the same rates as are charged at other wharves) was not entitled to the reduction.

Soule v. S. F. Gas Co., 54 Cal. 241.

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WILLS.

1. WHO MAY MAKE.

3. EXECUTION OF.

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52. WHAT PASSES BY.

69. POWERS CONTAINED IN.

73. ELECTION AND ACCEPTANCE UNDER.

82. CODICILS.

WHO MAY MAKE A WILL.

1. Where a last will and testament was executed, on the nineteenth day of September, 1846, by a Mexican citizen of California, before the judge (*jurz*) of the place, who certified at the foot of the will that the testator was possessed of his entire judgment and understanding, and retained his perfect memory: *Held*, that it was incumbent on the person contesting the validity of the will to establish that the testator was not of sound mind and disposing memory.

Panaud v. Jones, 1 Cal. 488.

2. In the state there is no limitation upon the power of disposition by will.

Norris v. Harris, 15 Cal. 226.

EXECUTION OF.

3. A will is valid, although one of the three **subscribing witnesses** was alcalde of the place. *Panaud v. Jones*, 1 Cal. 488.

4. Where a will was attested by two **witnesses**, and made before a person who was a *sindico*: *Held*, the fact that such person signed the instrument as *sindico* did not the less render him a witness.

Tevis v. Pilcher, 10 Cal. 465.

5. The fact that a will was begun on one day and finished several days afterwards is, it seems, no ground for invalidating the will under the Mexican law.

Castro v. Castro, 6 Cal. 158.

6. The strictness of the rules of the civil law requiring five, or at least three, **witnesses** to a will, was relaxed expressly in favor of remote districts, and by the customs of California, under the Mexican rule, which have the force of law, two witnesses were sufficient to a will. *Id.*

7. A will only becomes executed on the death of the testator, and therefore this construction does not affect wills made before the passage of the statute, where the testator did not die till after its passage.

Grimes' Estate v. Norris, 6 Cal. 621.

8. The principal beneficiary under a will was a partner of the testator, at the time of the testator's death and for many years previous: *Held*, that this did not, *per se*, raise a presumption of **undue influence**.

Estate of Brooks, 54 Cal. 471.

9. The testator, soon after the execution of the will, told the proponent that he would some day tell him what he wished to have him do with some of his property; and before his death, directed him to pay certain persons and charitable institutions certain sums: *Held*, that, while, in a proper case, the courts would compel a devisee to carry out such directions, the fact of such directions having been given and assented to was not evidence that the execution of the will was procured by undue influence. *Id.*

10. The name of a **testatrix** was subscribed to the will by one of the **subscribing witnesses**, and she declared the document to be her will in the presence and hearing of the witnesses, who subscribed their names at her request, and in her presence, and in the presence of each other: *Held*, to be a sufficient execution.

Estate of Toomes, 54 Cal. 509.

11. If the probating of a will is contested on the ground that its execution was obtained by **undue influence**, evidence that the testator was intoxicated when it was executed is admissible in connection with other circumstances to show "undue influence;" and if such testimony is introduced, the court can not take away from the jury the right to find on the issue.

Estate of Cunningham, 52 Cal. 465.

12. Upon the contest of a will by one of two children of the testator who had been excluded from its provisions, the contestant introduced evidence tending to show that the testator executed the will under **undue influence**, and a witness of proponent in reply testified that by direction of the testator he made a draft of his will, and that upon reading it to him, the testator objected to the names of the contestant and the other excluded child, and said he would not have them in, which testimony was, upon the motion of contestant, stricken out: *Held*, that the **declarations** of the testator, if made, constituted part of the *res gestae*, and that the court erred in excluding them.

Nelson v. McClanahan, 55 Cal. 308.

13. **Declarations** made by the testator in his will are competent evidence after his death, tending to prove his marriage and the legitimacy of his children, in a case where the persons so declared his wife and children are the devisees. *Pearson v. Pearson*, 46 Cal. 610.

14. Such declarations being competent evidence, and admitted without objection, in the absence of contradictory evidence, prove such marriage and legitimacy, and are not to be disregarded because the wife and witnesses of the marriage are living and might have been called. *Id.*

VALIDITY AND CONSTRUCTION OF.

15. A will having been once admitted to probate, must, so long as the probate stands, be recognized and admitted in all courts to be valid. *State v. McGlynn*, 20 Cal. 233.

16. The same instrument may operate both as a **conveyance** and as a will or devise in regard to different pieces of property.

Adams v. Lansing, 17 Cal. 629.

17. A will is regarded by the courts of England and the United States as a **conveyance**, and takes effect as a deed on proof of its execution, unless there be some express statute requiring it to be probated.

Castro v. Castro, 6 Cal. 158.

18. Where a testator, in his will, provided that, "before any distribution be made, there shall be parted out from the neat stock, which at my decease may be found, one thousand four hundred head of large cattle, which shall be sold by my executors, and their product shall be invested by them according to the instructions which I have given to them, of the fulfillment whereof they shall have to give account to God alone;" and, "I declare that, besides what has been already expressed, I made a secret bequest to my said son Joaquin, which my executors shall give him to understand, according to my instructions, when they may deem it convenient;" and the executors, in obedience to an order of court, answered that the instructions given them were verbal, and to the effect that this clause of the will referred to a son of the testator; that they were to give these cattle to this son if and when they saw fit, and that the obligation so to do was merely moral: *Held*, that the son has no claim upon the estate which he or his creditors can enforce; that it is a mere matter of conscience, and not a legal obligation.

Sparks v. De la Guerra, 18 Cal. 676.

19. Where a testator had precisely ordained in what way his property was to be disposed of, and what duties the executors were to perform: *Held*, that the will was valid, notwithstanding one of the three subscribing witnesses was named in the will as one of the two executors, he not being named as heir or legatee, nor empowered to institute an heir, nor vested with any discretion in respect to the disposition of the estate; and *held*, further, that such executor was competent as a witness to testify in support of the will. *Panaud v. Jones*, 1 Cal. 483.

20. The will of a testator dying before the organization of the state government did not require to be probated under the then existing laws. *Grimes' Estate v. Norris*, 6 Cal. 621.

21. Our statute of wills not only fails to require the probate of wills executed before its passage, but it must from its terms be concluded that the legislature actually intended to exclude such wills from the operation of the statute altogether, leaving their validity to depend upon the laws under which they were made, and not disturbing rights which had grown up under the former system. *Id.*

22. In England, it is well settled by a long series of decisions, that the comprehensive jurisdiction exercised by courts of chancery, in setting aside instruments obtained by fraud does not extend to wills, and that those courts have no power to determine the validity of a will of either personal or real property.

State v. McGlynn, 20 Cal. 233.

23. Courts of chancery in England, in their efforts to defeat fraudulent practices, have in some cases deprived parties of the

benefit of the fraudulent will, by decreeing that such parties should hold the property under their will in trust for the parties who would have been entitled to it if such will had not been probated; but in all such cases they have disclaimed any power to set aside the will or the probate. *Id.*

24. Under the provisions of section 17 of the "act concerning wills," parol evidence is not admissible to show that a testator, who by his will devised his whole estate to his wife without mentioning his children therein, intentionally omitted to make any provision for his children; but to render an exclusion of the latter effectual, the evidence that the testator intended to do so must be furnished by the will itself.

Estate of Garraud, 35 Cal. 336.

25. If a word in a will is repugnant to the clear intention manifested in other parts of the instrument, it may be regarded as surplusage, or restricted in its application.

Estate of Wood, 36 Cal. 75.

26. The following instrument, "I wish five thousand dollars to go to John C. Cole, in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate," if properly executed and witnessed, is testamentary in its character, and is a will. *Id.*

27. The testator charged the bequest of his estate with the "support and education" of a minor illegitimate child, without naming any amount therefor. It was *held*, that, in determining what should be the style and manner of education and support, the conclusion must be arrived at by reference to the will, and on a fair and just interpretation of its provisions, considering all the circumstances which surrounded the testator, and the motives which probably actuated him. *William v. McDougall*, 39 Cal. 80.

28. The construction of a devise, like that of a contract in writing, is always a matter of law, and is, therefore, never to be submitted to a jury.

Bruck v. Tucker, 42 Cal. 346.

29. Where a deviser, having but one flour mill, made a devise in these words: "To my daughter, Lolita, the flour mill, with the land appertaining thereto—a half league, more or less;" *Held*, that the language was sufficiently accurate in expression and certain in its application to be the subject of the devise. *Id.*

30. A purpose by a husband to attempt the disposition by will of the wife's half of the common property is not to be readily inferred, and especially not where the words employed may have their fair and natural import by applying them only to that moiety of which he has the testamentary disposition.

Estate of Silvey, 42 Cal. 210.

31. Where a husband, having only **common property**, left a will devising all his estate to his wife for life, and after her death to be equally divided between the children: *Held*, that she was entitled to one half of the property absolutely in her own right, and to a life estate in the other half under the will. *Id.*

32. Where a testator, in disposing of his property, used the expression, "**to my children**," and proceeded to name them, and the portion devised to each, but omitted any special mention of a devise to the children of a deceased daughter: *Held*, that the use of the word "children" did not indicate a deliberate purpose to exclude the children of a deceased daughter, and that, under section 17 of the statute of wills, they were entitled to a full share of the estate, as if the deceased had died intestate.

Estate of Utz, 43 Cal. 200.

33. If the testator, in his will, devise his property to his grandson, the son of his deceased son, and the testator has children living, it does not show as matter of construction of the will that his children were brought to his recollection, and that his omission to provide for them in his will was intentional.

Bush v. Lindsey, 44 Cal. 121.

34. A will which declares that the testator's lands are for the benefit and property of the testator's daughter, Dolores, and of the sons of a deceased son, Domingo, and then declares, that whereas the widow of a deceased son, Jose Maria, has a house on a portion of the land called "Chino," that it is the will of the testator that she be permitted to remain in permanency in her house, with liberty to raise her cattle and cultivate it, passes the fee to Dolores and the sons of Domingo, subject to an estate for life in the widow of Jose Maria, to the part called "Chino." Bernal v. Wade, 46 Cal. 663.

35. A will made in Texas, operating upon property there situated, must be **interpreted by the law of that state**. To that law reference must be had to determine the capacity of the testator, the extent of his power of disposition, and the conditions upon which the power of alienation vested in the guardian of his children, appointed by the will, is to be exercised. Norris v. Harris, 15 Cal. 226.

36. In the absence of proof as to the laws of Texas, the courts of this state, in interpreting a will made in that state, will presume its laws to be in accordance with the laws of California. *Id.*

37. R. died, leaving property, principally cash, in California, and also real estate in Nevada; and by his will, after making certain money legacies, directed his executors to deposit in some bank or other secure place in San Francisco, all rents from the property in Nevada, and all the rents and profits derived from his estate, and that the same

should be applied to the payment of an annuity to his mother, and to the education of certain nephews and nieces; and devised and bequeathed the **residue of his estate** to his nephews and nieces generally: *Held*, that the intention of the testator was that the money legacies should look first to the California assets for payment, and that the proceeds of the Nevada property should, at least for the present, be reserved for the annuity and the education of the nephews and nieces. Estate of Radovich, 54 Cal. 540.

38. The word "**money**," used in making a devise in a will, will be construed to include both personal and real property, if it appears from the context, and on the face of the instrument, that such was the intention of the testator. Estate of Miller, 48 Cal. 165.

39. C., in his will, **devised** a portion of his property to **trustees in trust**, to be held and managed for the benefit of a son, in such manner as the trustees should judge for the interest of the son; and to pay over to the son such part of the income as they might think best, until he arrived at the age of thirty years, and then, if they thought he possessed such habits of prudence and economy as to render it proper, to transfer it to him, but otherwise to retain it in trust, and still manage it for his benefit; and at his decease, if still in their hands, to transfer it to his heirs: *Held*, that the son, by the devise, took no interest in the property which he could assert in an action against the trustees, even after he arrived at the age of thirty years, and that the title to the property vested in the trustees.

Cutter v. Hardy, 48 Cal. 568.

40. *Held, further*, that the **trust** was valid in law, and that its duration could not extend beyond the life-time of the son, and might terminate sooner, if, in the opinion of the trustees, it was prudent to transfer the property to the devisee. *Id.*

41. A will, made before the present codes took effect, is to be construed under the statutes in force at the time it was made.

Estate of Puelb, 48 Cal. 643.

42. The word "**relation**," in the statute, providing that a devise to a relation shall not lapse by the death of the devisee during the life-time of the testator, if the devisee leaves lineal descendants, includes only relations by blood, and not by affinity. *Id.*

43. Courts of probate have exclusive jurisdiction of matters relating to the proof of wills; and before a will can be read in evidence in support of a title under it, the party seeking to introduce it must show that it has been regularly probated.

Castro v. Richardson, 18 Cal. 478.

44. A will is not a conveyance within the provisions of the act concerning conveyances, which can be read in evidence upon

the certificate of proof, or of acknowledgment by a notary.

Carpentier v. Gardiner, 29 Cal. 160.

45. A will which devises a certain number of cattle and sheep, and also bequeaths to the devisee the right, during his natural life, to pasture cattle and sheep on land of the testator devised to another, is to be construed as giving to the devisee the right to graze on the land, during his life, the number of cattle and sheep bequeathed, even if not the identical live stock bequeathed.

Welch v. Huse, 49 Cal. 506.

46. Wills are to be **liberally construed** so as to effectuate the intention of the testator. *Id.*

47. **Parol testimony** will be received for the purpose of **showing whether an instrument** propounded as a will, which is not upon its face testamentary in its character, is such; and if it appears from the surrounding circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, and in such case the particular form of the instrument is immaterial.

Clarke v. Ransom, 50 Cal. 595.

48. Under the foregoing rule, the following instrument held to be testamentary in its character and admitted to probate: "Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon." *Id.*

49. It is not necessary that a second will, **altering a former one**, should state in terms that it is intended thereby to alter such former will. *Id.*

50. A decedent who has left an instrument in writing, entitled to probate as his last will and testament, did not die intestate within the meaning of section 1365 of the code of procedure.

Estate of Barton, 52 Cal. 538.

51. If an instrument in writing is intended as a last will and testament, although it does not name an **executor**, this is not essential to its validity as a will. *Id.*

WHAT PASSES BY.

52. If the **testator** in his life-time **conveys** or contracts to convey a **part of a tract** of land devised by him, the will, upon his death, operates only upon so much of the land as legally and equitably belonged to him at his death. *Bruck v. Tucker*, 32 Cal. 425.

53. A **specific bequest** of personal property is the bequest of a particular thing; or money specified and distinguished from all others of the same kind, as of a horse, or money in purse.

Estate of Woodworth, 31 Cal. 595.

54. A bequest of "all my personal estate * * *" is not a specific bequest, and under

the common law such bequest would not discharge the personality from being applied to the payment of the debts. *Id.*

55. If by the terms of a will the estate is devised to A., to have and to hold during his life-time, and then go to his heirs; if the word "heirs" is used in a general sense to indicate those to whom by law the property would pass by descent, and not in a special or restrictive sense to designate certain particular individuals, the whole estate vests in A. in fee simple, notwithstanding the language of the will limits him to a life estate.

Norris v. Hensley, 27 Cal. 39.

56. The following was the language of the bequest in the will: "I bequeath to Dr. Van Canaghen one third of my property on California street, and one third to my son, and one third to my brother, each and all of them to have and to hold their life-time, and then to go to their heirs and assigns. But never to sell." *Hehl*, that by the terms of the will, the three devisees named took a fee-simple estate in the property devised. *Id.*

57. If the testator devises his "**flour mill, with the land pertaining thereto**, a half league, more or less," and he owns a large tract of land around the mill, and there is no inclosure around the mill, and no portion of it has any special relation to the business carried on at the mill, the entire tract of land passes by the will to the devisee, upon the death of the testator.

Bruck v. Tucker, 32 Cal. 425.

58. If the whole tract of land around the mill which belongs to the testator in such case is less than half a league, it will be assumed that he intended to give the whole tract. *Id.*

59. Under the common law every devise of real estate was regarded as specific. Under the statutes of California, a devise of real estate may be general.

Estate of Woodworth, 31 Cal. 595.

60. A **devise of all the real estate** of which the testator may die seised, made in pursuance of the provisions of section 22 of the act of the state of California, concerning wills, is a general, not a specific, devise. *Id.*

61. Where a devise was made "to my youngest daughter, Margaret Utz, and to her children:" *Id.*, that Margaret's children became devisees as well as herself, and that the devise passed an estate in common to all.

Estate of Utz, 43 Cal. 201.

62. The "rule in *Shelley's case*," when applied to wills, is confined to cases in which, after a freehold is devised to one, the remainder is to go in terms to the "heirs" of the first taker, and does not apply to a devise to a mother and to her "children." *Id.*

63. Where a devise was made "to Margaret Utz and to her children," on condition that Margaret would take care of the

testator during his life-time, which she did: *Held*, that there was nothing in the condition to show an intention on the part of the testator that Margaret alone should have the benefit of the devise. *Id.*

63a. A devise in a will made to executors in trust for heirs, of all the testator's property, real and personal, wheresoever situated, includes the **homestead** of the testator and his family.

Etcheborne v. Auzerai, 45 Cal. 121.

64. A will, in which the testator devises his lands to his executors, nominated in the will, to be held by them **in trust** for purposes named in the will, gives the fee of the land to the executors to be thus held in trust.

Estate of Delancy, 49 Cal. 76.

65. If the testator devises all his lands to his executor **in trust**, and makes provision in the will for the support of his wife, and she renounces her rights under the will, and the probate court sets off to her an undivided one half of the property, because it was common property, this does not extinguish the trusts declared in the will, nor divest the executor of the fee in the remaining portion of the property. *Id.*

66. If the will directs the executor to sell the real estate left by the testator, he **may sell without procuring an order of sale** from the probate court. *Id.*

67. The testator, when he devises his lands **in trust**, may nominate the trustee, or any other person his executor, and if he devises the lands to the same person that he appoints executor, the executor will take and hold the lands in the same manner and capacity that a trustee would. *Id.*

68. In an action to quiet title, the answer alleged that the plaintiff's father died seised of the land in controversy, and of another tract, and by his will devised the latter to the plaintiff, and the former to other children, one of whom conveyed to the defendant; that, under a decree of distribution, the land devised to plaintiff was assigned to him, and that he accepted the same: *Held*, upon the facts alleged, that the plaintiff was **estopped by the decree** from claiming the property in controversy; and *held, further*, that the defense was well pleaded, though the answer alleged that both the land devised to the plaintiff, and the land claimed by him in opposition to the will, were the property of the testator.

Noe v. Spivalo, 54 Cal. 207.

POWERS CONTAINED IN.

69. The husband has not the power by a last will and testament to dispose of the wife's interest and estate in the common property. *Morrison v. Bowman*, 29 Cal. 337.

70. A will which expressly empowers an executor to sell land, without any reference

to the probate court, is like a power of attorney, and is to be consulted as the source of power to convey.

Larco v. Casanueva, 30 Cal. 560.

71. When the testator in his will directs his executor, within one year after his decease, to sell his real estate, the proceeds to be disposed of upon certain trusts, the power to sell is not limited to one year, but may be exercised after that time, unless there are express words in the will showing the intention of the testator to thus limit the exercise of the power.

Kidwell v. Brummagim, 32 Cal. 436.

72. If the testator devises his real estate to his children, and, in his will, appoints an executor to whom he gives full power to sell his real estate, the executor does not hold the title to such real estate in trust for the devisees. *Auguisola v. Arnaz*, 51 Cal. 435.

ELECTION AND ACCEPTANCE UNDER.

73. Though a testator has not the power to dispose of the property of another person by his will, still if he undertakes so to do, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the testamentary dispositions of the testator.

Morrison v. Bowman, 29 Cal. 337.

74. A will by which interests in real estate were devised to certain infants, provided that the devisees might each "take out" one half of his share when he should come of age; and the other half not until all the other children should come of age; and it was objected to the validity of a sale made by the guardian of the devisees, under order of the probate court, that the above provision of the will so controlled the disposition of the property, that it was not the subject of sale by the guardian: *Held*, that whatever effect this provision might have in controlling the use of the property, the title to it, the estate of the devisees vested in them upon the death of the testator, and this estate was the subject of sale under the provisions of the statute, and the effect of its sale was to transfer whatever estate the wards had to the purchaser. *Fitch v. Miller*, 20 Cal. 352.

75. If the husband, by his will, undertakes to dispose of the wife's half of the **common property**, as well as his own, to her and others, and she elects to accept the benefits intended and provided for her by the will, she thereby becomes divested of her title in and to the undivided half of the common property, provided an assertion of her community right and interest would necessarily defeat the objects of the will.

Morrison v. Bowman, 29 Cal. 337.

76. If, by a just construction of the will, it appears that the testator did not intend to dispose of his wife's share of the common

property, her acceptance of a bequest or devise under the will will not operate as an election to relinquish her right to one half of the common property. *Id.*

77. If a married man, by will, devises his real estate to his wife, and the same is **community property**, and there is nothing on the face of the will to show that he intends to devise more than the undivided half which is subject to his testamentary disposition, and, after the death of the testator, the executor, under a power of sale in the will, and in ignorance of the law which allows the wife to inherit one half of the community property, sells and conveys the right of the testator to all the land, and the purchaser, also in ignorance of the law, supposes he is buying the entire property, and the wife, also in ignorance of the law, receives the purchase money, she does not thereby waive her right to the undivided half of the property which the statute permits her to inherit.

King v. Lagrange, 50 Cal. 328.

78. In such case there is no alternative by which the widow is required to elect whether she will take under the will, or repudiate it and claim her inheritance under the statute. *Id.*

79. The essence of either an election or ratification is that it was done with full knowledge of the party's right. *Id.*

80. The surviving wife, by acting and taking under the will in this case, will not be deemed to have renounced her rights in the common property.

Estate of Frey, 52 Cal. 658.

81. If a testator undertakes to dispose of the **property of a third person**, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the disposition by the will; for a person can not accept a benefit under a will, and at the same time reject it, by asserting, in opposition to it, his own inconsistent proprietary rights. *Noe v. Splivalo*, 54 Cal. 207.

CODICIL.

82. The codicil to a will operates as a republication of the will, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil.

Payne v. Payne, 18 Cal. 291.

83. Where a will gives all the testator's property to his wife, without naming his children, and subsequently a codicil is made referring to the will, and mentioning the children: *Held*, that the codicil and the will must be read together as parts of one instrument in determining whether the omission to provide for the children was intentional, within the seventeenth section of the act of 1850 concerning wills, which declares that if the testator omit to provide in his will for

his children, they shall inherit the same share in his estate as if he had died intestate, "unless it shall appear that such omission was intentional." *Id.*

84. *Held, further*, that the only object of the statute is to protect the children against omission or oversight, frequently arising from sickness, old age, or other infirmity, or the peculiar circumstances under which the will is executed; and that whenever the children are present to the mind of the testator—and of this the fact that they are mentioned is conclusive evidence—the statute affords them no protection if provision is not made for them. *Id.*

85. *Held, further*, that in this case, as the property left by the husband was common property, and as his will devises all his property to his wife, and as the codicil mentions the children, the wife takes one half of the property in her own right, and the other half as devisee under the will. *Id.*

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WRIT OF ASSISTANCE.

1. GENERALLY.
13. WHEN THE WRIT WILL LIE.
25. WHEN THE WRIT WILL NOT LIE.

GENERALLY.

1. If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession.

Skinner v. Beatty, 16 Cal. 156.

2. Prior to the passage of the act of May 18, 1861, judges of courts had **no power** to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same.

Chapman v. Thornburg, 23 Cal. 48.

3. Upon an application for a writ of assistance to place a party in possession of land sold by the sheriff under a judgment for taxes, rendered by a justice of the peace, the applicant must produce in evidence the execution and the judgment, and proceedings upon which the execution issued.

People v. Doe, 31 Cal. 220.

4. Can the district court issue a writ of assistance to place the purchaser at a sheriff's sale in possession of land sold under a **judgment rendered by a justice** of the peace for taxes, and filed with and docketed by the county clerk?

Id.

5. On an application for a writ of assistance to place a party in possession of land purchased at a sheriff's sale made under a judgment rendered by a justice of the peace, the sheriff's deed is not admissible in evidence without first producing the judgment and execution.

Id.

6. The power of district courts to issue writs of assistance is limited to sales on judgments rendered by the district court to which the application for writ of assistance is made.

Id.

7. If the return to the first writ does not clearly declare that it has been fully executed, and it is made to appear by affidavits that it has not been, it is competent for the court to issue **another writ**.

Tevis v. Hicks, 38 Cal. 234.

8. When the application is made for a writ of assistance under a sheriff's sale, enforcing the lien of a tax, **notice** should be given to the defendant, and also to the terretenant, if there be one who will be disturbed by execution of the writ.

San Jose v. Fulton, 45 Cal. 316.

9. On a motion for a writ of assistance questions of equitable cognizance between the parties in possession of the land who are not parties to the foreclosure suit, and the plaintiff, as to their respective rights to the land, can not be litigated.

Henderson v. McTucker, 45 Cal. 647.

10. It is the duty of the sheriff, in the execution of a writ of assistance, to place the purchaser on foreclosure of mortgage of an estate in common in the possession of

every part and parcel of the land, jointly with the other tenants in common.

Tevis v. Hicks, 38 Cal. 234.

11. In the execution of the writ, the sheriff can not remove any of the tenants in common who hold under a title derived from a source independent of him through whom the purchaser claims.

Id.

12. In proceedings for a writ of assistance, a person in possession under a lease, made after the commencement of the action to foreclose the mortgage, can not **collaterally attack** the process on the ground that it is erroneous.

Newmark v. Chapman, 53 Cal. 557.

WHEN THE WRIT WILL LIE.

13. A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of **foreclosure**, in possession, after he has obtained the sheriff's deed.

Montgomery v. Tutt, 11 Cal. 191.

14. Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if upon its service that is disregarded, the court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite, but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ as against the defendant in the suit.

Id.

15. *Prima facie*, plaintiff in a **foreclosure** suit is entitled, after sale of the premises and sheriff's deed to him, to a writ of assistance as against the mortgagor, and those entering under him subsequent to the decree, if they refuse to surrender possession.

Skinner v. Beatty, 16 Cal. 156.

16. Where, in such case, a writ of assistance is granted, and the mortgagor and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a **homestead** before the execution of the mortgage by the husband, and continuously ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure.

Id.

17. To entitle a purchaser at a **foreclosure** sale to a writ of assistance, it is not essential that the decree of foreclosure direct delivery of possession to the purchaser. The decree ascertains the rights of the parties, and gives the purchaser a summary right to be put in possession, as against the mortgagor and all others entering in subordination to his right after commencement of suit.

Horn v. Volcano W. Co., 18 Cal. 141.

18. A writ of assistance can only issue

against the defendants in the suit, and parties holding under them who are bound by the decree. *Burton v. Lies*, 21 Cal. 87.

19. The purchaser at a sale under a decree of foreclosure of a mortgage is entitled to a writ of assistance, although the decree in the foreclosure action contains no direction to deliver the possession, and although at the time of the application no preliminary order for such delivery of possession has been made by the court.

Montgomery v. Middlemiss, 21 Cal. 103.

20. All that is requisite to obtain the writ as against the parties, and those claiming with notice under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it. *Id.*

21. A person who, pending an action for the foreclosure of a mortgage and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree.

Montgomery v. Byers, 21 Cal. 107.

22. Under the fifth section of the act of April 3, 1858, providing for the collection of delinquent taxes in Sacramento, the purchaser at a tax sale made in pursuance of the act is entitled to a writ of assistance against the person in possession of the premises, notwithstanding the existence of such fiduciary relations between the parties at the time of the sale, that a court of equity would hold the purchaser a trustee for the possessor in the purchase, on the ground of constructive fraud. *Mills v. Tukey*, 22 Cal. 373.

23. If the decree in a foreclosure suit directs the sale of all the mortgaged premises, and forecloses and bars the equity of redemption of the defendants, and directs that the purchaser at the sheriff's sale be let into possession, the person who receives the sheriff's deed, after a sale, is entitled to a writ of assistance as against all the defendants who were served with process or appeared in the action.

Frisbie v. Fogarty, 34 Cal. 11.

24. The above rule prevails as against a defendant who is not mentioned in the decree by name, and also as against one whose name is not mentioned in the sheriff's deed. *Id.*

WHEN THE WRIT WILL NOT LIE.

25. L., a married man, purchased certain real estate subject to a mortgage thereon, which had been previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of L.

but not the widow, a party; and after a decree of foreclosure and sale and expiration of the time of redemption, received the sheriff's deed (himself being the purchaser), and thereupon applied to the court for a writ of assistance against the widow, who retained possession of a portion of the premises, which on demand she refused to surrender: *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to L. became thereby the common property of himself and wife; that upon his death the title to one half of this property vested in her, subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that not being bound by the decree, a writ of assistance could not be issued against her.

Burton v. Lies, 21 Cal. 87.

26. A writ of assistance will not be issued against a purchaser of the mortgaged premises who buys during the pendency of a suit to foreclose, and who is not a party to the suit, without actual or constructive notice of its pendency.

Harlan v. Rackerby, 24 Cal. 561.

27. If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused.

Steinbach v. Leese, 27 Cal. 295.

28. A writ of assistance will not issue in favor of a purchaser from one who received a sheriff's deed for land sold under a judgment for delinquent taxes. Such writ can only issue in favor of one who was the grantee of the sheriff.

People v. Grant, 45 Cal. 97.

29. The grantee of a sheriff's grantee, under a sale on a judgment enforcing the lien of a tax, is not entitled to a writ of assistance. *San Jose v. Fulton*, 45 Cal. 316.

30. A party who forecloses a mortgage given by one partner, on, and obtains a sheriff's deed for, an undivided interest in partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver who has been appointed by the court, at the instance of such other partner, in an action commenced by him to dissolve the partnership, and have the partnership property sold to pay the debts.

Autenreith v. Hessenauer, 43 Cal. 357.

31. If the sheriff's grantee holds the title in trust for another, and such other has contracted with the defendant to sell him the land conveyed by the sheriff's deed, or if it be alleged that such is the fact, and a real

controversy exists in relation to it, a writ of assistance should not issue.

San Jose v. Fulton, 45 Cal. 316.

32. The writ of assistance is a **summary proceeding** used to give effect to the decree, and if the rights of the parties have been changed since the decree and sale by reason of any agreement between the defendant and the purchaser at the sale, or his *cestui que trust*, or if it be alleged that such is the case, and the allegation is controverted, the writ should not be issued. *Id.*

33. Upon an application for a writ of assistance, to place the grantee of the purchaser of real estate under judgment sale in possession, it appeared that the defendants had acquired, or claimed to have acquired, a **new right to the possession** from the purchaser: *Held*, that the writ should have been denied, and the parties left to settle their rights in a regular suit.

Langley v. Voll, 54 Cal. 435.

APPEAL, 32, 71.
ESTOPPEL, 60.

EXECUTION, 79.
SHERIFF, 120.

WRIT OF ERROR.

1. WHEN THE WRIT WILL LIE.
14. WHEN THE WRIT WILL NOT LIE.
18. PRACTICE CONCERNING.

WHEN THE WRIT WILL LIE.

1. By the constitution, this court has appellate jurisdiction in all cases where the **matter in dispute exceeds two hundred dollars**; and this court and each of its justices are expressly authorized to issue all writs and process necessary to the exercise of its appellate jurisdiction; and by the seventh section of the judiciary act, have authority to issue all writs necessary and proper to the complete exercise of the powers conferred by the constitution, and, under these provisions, this court has power to issue a writ of error to the county court, when no express provision by law exists, by which such case can be brought into this court without process issuing from it. *Adams v. Town*, 3 Cal. 247.

2. Where no appeal is allowed by law, the proper method to take a case to an appellate court is by writ of error.

Middleton v. Gould, 5 Cal. 190.

3. A writ of error will only lie in cases where no appeal is given by the act of our legislature. *Haight v. Gay*, 8 Cal. 297.

4. A motion for such relief will only be entertained upon a proper showing, and after due notice to respondent. *Id.*

5. On application for a citation on pro-

duction of a writ of error, from the clerk of the United States court, and for a stay of proceedings in the supreme court of this state, the duty and power of issuing the citation devolves on the chief justice, as a chamber proceeding, and he must see when he is required to act or authorized to proceed under the federal law, that he is within that law. *Ferris v. Coover*, 11 Cal. 175.

6. A contrary doctrine would permit writs of error in every case, whether civil or criminal, and would delay the whole machinery of justice in the courts of the state in every case, however destitute of any right to a writ of error. *Id.*

7. The true test as to whether a writ of error lies to the supreme court of the United States from the final judgment of a state court is to be arrived at, not from mere averment in the pleadings, but from the matter decided, as developed in the whole record.

Greely v. Townsend, 25 Cal. 604.

8. When a final judgment in a suit has been rendered in the highest court of law or equity of a state in which a decision in the suit could be had, and a writ of error has been issued by the clerk of the circuit court of the United States, directed to the judges of the court in which the judgment was rendered, commanding that the record be sent before the supreme court of the United States to be there reviewed, the presiding judge of the court in which the judgment was rendered is not compelled, as a matter of right, to award a citation to the respondent to appear before the supreme court of the United States to maintain the validity of his judgment, but he may look into the record for the purpose of determining whether in his opinion the judgment is one from which a writ of error lies, and if he determines that it is not he may refuse the citation. The granting of a citation is not a mere ministerial act, but one of judicial discretion. *Id.*

9. An appeal from the supreme court of this state to the supreme court of the United States is taken within ten days "after rendering the judgment" within the meaning of these terms as used in the act of congress, and operates as a *supersedeas*, if the writ of error is sued out and lodged with the clerk, and the proper security given, within ten days from the time a petition for rehearing is denied. *Magraw v. McGlynn*, 32 Cal. 257.

10. The judge of the United States district court for the district of Oregon has no authority, while holding the circuit court of the United States for the district of California, to sign a citation upon a writ of error from the supreme court of the United States to the supreme court of this state, nor has he authority to take and approve of the security required in order to make the writ of error a *supersedeas* and operate as a stay

of execution upon the judgment to be reviewed. *Tompkins v. Mahoney*, 32 Cal. 231.

11. If the constitution confers appellate jurisdiction on a court, and there is **no statute providing for a mode of taking an appeal**, and the legislature has authorized the court to issue all writs necessary to the exercise of its powers, a case may be brought up to the court from an inferior tribunal, by a writ of error.

Ex parte Thistleton, 52 Cal. 220.

12. A writ of error is a writ *ex debito justitiae*, wherever, by reason of error, a judgment of a court of record ought not to stand, and an appeal is not provided by statute. *Id.*

13. A writ of error may be **issued by the county court to the city criminal court of the city and county of San Francisco** when there is no statute providing the mode of an appeal. *Id.*

WHEN THE WRIT WILL NOT LIE.

14. An action of ejectment, raising the question whether a grant made by the Mexican government passed title to the tract within the limits of the grant, is not a case in which a writ of error lies under the judiciary act.

Ferris v. Coover, 11 Cal. 175.

15. A writ of error does not lie in any case where an appeal is given to the supreme court by statute.

P. & N. R. Co. v. Harlan, 24 Cal. 334.

16. A writ of error does not lie to the supreme court of the United States from a judgment rendered by the supreme court of this state, by which it is decided that the city of San Francisco was, at the date of the conquest and cession of California, and long prior thereto, a pueblo, and that as such pueblo she had a title to the lands within her general limits, and that such lands were held by the city in trust for public uses, and were not, either under the old government or the new, the subject of seizure and sale under execution issued on a judgment against the city.

Greely v. Townsend, 25 Cal. 604.

17. A writ of error does not lie to the supreme court of the United States from the judgment of the supreme court of this state, by which judgment is decided that where a state school land warrant is located upon lands previously occupied and settled upon by another, and pre-empted by him, under the laws of the United States, the patent issued by the state under the location is void, and the patentee can not maintain an action against the pre-emptioner to recover possession of the same. The construction of an act of congress was not necessary in rendering such judgment, but the state law under which the warrant was located afforded a rule for the complete determination of the rights of the party who made the location.

Athearn v. Poppe, 25 Cal. 631.

PRACTICE CONCERNING.

18. It is only final judgments, or decrees of the highest court of a state, which can be re-examined upon a writ of error by the supreme court of the United States.

Hart v. Burnett, 20 Cal. 169.

19. A judgment of this court on appeal, reversing the judgment of a lower court in an action of ejectment, and remanding the cause for a new trial—following a decision finally determining certain questions of law arising in the case which will control the court below in its further action—is not a final judgment within the meaning of the twenty-fifth section of the judiciary act of 1789. *Id.*

20. The action of the presiding judge of a state court on the application for a citation upon a writ of error, directed to the justices of that court, issued by the clerk of the circuit court of the United States, is so far judicial in its nature that he may refuse to issue the citation when in his judgment it is clear that the writ of error will not lie for want of jurisdiction. *Id.*

See APPEAL.

WRIT OF MANDAMUS.

MANDAMUS.

WRIT OF POSSESSION.

1. Where L. and P. entered into possession of certain lands under neither of the parties to an action for the possession of the same, and were **not parties to said action**, they can not be dispossessed under a writ issued on a judgment rendered for plaintiff therein.

Rogers v. Parrish, 35 Cal. 127.

2. When a sheriff goes to execute a writ of possession issued on a judgment in an action to recover land, if he finds **other parties in possession** than those named in the complaint, who claim that they are rightfully in possession, not in privity with the defendants, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may demand indemnity, and, unless it is given, may refuse to execute the writ. This is the law, even if the premises are specifically described in the writ.

Long v. Neville, 36 Cal. 455.

3. *Prima facie*, all who come into possession of the land, pending the action to recover possession, must go out under the writ of possession, if the plaintiff recovers, for the presumption is that they came in under the defendant.

Wetherbee v. Dunn, 33 Cal. 147.

4. If the **defendant**, pending an action against him to recover possession of land, **colludes** with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment if it was collusively obtained. *Id.*

5. Persons who are on land in the character of **employees of a defendant** in ejectment at the time the suit is commenced against him, are properly turned out under the writ, if the suit goes against him; and no subsequent entry of such persons under said defendant, or in collusion with him, or under the title determined in that action, will be available to protect him.

Satterlee v. Bliss, 36 Cal. 489.

6. In an action against ——— Doyle, John Doe, and Richard Roe, to recover land, wherein there was no service of summons, but John Doyle answered, and a judgment was subsequently entered against James Doyle: *Held*, that the district court properly refused to direct the sheriff to execute the writ of possession, by turning out James Doyle, jr., James Doyle, sr., and Catharine Doyle, who were in possession at the time of the commencement of the action, but who had not been made parties to the suit. *Ford v. Doyle*, 37 Cal. 346.

7. A person in possession of the demanded premises at the time of the commencement of the action to recover possession can not be removed under a writ issued on a judgment in the case, unless he is made defendant, and judgment is rendered against him after the court acquires jurisdiction of his person. *Id.*

8. If a writ of possession issued on a judgment in ejectment described the land recovered, so that its **boundaries** appear on the face of the writ to be possible of identification by the sheriff in the field, the writ is not void for uncertainty of description.

Lawrence v. Davidson, 44 Cal. 177.

9. Appellant moved in the lower court to restrain the sheriff from executing against him a writ of possession in an action of ejectment to which he was not a party. It appeared from his affidavit that he **entered after the suit was commenced**, but the affidavit failed to show that he did not enter under the defendants or in collusion with them: *Held*, that he was not entitled to the order. *McCreery v. Everding*, 54 Cal. 166.

WRIT OF RESTITUTION.

1. Under a writ of restitution issued upon a judgment in favor of the plaintiff, in an action of ejectment, it is the duty of the officer serving the writ to remove from the premises the parties defendant and all persons who have derived possession from them since the commencement of the action, with notice, actual or constructive, and also all other persons, although not parties or in privity with them, who have acquired possession subsequent to the filing of a *lis pendens* in the action, or with actual notice of its pendency. *Fogarty v. Sparks*, 22 Cal. 142.

2. A person in possession of the premises at the time of the commencement of the action of ejectment, unless made a party defendant, is not affected by the judgment, nor can he, or those holding under him, be dispossessed by a writ of restitution issued thereon. *Id.*

3. A party in the actual possession of land at the commencement of an action of ejectment, and holding adversely to the plaintiff, is not amenable to a writ of restitution issued in the action to which he was not a party.

S. B. Land Ass. v. Christy, 41 Cal. 501.

4. One who, after an action of ejectment has been commenced, **enters** upon the demanded premises, but does not enter under the defendant, or by collusion with him, and is not made a party to the action, can not be removed by virtue of a writ of restitution issued on a judgment rendered in the action.

Mayo v. Sprout, 45 Cal. 99.

5. Where a plaintiff has been restored, under a writ of restitution, to the possession of the demanded premises in an action of ejectment, the defendant so evicted is ever after **estopped at law** to deny that plaintiff was rightfully restored, and that his own prior possession was wrongful.

Mann v. Rogers, 35 Cal. 316.

6. Where a defendant in ejectment has taken possession of land in collusion with the plaintiff, for no other purpose than to afford such plaintiff a pretext to take possession under a writ of restitution, such pretended possession will be disregarded.

S. B. Land Ass. v. Christy, 41 Cal. 501.

7. Persons **not parties** to a suit in ejectment and in possession before and at the time it is brought, or those claiming under them, can not be ousted by the writ of restitution issued upon a judgment therein in favor of the plaintiff.

Sampson v. Ohleyer, 22 Cal. 200.

8. A person in possession of land where a writ of restitution is served is presumed to hold under the defendant in the action, and to avoid being dispossessed by the writ, must show affirmatively that he holds by a right independent and paramount. *Id.*

9. Where, pending an action of ejectment

WRIT OF PROHIBITION.

PROHIBITION.

against a tenant, the latter transferred the possession to his landlord who had actual notice of and defended the suit, but was not made a party, and plaintiff recovered judgment: *Held*, that under the writ of restitution authorized by the judgment, the landlord might be dispossessed. *Id.*

10. Where, after the commencement of an action of ejectment against a tenant, he gave notice thereof to his landlord, and requested him to defend, and the latter employed an attorney to conduct the suit: *Held*, that the actual notice given to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him. *Id.*

11. A person in possession of land, where a writ of restitution is served, is presumed to hold under the defendants in the action, and, to avoid being dispossessed by the writ, must show affirmatively that he holds by a right independent and paramount. *Id.*

12. In ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant, but all persons who receive possession of the premises from him, with actual notice of the pending suit. *Id.*

13. Persons not parties to a suit in ejectment, and in possession before and at the time it is brought, or those claiming under them, can not be ousted by the writ of restitution issued upon a judgment therein in favor of the plaintiff. *Id.*

14. In an application for mandamus to compel a sheriff to remove from possession of the premises, under a writ of restitution, an occupant who was not a party to the action, it must be shown distinctly by the affidavits that his possession was acquired under the parties or subsequent to the filing of a *lis pendens*. If these matters are left in doubt the application will be denied. *Fogarty v. Sparks*, 22 Cal. 142.

15. A sheriff has no authority by virtue of a writ of restitution to remove from the premises described in the writ persons who were not parties to the judgment on which the writ was issued, and did not enter under defendant in the judgment pending the suit. *Tevis v. Ellis*, 25 Cal. 515.

16. Where several persons are owners of a tract of land as tenants in common, and the interest of one passes to a purchaser under execution sale, who brings ejectment against the execution debtor alone, and recovers judgment, neither the other tenants in common nor their grantees who purchase and enter upon the land pending the suit can be dispossessed by the sheriff by virtue of the writ of restitution.

Watson v. Dowling, 26 Cal. 124.

17. It is the duty of the sheriff, having the writ of *habere facias possessionem*, to remove

all persons who came upon the property after the suit was brought, except a person other than the defendant, who is in possession under a title adverse to the defendant.

Long v. Neville, 20 Cal. 131.

See also *Leese v. Clark*, 29 Cal. 664; *Mayne v. Jones*, 34 *Id.* 483.

18. Where ejectment is brought against a tenant alone, and pending the action the landlord dispossesses him and leases to another tenant who has no notice of the pendency of the action, it is the duty of the sheriff who receives the writ of *habere facias possessionem* to remove the second tenant. *Id.*

19. If a sheriff has wrongfully turned a person out of possession of land under a writ of restitution, he will be restored by the court to the possession, on motion made for that purpose.

S. B. Land Ass. v. Christy, 41 Cal. 501.

Mayo v. Sprout, 45 *Id.* 99.

20. If the plaintiff obtains judgment in an action of forcible entry and detainer, but does not obtain possession of the property, and a writ of restitution is not issued, and the judgment is afterwards reversed and the action dismissed, and during the pendency of the action, third parties obtain possession of the property by collusion with a servant of the defendant, the defendant is not entitled to a writ to be restored to possession as against these third parties.

Bowers v. Cherokee Bob, 46 Cal. 279.

21. A defendant in forcible entry, against whom judgment is rendered, which is afterwards reversed, but who does not lose possession of the property under or through the judgment, is not entitled to be restored to possession as against third parties who have ousted him during the pendency of the action. *Id.*

22. If a plaintiff in forcible entry and detainer recovers judgment, and is placed in possession of the premises by a writ of restitution, and the judgment is afterwards reversed by the supreme court, the court below should restore the defendant to the possession.

Polack v. Shafer, 46 Cal. 270.

23. A person found in possession of land, and turned out under a writ of *habere facias possessionem*, if he was not a party to the suit, is not prejudiced in his title, if he has any antedating the suit.

Leese v. Clark, 29 Cal. 664.

24. At the hearing, under an order for the sheriff to show cause why an order should not be made requiring him to proceed and execute a writ of *habere facias possessionem*, the burden is cast upon the sheriff of establishing affirmatively the matters which he alleges as an excuse for refusing to serve the writ. *Fogarty v. Sparks*, 22 Cal. 142, referred to in this connection. *Id.*

25. The plaintiff in a judgment in ejectment in an action on an undertaking to stay a writ of restitution pending an appeal, can recover the value of the use of whatever part of the premises the defendants occupied, if the judgment is affirmed.

De Castro v. Clarke, 29 Cal. 11.

26. If neither the tenant nor his landlord is party to an action of ejectment, and the landlord was in possession when the suit was commenced, but subsequently leased to the tenant, the tenant can not rightfully be removed by a writ of restitution issued in such action. *Calderwood v. Peyser*, 31 Cal. 333.

27. The three hundred and forty-fifth section of the practice act, authorizing the supreme court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower court from exercising the same power. *Reynolds v. Harris*, 14 Cal. 667.

28. In an action between S. and D., a writ of restitution issued, commanding the sheriff to cause D. to be removed from certain premises, and S. to have restitution of the same. The return to the writ by the sheriff shows that he "put S., by his representative M., in peaceable possession." *Held*, that the possession under the writ was that of S. and not of M.; that M. was the mere agent of S.; and that the presumption of the continuance of this relation was not destroyed by proof of acts of control over the premises subsequently exercised by M. which were not inconsistent with his position as agent.

Mitchell v. Davis, 20 Cal. 45.

29. After the service of the writ, and while the relation remained unchanged between S. and M., D. entered upon the premises, and an action under the forcible entry and unlawful detainer statute was thereupon commenced by and in the name of M. against D.: *Held*, that M. could not maintain the action by reason of his want of possession. *Id.*

30. A sheriff is not guilty of a forcible entry, if, acting in good faith, by virtue of a writ of restitution, he removes from the premises a person against whom the writ does not run, and who is not in privity with any one against whom the writ does run.

Janson v. Brooks, 29 Cal. 214.

31. If the tenant and landlord are jointly made defendants in ejectment, and the tenant suffers default, and the landlord answers in his own name, and the plaintiff dismisses the action as to the landlord and takes judgment against the tenant, the court can not, on motion of the landlord, order a stay of proceedings under a writ of restitution.

Dinnick v. Deringer, 32 Cal. 488.

32. A motion made to set aside the return of the writ, showing the dispossession of said parties and her tenants, and to rein-

state them in possession, upon a showing of said facts, under the peculiar circumstances of the case disclosed by the record, was properly denied by the court below. *Leese v. Clark*, 29 Cal. 672, cited as authority, and error in report of that case corrected.

Mayne v. Jones, 34 Cal. 483.

33. Where a defendant duly served in an action brought to recover possession of lands, was in possession of a portion of the demanded premises as guardian of an infant who held an unrecorded conveyance thereof, of which plaintiff had no notice when the action was commenced: *Held*, that such defendant, and the infant and her tenants, who entered subsequent to the commencement of the action, were properly dispossessed under a writ of restitution issued on a judgment for plaintiff in said action. *Id.*

34. Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff and compel him to execute the writ. *Id.*

35. A party who is removed from the possession of real estate by virtue of a writ of restitution, issued on a judgment in ejectment, and who moves to be restored to the possession on the ground that he was not a party to the action, must make out a clear case, free from ambiguity.

California M. Co. v. Redington, 50 Cal. 160.

36. If the plaintiff in ejectment dies after a judgment in his favor has been rendered, a writ of restitution may be issued on the judgment, at the instance and for the benefit of his successor in interest in the property.

Franklin v. Merida, 50 Cal. 239.

37. If such writ of restitution is issued and served in the name of the deceased plaintiff, but is in point of fact issued at the instance and for the benefit of his successor in interest, although irregular in point of mere procedure, it is correct in substance, and the defendants will not be restored to the possession. *Id.*

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YOSEMITE

1. Congress having, in 1864, granted to the state of California the Yosemite valley in trust for certain purposes, and with a proviso that it should remain inalienable for-

ever, the **state legislature has no power to make an unconditional and absolute grant of it to a third person in violation of such trust.**

Low v. Hutchings, 41 Cal. 634.

2. The act of February 20, 1868, granting certain lands held in trust by the state in Yosemite valley, to Hutchings and Lamon, being in terms not to take effect until after its ratification by congress, can not, in the absence of such ratification, have any force, or serve as a muniment of title, or protect the contemplated grantees against an ejectment brought by the commissioners appointed to manage the property. **Id.**

3. The act of April 15, 1880, "for the management of the Yosemite Valley and the Mariposa big tree grove," is not unconstitutional. **People v. Ashburner, 55 Cal. 517.**

4. By the act of congress of June 30, 1864, the United States granted the Yosemite valley to the state of California, and in accepting the grant the state assumed certain obligations in the nature of a **trust**; but the act and the statute of the state accepting the grant did **not operate as a gift for charitable uses**, such as may be regulated, directed, and enforced by a court of equity; nor can the obligations of the state be enforced by the courts of the state. **Id.**

5. The commissioners to manage the Yosemite valley and the Mariposa big tree grove are mere agents of the state, and persons thus clothed with functions affecting the public, assigned to them by state laws, are officers of the state, and their terms of office expired four years after their appointment. **Id.**

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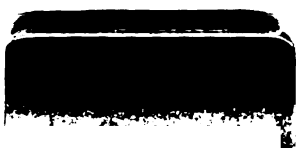
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